

# Trial Monitoring

A Reference Manual for Practitioners

Revised edition 2012

osce  
ODIHR

Published by the OSCE  
Office for Democratic Institutions and Human Rights (ODIHR)  
Ul. Miodowa 10  
00-251 Warsaw  
Poland  
[www.osce.org/odihr](http://www.osce.org/odihr)

© OSCE/ODIHR 2012

All rights reserved. The contents of this publication may be freely used and copied for educational and other non-commercial purposes, provided that any such reproduction is accompanied by an acknowledgement of the OSCE/ ODIHR as the source.

ISBN 978-92-9234-833-5

Cover photograph by Nona Reuter  
Designed by Nona Reuter

# Contents

<b>List of acronyms</b>	8
<b>Foreword</b>	9
<b>Introduction</b>	11
<b>PART I: GENERAL OVERVIEW AND OPERATIONAL ASPECTS OF TRIAL MONITORING</b>	<b>15</b>
Chapter 1 Trial Monitoring: Purposes and Basic Principles	16
<b>1.1 Trial monitoring – a multifaceted tool</b>	16
1.1.1 Trial monitoring and monitoring of the justice sector	17
1.1.2 Limits of trial monitoring	18
<b>1.2 Basic methodological principles underlying OSCE trial-monitoring programmes</b>	18
1.2.1 Principle of non-intervention in the judicial process	18
1.2.2 Principle of objectivity	19
1.2.3 Principle of agreement	20
<b>1.3 Description of the different trial-monitoring methodologies</b>	21
1.3.1 Description of trial-monitoring methodologies according to scope – types of monitoring programmes	21
1.3.2 Description of the working methodology – The “trial-monitoring cycle”	22
<b>PART II: FIRST STEPS AND INITIAL CONSIDERATIONS IN ESTABLISHING A TRIAL-MONITORING PROGRAMME</b>	<b>23</b>
Chapter 2: Conducting a Preliminary Assessment	24
<b>2.1 Evaluating in-country conditions, organizational capacities and access issues</b>	24
2.1.1 In-country conditions	24
2.1.2 Organizational capacities	25
2.1.3 Access preliminary consideration	26
<b>2.2 Main objectives and focus of trial-monitoring programmes</b>	26
<b>2.3 Drafting a programme paper</b>	27
Chapter 3: Choosing an Institutional Model	29
<b>3.1 Staff model</b>	29
<b>3.2 Project model</b>	30
<b>3.3 Domestic trial-monitoring organizations or coalitions</b>	31
<b>3.4 Hybrid trial-monitoring model – partnership</b>	32
<b>3.5 General comparison of staff and project models</b>	33
Chapter 4: Access to Court Proceedings and Other Access Issues	36
<b>4.1 Identifying the legal framework</b>	36
<b>4.2 Methods to increase overall programme access</b>	37
4.2.1 Memorandum of understanding	37
4.2.2 Contacts with court presidents, chief prosecutors and heads of bar associations	39
4.2.3 Contacts with individual judges, prosecutor, and defence counsel to introduce the trial-monitoring programme/monitor	39
4.2.4 Identification and informational materials on the monitoring programme	40
<b>4.3 Access to the courtroom and hearings in individual cases</b>	41
<b>4.4 Access to documents</b>	41
<b>4.5 Access to closed hearings</b>	42
<b>4.6 Access to investigation and pre-trial proceedings and materials</b>	43

Chapter 5: Establishment of an Information-Management System	45
<b>5.1 Case-registration charts</b>	45
<b>5.2 Advanced information-management systems</b>	46
<b>5.3 Systems for recording other types of information</b>	48
<b>5.4 Protecting confidential and sensitive information</b>	48
<b>PART III: SYSTEMIC TRIAL MONITORING</b>	<b>51</b>
Chapter 6: Main Aims, Outputs and Methods of Systemic Trial Monitoring	52
Chapter 7: Programme Structure And Staffing Issues	54
<b>7.1 Trial-monitoring field structure and organization</b>	54
<b>7.2 Supervisory structure and responsibilities</b>	55
7.2.1 Higher management responsibilities and staffing	56
7.2.2 Middle management responsibilities and staffing	57
<b>7.3 Monitors</b>	58
7.3.1 Size of the monitoring team	58
7.3.2 Recruitment	59
7.3.3 Contract obligations	59
7.3.4 Nationality of monitors	60
Chapter 8: Conduct and Capacity-Building of Trial-Monitoring Staff	62
<b>8.1 Standards of conduct for trial-monitoring staff</b>	62
8.1.1 Duty of non-intervention	63
8.1.2 Duty of impartiality	64
8.1.3 Duty of professionalism	65
8.1.4 Duty of confidentiality	66
<b>8.2 Monitoring instructions</b>	67
<b>8.3 Legal reference materials</b>	68
8.3.1 Considerations regarding legal reference materials	68
8.3.2 Creating a legal reference manual as a field support tool	69
8.3.3 A manual as an educational resource for building domestic capacity	70
<b>8.4 Training sessions</b>	70
8.4.1 Scope of training	70
8.4.2 Using external trainers and experts	71
8.4.3 External educational opportunities	71
<b>8.5 Other field support activities and mechanisms</b>	72
8.5.1 Regular feedback on monitoring and reporting	72
8.5.2 Regular team meetings	72
8.5.3 Internal report sharing	73
8.5.4 Monitor pairing	73
8.5.5 Monitor rotation	73
8.5.6 Structures for supporting the trial monitors' well-being	73
8.5.7 Structures for ensuring trial monitors' security	74
Chapter 9: Information Gathering and Verification in Systemic Trial Monitoring	75
<b>9.1 Identification of cases to monitor according to monitoring priorities</b>	75
<b>9.2 Trial observation in courtrooms</b>	77
<b>9.3 Interviews with justice actors and stakeholders</b>	78
9.3.1 Interviews with judges, prosecutors and legal representatives	80
9.3.2 Interviews with bar associations, legal clinics or legal aid groups	80
9.3.3 Interviews with defendants, especially when deprived of liberty	80

9.3.4	Interviews with injured parties, witnesses, and organizations involved in supporting vulnerable individuals	82
9.3.5	Interviews with police	83
9.3.6	Interviews with governmental officials, judicial and prosecutorial councils, training and disciplinary bodies	83
9.3.7	Communication with the international community and NGOs in a host country	83
9.3.8	Dealing with confidential or sensitive information in the context of interviews	84
<b>9.4</b>	<b>Information gathering on the basis of questionnaires or surveys</b>	<b>84</b>
<b>9.5</b>	<b>Review of media reports on trials and other cases</b>	<b>85</b>
Chapter 10: Analysis Of Trial-Monitoring Findings		87
<b>10.1</b>	<b>Problem identification</b>	<b>87</b>
<b>10.2</b>	<b>Problem verification</b>	<b>88</b>
<b>10.3</b>	<b>Identification of root causes and appropriate remedies</b>	<b>89</b>
<b>10.4</b>	<b>Monitoring developments after identifying and making note of an issue</b>	<b>89</b>
Chapter 11: Internal Reporting Systems		91
<b>11.1</b>	<b>Characteristics of case reports</b>	<b>91</b>
<b>11.2</b>	<b>Basic components of a case report</b>	<b>92</b>
<b>11.3</b>	<b>Selecting a case-reporting system</b>	<b>93</b>
11.3.1	Open (or narrative) reporting system	93
11.3.2	Closed (or questionnaire) reporting systems	95
11.3.3	A comparison of open and closed reporting systems	96
11.3.4	Hybrid formats - open organized format	97
<b>11.4</b>	<b>Strategies to organize, simplify and systematize reporting</b>	<b>99</b>
11.4.1	Using instructions to ensure a clear reporting methodology	99
11.4.2	Simplifying the reporting of facts	101
11.4.3	Hearing-based monitoring and reporting	102
<b>11.5</b>	<b>Secondary internal reporting</b>	<b>103</b>
11.5.1	Internal reporting by legal analysts	103
11.5.2	Other reporting by monitors	104
Chapter 12: Advocacy Strategies		105
<b>12.1</b>	<b>Promoting a positive image of the trial-monitoring programme and establishing effective co-operation with the authorities</b>	<b>105</b>
<b>12.2</b>	<b>Public reporting</b>	<b>108</b>
12.2.1	Comprehensive reports related to the functioning of the justice system	109
12.2.2	Thematic reports related to the functioning of specific aspects of the justice system	110
12.2.3	Reports on individual cases or sets of cases	111
12.2.4	Other regular and frequent public reports	112
12.2.5	Organizing trial-monitoring public reports	112
12.2.6	Good practices for getting reports done on time	117
12.2.7	Maximizing the acceptance and impact of public reporting	119
<b>12.3</b>	<b>Confidential and semi-public reporting</b>	<b>122</b>
<b>12.4</b>	<b>Supporting other advocacy and capacity-building activities</b>	<b>123</b>
12.4.1	Undertaking outreach activities to disseminate monitoring findings and programme views	123
12.4.2	Providing expert advice and participating in working groups for the implementation of reforms	124
12.4.3	Support of training for actors in the justice sector	124
12.4.4	Supporting the development and work of domestic institutions	125

Chapter 13: Measuring the Impact of Systemic Trial-Monitoring Activities	126
<b>13.1 Choice of a model for measuring impact</b>	126
<b>13.2 Choosing indicators to measure impact</b>	127
<b>13.3 Practical considerations of monitoring programmes in assessing their impact</b>	128
Chapter 14: Phasing Out and Sustainability of Systemic Trial-Monitoring Programmes	129
<b>14.1 Activities to support the sustainability of monitoring work</b>	129
14.1.1 Handover to NGOs	130
14.1.2 Supporting academic review and legal periodicals	130
14.1.3 Strengthening the capacity of journalists	131
14.1.4 Strengthening the capacity of domestic human rights institutions	132
<b>14.2 Other steps in the phasing-out process</b>	132
14.2.1 Handling files and other substantive material	132
14.2.2 Compiling lessons learned and good practices	132
<b>PART IV: THEMATIC TRIAL MONITORING</b>	<b>133</b>
Chapter 15: Main Aims, Outputs and Methods of Thematic Trial Monitoring	134
<b>15.1 Aims of thematic trial monitoring</b>	134
<b>15.2 Staffing, capacity-building and field support for thematic monitoring</b>	135
<b>15.3 Thematic monitoring mode of operations</b>	135
<b>15.4 Outputs of thematic trial monitoring</b>	136
Chapter 16: Main Themes Encountered in Trial-Monitoring Programmes	137
<b>16.1 Monitoring the implementation of new codes</b>	137
<b>16.2 Monitoring investigation and pre-trial proceedings</b>	138
<b>16.3 Monitoring war crimes proceedings</b>	138
<b>16.4 Monitoring trafficking in human beings and other organized crime</b>	139
<b>16.5 Monitoring cases with vulnerable persons</b>	140
<b>16.6 Monitoring civil and administrative proceedings</b>	140
<b>PART V: AD HOC TRIAL MONITORING</b>	<b>143</b>
Chapter 17: Mandate, Principles and Aims of <i>Ad Hoc</i> Trial Monitoring	144
Chapter 18: First Steps and Initial Considerations in Establishing an <i>Ad Hoc</i> Trial-Monitoring Programme	146
<b>18.1 Identifying situations for ad hoc monitoring</b>	<b>146</b>
<b>18.2 Reviewing operational capacity</b>	146
<b>18.3 Ensuring access</b>	147
<b>18.4 Making logistical and administrative arrangements</b>	147
Chapter 19: Operational Aspects of <i>Ad Hoc</i> Trial-Monitoring Projects	149
<b>19.1 Project structure</b>	149
<b>19.2 Staffing issues</b>	150
19.2.1 Nationality and experience	150
19.2.2 Project-scale issues	150
19.2.3 Contract issues	151
19.2.4 Support staff	151
<b>19.3 Training and briefing issues</b>	151
Chapter 20: <i>Ad Hoc</i> Project Monitoring Cycle	153
<b>20.1 Information-gathering techniques in ad hoc monitoring</b>	153
20.1.1 Identification of cases and scheduling issues	153

20.1.2	Scope of ad hoc monitoring	153
20.1.3	Note taking	154
20.1.4	Access to case files	154
20.1.5	Meetings and interviews	154
<b>20.2</b>	<b>Identification of issues and analysis in ad hoc monitoring</b>	<b>155</b>
<b>20.3</b>	<b>Advocacy and follow-up in ad hoc monitoring</b>	<b>155</b>

<b>ANNEXES</b>		<b>159</b>
<b>ANNEX I: CODE OF CONDUCT AND OTHER GUIDELINES FOR MONITORS</b>		<b>160</b>
A.	Sample Code of Conduct	160
B.	Sample Guidelines for Monitors	162
<b>ANNEX II: MONITORING COURT PROCEEDINGS – ISSUES AND SAMPLE FORMS</b>		<b>167</b>
A.	Common Issues Monitored In Proceedings	167
B.	Possible Issues to Examine when Monitoring Trial Proceedings	169
C.	Sample Questionnaire for Closed Reporting System	173
<b>ANNEX III: CONDUCTING INTERVIEWS – ISSUES AND SAMPLE FORMS</b>		<b>191</b>
A.	Indicative Issues to Explore in Information-Gathering Interviews	191
B.	Sample Interview Questionnaire for Defence Attorney	195
C.	Sample Questionnaire for Interviews with the Police	197
<b>ANNEX IV: REPORTING – SAMPLE FORMS</b>		<b>202</b>
A.	Sample Final Report (Table Of Contents)	202
B.	Template for Analyst Internal Reporting	204
<b>ANNEX V: ADMINISTRATIVE MATTERS</b>		<b>206</b>
A.	Terms of Reference, Team Leader,	206
B.	Terms of Reference, Trial Monitor	208
C.	Briefing Package for the Monitoring Team (Table of Contents)	209
<b>ANNEX VI: EXAMPLES OF OSCE THEMATIC AREA REPORTS</b>		<b>211</b>
<b>ANNEX VII: TRIAL-MONITORING PROGRAMME SUMMARIES OF OSCE FIELD OPERATIONS</b>		<b>213</b>
A.	Fair Trial Development Project, OSCE Presence in Albania	213
B.	Trial-monitoring Project in Armenia, ODIHR and the OSCE Office in Yerevan	214
C.	Trial-monitoring Project in Azerbaijan, ODIHR and the OSCE Office in Baku	215
D.	Trial-monitoring Programme of the OSCE Mission to Bosnia and Herzegovina	216
E.	Domestic War Crimes Programme, OSCE Office in Zagreb (Croatia)	218
F.	Legal System Monitoring Section (LSMS), OSCE Mission in Kosovo	220
G.	Trial-monitoring Project in Kazakhstan, ODIHR and the OSCE Centre in Almaty	222
H.	Trial-monitoring Project in Kyrgyzstan, ODIHR and the OSCE Centre in Bishkek	222
I.	Trial monitoring conducted by the OSCE Mission to Skopje and Coalition All for Fair Trials, the former Yugoslav Republic of Macedonia	223
J.	Trial-monitoring Programme in Moldova, OSCE Mission to Moldova	226
K.	Domestic War Crimes Trial Monitoring, OSCE Mission to Serbia	228
L.	Fair Trials through Monitoring in Tajikistan, OSCE Centre in Dushanbe	229
M.	Trial Monitoring in Uzbekistan, ODIHR and the OSCE Centre in Tashkent	230
<b>ANNEX VIII: SOURCES FOR SUBSTANTIVE PRINCIPLES ON TRIAL MONITORING</b>		<b>231</b>
<b>ABOUT THE OSCE/ODIHR</b>		<b>232</b>

## List of Acronyms

BiH	Bosnia and Herzegovina
CEMI	Center for Monitoring (Montenegro)
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
EULEX	The European Union Rule of Law Mission in Kosovo
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
LSMS	Legal System Monitoring Section, OSCE Mission in Kosovo
MoU	Memorandum of Understanding
NGO	Non-Governmental Organization
ODIHR	Office for Democratic Institutions and Human Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
UN	United Nations

# Foreword

The participating States of the Organization for Security and Co-operation in Europe (OSCE) have agreed to accept as a confidence-building measure the presence of observers from other OSCE participating States and non-governmental organizations (NGOs) at proceedings before their courts.<sup>1</sup> As this commitment has been put into practice, OSCE field operations and the OSCE Office for Democratic Institutions and Human Rights (ODIHR) have accumulated significant experience in trial monitoring. This manual brings together the knowledge and good practices collected over many years of OSCE trial-monitoring programmes in more than a dozen countries.

Trial monitoring has proven to be a powerful tool for supporting judicial reform and promoting domestic and international guarantees of fair trial rights. Independent monitoring of court proceedings can identify both weaknesses and strengths of justice systems and can generate recommendations for improved practices. The governments of many OSCE participating States have welcomed and implemented such recommendations, leading to improvements in the administration of justice and to greater respect for human rights and the rule of law.

This manual is intended primarily for practitioners involved in trial monitoring. It will, however, be of interest to anyone seeking information on trial monitoring and should also be useful to anyone involved in reforming the justice system. This manual focuses on the various practical methodologies used for trial monitoring; while a companion volume, the *Legal Digest of International Fair Trial Rights*,<sup>2</sup> deals with the substantive fair trial rights related issues addressed while monitoring trials.

The first edition of this manual was published by ODIHR in 2008. This revised and expanded edition provides a far broader range of methodological approaches, based on OSCE experience. It discusses different types of trial monitoring, distinguishing among systemic, thematic and ad hoc monitoring activities. While the first edition of the manual centred on monitoring criminal trials, this edition also addresses civil and administrative proceedings, as well as many thematic areas covered by trial-monitoring programmes. The manual expands further on many other aspects of trial monitoring, including additional approaches to information gathering, analysis of findings, reporting and advocacy activities. It also addresses, for the first time, methods for measuring the impact of trial-monitoring programmes. It provides detailed guidelines for practitioners on setting up, operating and phasing out trial-monitoring programmes, and on developing partnerships that can ensure the sustainability of programmes once international involvement has ended.

<sup>1</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990), paragraph 12, 1990.

<sup>2</sup> *Legal Digest of International Fair Trial Rights*, (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2012). A list of other sources for substantive standards is included in Annex VII.

The breadth and quality of this revised manual is due in large part to the contribution of an advisory board created in 2009. The board includes representatives of nine OSCE field operations<sup>3</sup> that have been involved in trial monitoring.<sup>4</sup> The board's work has greatly assisted ODIHR with the development of its trial-monitoring portfolio. We offer our sincere thanks to the members of the board, without whose contributions this manual would not have been possible.

ODIHR would like to express its appreciation to Thomas Chaseman, the author of the first edition of this manual,<sup>5</sup> and to Pipina Katsaris, the principal author of this revised edition.

Finally but not least, ODIHR is grateful for the generous contributions of OSCE individuals participating States, which made this manual possible.

*Ambassador Janez Lenarčič*  
Director, ODIHR

<sup>3</sup> OSCE Presence in Albania, OSCE Office in Baku, OSCE Mission to Bosnia and Herzegovina, OSCE Mission in Kosovo, OSCE Mission to Montenegro, OSCE Mission to Serbia, OSCE Mission to Skopje, OSCE Office in Yerevan and the OSCE Office in Zagreb.

<sup>4</sup> OSCE Presence in Albania, OSCE Office in Baku, OSCE Mission to Bosnia and Herzegovina, OSCE Mission in Kosovo, OSCE Mission to Montenegro, OSCE Mission to Serbia, OSCE Mission to Skopje, OSCE Office in Yerevan and the OSCE Office in Zagreb.

<sup>5</sup> *Trial Monitoring: A Reference Manual for Practitioners*, (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2008).

# Introduction

OSCE trial-monitoring programmes have proven to be valuable, multi-faceted tools for supporting the process of judicial reform and assisting participating States in developing functioning justice systems that adjudicate cases consistent with the rule of law and international human rights standards.

By increasing the transparency of the judicial process, trial monitoring is itself an exercise in support of the right to a public trial. The presence of monitors can lead tribunals to implement improved fair trial practices and build confidence in the judicial process. When organized as a long-term programme, trial monitoring is a unique diagnostic tool for assessing the functioning of key elements of the justice system. It acts as a spotlight to identify areas in need of reform. Trial-monitoring programmes have also proven to be effective vehicles for training and engaging local lawyers and organizations in the process of justice reform.

## **Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen 1990), paragraph 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**

This manual is intended to serve as a resource for practitioners and representatives of international and domestic organizations interested in developing trial-monitoring programmes to assess compliance with fair trial standards and support justice reforms. It sets out principles and provides guidance on how to organize and operate a trial-monitoring programme. Based on the experiences of 12 OSCE field operations and of ODIHR, it shares field-tested methodologies and techniques to enhance the capacities and effectiveness of trial-monitoring programmes. The manual also seeks to stimulate thought on trial-monitoring related activities that help develop effective justice systems that operate in line with human rights standards. The manual reflects what is known as the “trial-monitoring cycle”, by describing the different activities undertaken by trial-monitoring programmes, from inception to conclusion.

This manual provides organizational and operational guidance to trial monitoring. It does not provide guidance on international fair trial standards or describe how to assess individual proceedings

to determine their compliance with such standards. These substantive aspects of international standards on fair trials that should be assessed during the course of trial monitoring are described in a companion volume, ODIHR's *Legal Digest of International Fair Trial Rights*<sup>6</sup>.

Trial monitoring generally takes one of three different forms. "Systemic trial monitoring" is the term used for a long-term, wide-ranging trial-monitoring programme aimed at assessing parts of the justice system in order to support justice reform. A second approach to trial monitoring can be thematic, with an in-depth focus on one or several areas — for example, war crimes, administrative justice or pre-trial proceedings. The third approach to trial-monitoring centres on individual, usually high-profile cases or a group of such cases. This approach is known as "ad hoc trial monitoring". All three types of monitoring are addressed in this manual.

The focus of most OSCE trial-monitoring programmes has been on criminal justice cases. In response to developments and reforms in the OSCE region, however, they increasingly pay attention to civil and administrative justice as well, given the crucial importance of the relevant court systems in providing remedies in these areas of profound impact on individuals' rights and legal interests. The practical advice and tools set out in the manual are applicable to any form of trial monitoring, including civil and administrative justice.

This substantially revised edition retains the focus of the original manual on the public phase of trial proceedings. This mirrors the emphasis placed by many programmes on the right to a public trial and on a methodology that favours direct observation over other information-gathering techniques. Unlike the previous edition, however, this document recognizes that many trial-monitoring programmes extend their monitoring and advocacy beyond the public phase of the trial. Thus, the manual addresses strategies for gaining access to court documents and observing closed hearings. The manual also describes interviewing techniques and advocacy activities directed towards actors outside the courtroom. Further, the manual recognizes that certain trial-monitoring programmes go beyond the trial phase and include activities such as investigative proceedings, detention hearings and access to justice issues relating to persons in detention facilities. Frequently, these activities may require special access agreements. To a large degree, this expansion of the manual underscores the close interrelation between trial monitoring and justice-sector monitoring, which is discussed in the first chapter.

## ➔ Content and organization of the manual

This revised manual is divided into five parts and a number of annexes. Part I describes the nature of trial monitoring, its underlying principles, and the different trial-monitoring methodologies. Part II addresses the planning phase of trial monitoring. It outlines the actions programme managers should take when establishing a new programme or expanding activities into a new field. It describes the initial considerations they need to take into account to clarify programme objectives, decide on the most appropriate structure for the monitoring teams, lay the groundwork for obtaining access to information, and put in place systems to manage the information to be gathered.

Part III describes systemic trial monitoring. It is the largest part of the volume, as it describes and gives guidelines on the many aspects of a comprehensive trial-monitoring programme. After depicting the general features of systemic trial monitoring, this part explains in more detail the organizational aspects involved. Subsequently, it walks the reader through the different steps of the "monitoring cycle" in these long-term programmes. These steps span from information-gathering techniques and analysis of findings to advocacy activities. Methods for the evaluation of a programme's impact are included, as are considerations pertaining to the sustainability and phasing-out of programmes.

<sup>6</sup> ODIHR, *Legal Digest of International Fair Trial Rights*, *op. cit.*, note 2. A list of other sources for substantive standards is included in Annex VII.

This part of the manual covers most aspects of trial-monitoring methodology, which are also applicable to the other types of monitoring programmes covered in Parts IV and V.

Part IV is devoted to thematic trial monitoring, to the extent that it differs from systemic monitoring. It refers to the specific themes that have been monitored extensively in the OSCE area, such as war crimes, trafficking in human beings and organized crime cases, investigative proceedings, and civil and administrative proceedings. Finally, Part V discusses the special features and considerations of ad hoc trial monitoring and how it differs from other forms of monitoring.

The annexes provide additional information to supplement the text. These include examples, guidelines and practical tools for monitors, such as sample questionnaires. Annex VIII provides summary information on 14 trial-monitoring programmes conducted by OSCE field operations. These may be useful resources in planning future operations, in addition to serving as institutional memory.



# Part I

## GENERAL OVERVIEW AND OPERATIONAL ASPECTS OF TRIAL MONITORING

## CHAPTER 1

# Trial Monitoring: Purposes and Basic Principles

### 1.1 Trial monitoring – a multifaceted tool

Trial-monitoring programmes can be multifaceted tools for states, civil society groups and international organizations seeking to enhance the fairness, effectiveness and transparency of judicial systems. To maximize the effectiveness of these tools, organizations must be aware of the different types of trial monitoring and should design programmes that are responsive to the needs of a justice system in a particular domestic context. The paragraphs below set out some of the key concepts in trial monitoring.

#### ➔ Exercise of the right to a public trial

At its most basic level, the act of monitoring a trial is an expression of the right to a public trial and increases the transparency of the judicial process. In individual cases, trial monitoring may serve to improve the effective and fair administration of justice or bring attention to serious deficiencies. 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 other international human rights and fair trial standards.

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

A trial-monitoring programme can be seen as a diagnostic tool to collect objective information on the administration of justice in individual cases and, through these, to draw and disseminate conclusions regarding the broader functioning of the justice system. Trial-monitoring programmes provide objective findings and conclusions for the consideration of all stakeholders, including the judicial, executive, and legislative branches of government, as well as civil society and the international community. A programme's recommendations and advocacy efforts can guide and influence stakeholders to take action and develop positive reforms. Trial-monitoring programmes can prompt justice actors to improve their practices; they may urge the executive to prioritize the allocation of resources needed to overcome shortcomings; they can encourage parliaments to adopt or amend legislation to bring justice practices into conformity with human rights standards; and they may raise civil society awareness of areas where it can play a significant role.

#### ➔ A capacity-building vehicle

The advocacy and capacity-building elements of trial-monitoring programmes provide a powerful vehicle to educate and train local jurists on international standards and domestic law. By pointing out shortcomings in the administration of justice from the perspective of fair trial standards, trial monitoring contributes to enhancing the knowledge of judges, prosecutors, legal counsel and other stakeholders on international due process rights and their application in domestic proceedings. It can acquaint these actors with good practices from the same or other justice systems that may be used to meet challenges. At the same time, by hiring local lawyers as monitors and legal analysts, programmes can provide interested legal professionals with an opportunity to become involved in

the legal reform process. Programme partnerships and support for domestic monitoring groups increase the capacity of domestic organizations to engage in monitoring. In this way, programmes may facilitate the creation of a local monitoring capacity that will survive beyond the completion of an international organization's programme. Additionally, monitoring personnel may be subsequently hired by state authorities and be able to use their expertise to benefit the justice system.

### 1.1.1 Trial monitoring and monitoring of the justice sector

Trial monitoring can be defined in a strict or a wider sense. In a strict sense, trial monitoring is limited to observing public court proceedings and concentrating on the conduct of judges, prosecutors, lawyers and, possibly, other judicial officials who are physically present during the trial. Oftentimes, access to public court documents may also be sought. The traditional output of such activity is the issuance of a report, be it public or otherwise. In a number of contexts, this form of monitoring may be the only possible means of assessing the fairness of proceedings and, despite its limited scope, many significant challenges can be detected in this way. However, direct observation of trial proceedings captures only a snapshot of the legal process. In order to understand the root causes of any challenges observed in trial proceedings, to cross-check information gathered from direct observation, and to propose sustainable solutions, there may be a need to seek further sources of information.

Gathering such information requires that trial monitoring be defined and implemented in a broader sense, as justice sector or legal system monitoring<sup>7</sup>. This would comprise observation not only of trials but also of other aspects of the proceedings and other institutions in the legal sphere. These might include prisons, the police, bodies dealing with judicial administration, training institutions, selection processes or disciplinary proceedings for judges and prosecutors, bar associations and their process of admitting, training, and disciplining lawyers, the process of drafting legislation, the effectiveness of civil society in supporting the administration of justice and other matters.<sup>8</sup> Obviously, monitoring the justice sector in its entirety is a vast task and would require diverse resources and expertise, as well as special access agreements.

There are no easily discerned boundaries between trial monitoring and justice-sector monitoring.<sup>9</sup> Generally, OSCE trial-monitoring programmes have endeavoured to strike a balance between strict trial monitoring and broader justice-system monitoring, by covering all areas necessary to achieve their aims while avoiding overstressing their capacities or losing their focus. Consequently, OSCE trial-monitoring programmes have pursued access to additional sources of information and phases of legal proceedings that are directly relevant to their work.<sup>10</sup> Most OSCE programmes in this field now regard trial monitoring as their core activity but use wider justice-system monitoring to supplement their findings. Moreover, many programmes have expanded their activities beyond the

7 Justice-sector and legal-system monitoring can generally be used as synonyms (e.g., the former term is used in the OSCE Mission to Bosnia and Herzegovina (BiH) and the OSCE Presence in Albania, while the latter is used in the OSCE Mission in Kosovo).

8 For instance, the OSCE Mission to Skopje monitors the State Judicial Council's open sessions under the same mandate that covers trial monitoring, under the umbrella of independence of the judiciary.

9 Both concepts, moreover, can be seen as a part of human rights monitoring, which covers a broad array of additional issues, such as election observation, monitoring demonstrations and public gatherings, monitoring of asylum proceedings, monitoring implementation of minority rights and gender equality, and all kinds of situations related to the implementation of human rights standards.

10 In practice, this means undertaking a number of activities that transcend the direct observation of the public phase of the trial. Such activities include: a) obtaining access to non-public hearings and to documents that are usually not available to the wider public – i.e., detention orders, statements of defendants and witnesses; b) communication with justice actors about problems they face in their work or their views on legal matters in general; c) monitoring of pre-trial detention hearings and investigation proceedings; d) interviewing detained persons; e) interviewing personnel involved in victim and witness protection and support; f) submitting proposals on draft laws; and g) noting threats to judicial independence and other activities.

issuance of reports, to assist the authorities and other interested actors in implementing recommendations through advocacy and capacity-building.<sup>11</sup>

### 1.1.2 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 to support justice reform. Where there is no political will for reform, for instance, trial monitoring may be able to point out deficiencies, but it can achieve little in the way of prompt or systemic justice reform. Further, in situations where governments are actively complicit in violations of fair trial standards, organizations should 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 strengths and limitations of trial monitoring in determining whether and how a programme can support a process of justice reform and ultimately contribute to overall increased human rights protection and respect for the rule of law.

A different kind of limitation of trial monitoring arises when programmes identify concerns in court proceedings but are not in a position to check their veracity or to identify their root causes without additional methods of information gathering. For example, where the accused alleges ill-treatment in the extraction of a confession, trial monitoring would be able to record this complaint and note the reaction of the court but only speculate as to the rest. Or, when a sound trial is conducted from the perspective of procedural fairness but a verdict manifestly unfair on its merits is issued, trial monitoring of only procedural issues would need to go to extra lengths to make grounded comments on this observation. Assistance in overcoming this category of limitations to trial monitoring can be offered by justice-sector monitoring, as outlined below.

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

Several methodological principles underlie OSCE trial-monitoring programmes. These are described in the sections below.

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

The principle of non-intervention, also referred to as non-interference, underlies the trial monitoring conducted by all OSCE programmes. This principle aims at respecting the precept of judicial independence. Independence means that “both the judiciary as an institution and the individual judges administering justice in particular cases must be able to exercise their professional responsibilities without being unduly influenced by the executive, the legislature, or any other inappropriate sources”.<sup>12</sup> Therefore, the principle of non-intervention requires that all trial-monitoring programmes respect and enhance the independence of the courts, both through their design and through the activities of the monitors. In practice, however, the application of the principle of non-intervention to all trial-monitoring activities is not always straightforward, and there are different approaches as to how it is applied.

Certain programmes implement the principle of non-intervention in an absolute manner, by avoiding direct interaction, particularly by court monitors, with individual members of the judiciary, prosecutors or lawyers, and not inquiring even about their general views except in structured forums, such as seminars. This is done in order to avoid any possibility of undermining — in practice

<sup>11</sup> For an overview of these other advocacy activities, see Chapter 12.4, “Supporting other advocacy and capacity-building activities”.

<sup>12</sup> *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Office of the United Nations High Commissioner for Human Rights, Professional Training Series #9, 2003, p. 115.

or in perception — the exclusive decision-making authority of the court. Creating the suspicion of trying to influence the judiciary can jeopardize trial-monitoring operations and is seen to risk inducing retribution on the part of the authorities against judges who have communicated with monitors.

Most trial-monitoring programmes stipulate that non-intervention means no engagement or interaction with the court regarding the merits of an individual case and no attempts to influence indirectly outcomes in cases through informal channels. Even where objectively fairer outcomes in individual cases might result from interventions, such interventions can have the consequence of compromising the judiciary's independence. As a result, all OSCE trial-monitoring programmes prohibit such interventions.

On the other hand, most programmes do allow communication — by legal analysts, managers or monitors — on administrative or general legal matters. The rationale behind this approach is founded on a less restrictive interpretation of the role of monitoring. This approach holds that judicial independence should not be used as an excuse to cover up corrupt or non-objective behaviour, to unduly limit judges' freedom of expression and opinion compatible with their function, or to shield them from review of their practices or from communication with professionals in general. Under this approach, there would be no restraint on communicating with the judiciary on issues that do not impact on their duty to decide independently, impartially and in accordance with the law and evidence.<sup>13</sup>

Furthermore, the principle of non-intervention needs to be seen in light of the purposes of monitoring. In fact, even the presence of a monitor at proceedings or the issuance of a report could be perceived as a form of "intervention". However, such a presence can have a positive human rights impact, since it may result in better court practices and limit arbitrariness. Moreover, the essence of a trial-monitoring programme is not to gather and store away information on problematic court practices. Making such findings available does not improperly interfere with the court's execution of the laws in individual cases but provides information regarding the system's functioning. Hence, inevitably, trial monitoring is intended by its nature to "intervene" in the sense of having a positive effect on the system overall, including on the conduct of judges in general.

The variations in implementation of the principle of non-intervention also apply to contacts of trial monitors with prosecutors and lawyers. Some programmes follow a strict interpretation that prohibits meetings between monitors and prosecutors and lawyers, while others regard such meetings as a routine part of information gathering. In all cases, however, monitors should avoid any actions that could be regarded as constituting improper interference.

### 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 and apply these standards impartially. 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. Minimizing the perception of bias also serves to encourage the acceptance of a programme's findings, conclusions and recommendations among the broadest possible group of stakeholders.

Monitoring findings and reports must, therefore, be based upon domestic law and clearly articulated international standards, so that the basis for conclusions is clear and objective. Additionally,

<sup>13</sup> For instance, monitoring personnel would be able to ask judges to enable their reviewing a court file in their possession if unable to access it through the court administration, inquire about general difficulties they face in their work or problems that they identify in the system, their perception on legal trends, invite them to share their views on general findings reflected in reports before or after publication, and other similar advocacy issues.

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 any one side on the merits of a case. Rather, even when the conduct of a specific actor gives rise to a breach of due process, objective monitoring requires that the conduct of other actors is also examined and any contribution to the breach recorded. For instance, when a trial is prolonged for an excessive period of time, a monitor would need to consider, among other points, the trial-management skills of the court, possible administrative delays in obtaining expert reports, lack of preparation by the prosecution, and intentional delaying by the defence.

When systemic or thematic trial monitoring is conducted, the principle of objectivity requires a balanced approach to a programme's selection of trials and observation of proceedings, as well as to its formulations of findings, conclusions and recommendations. This might not be the case for ad hoc monitoring, which may focus on a single trial or on a pre-determined set of trials.

Another crucial element that might impact on a trial-monitoring programme's objectivity or its external image is the source of funding to conduct the activity. External donors might impose conditions in exchange for funding of trial-monitoring activities. Therefore, programme managers should take into account the political and legal conditions, as well as the mandates under which they work, and be mindful, strategic and transparent in fundraising. Even when the allocation of funds is not subject to any conditions, the perception of objectivity may still be affected by the choice of a donor. This is all the more true in the case of thematic monitoring<sup>14</sup> and ad hoc trial monitoring<sup>15</sup> of politically sensitive cases.

### 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 justice. Among the most important of these are commitments to ensure the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal.<sup>16</sup> In order to give effect to these commitments and others relating to fair trials, participating States have agreed to permit trial monitoring.<sup>17</sup>

OSCE commitments reinforce other international obligations to provide fair trials. These include the International Covenant on Civil and Political Rights (ICCPR) and 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 trial monitoring as a tool to support the development of judicial systems, consistent with international standards and principles of justice.

At the operational level, achieving a common understanding with national authorities regarding the purpose of monitoring serves to secure access<sup>18</sup> to courts for monitors and to increase the effectiveness of trial monitoring. Such an understanding can be attained by 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.

14 See Part IV, on "Thematic trial monitoring".

15 See Part V, on "Ad hoc trial monitoring".

16 See, for instance, Concluding Document of the Vienna Meeting, Vienna 1989, paragraph 13.9.

17 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990, paragraph 12.

18 Also see Chapter 4, "Access to court proceedings".

## 1.3 Description of the different trial-monitoring methodologies

### 1.3.1 Description of trial-monitoring methodologies according to scope – types of monitoring programmes

This manual addresses three types of trial-monitoring methodologies, separated according to their scope and objectives: systemic trial monitoring, thematic trial monitoring and ad hoc trial monitoring. The aims, modus operandi and outcomes of each type of monitoring are described in more detail in Part III, Part IV, and Part V, respectively. The paragraphs below provide a general introduction and comparison of the methodologies. It should be noted, however, that programmes often combine aspects of the different methodologies, in order to respond to emerging needs or to ensure adequate coverage of priority cases. For instance, it is common for systemic programmes to include thematic projects in relation to vulnerable groups. The classification into three types of monitoring used in this manual was chosen for ease of reference and description and, therefore, is not absolute, but is intended to illustrate the main methodological approaches commonly used in trial monitoring.

#### ↪ Systemic Trial Monitoring

Systemic trial monitoring refers to the type of programme conducted as part of a wide, well-resourced and long-term project, which has a general mandate and aims at supporting broad justice-sector reforms. It relies on trial monitoring as a basic source of information. However, it adopts a more comprehensive approach in regard to gathering information, as it looks also at the impact other institutions have on the effective administration of justice. Systemic trial monitoring would, in principle, not exclude any types of case from its activities, but it usually identifies certain kinds of proceedings as priorities. The focus of monitoring may change over time, either in response to emerging events or as a consequence of programme developments. For example, a systemic programme may focus on criminal proceedings first, and then expand to include civil proceedings. The long-term commitment and comprehensive approach of systemic programmes leads to a deep understanding of the strong and weak points of a justice system and gives such programmes the ability to gain the confidence of stakeholders and carry out a variety of advocacy activities.

#### ↪ Thematic Trial Monitoring

Thematic trial monitoring refers to projects that focus on a specific category of cases, phase of proceedings or subject matter. Such programmes have been created to follow, for instance, proceedings on charges of war crimes<sup>19</sup> or organized crime, as well as proceedings involving vulnerable groups or the application of new codes. Thematic monitoring can be triggered by a specific issue that might be of grave concern or by any other special challenges faced by a justice system. It can be conducted as part of a systemic trial-monitoring programme or separately. The term “thematic trial monitoring” is used in this manual primarily to describe programmes that cover a specific topic for an extended time, assign staff, and develop an identifiable methodology for their work, in contrast to systemic trial monitoring, which looks at broader issues. Thematic monitoring allows for more in-depth review of an issue and requires specialization by the monitoring staff to match the specificity of the fields of law being monitored. Often, it necessitates access to additional data and stakeholders. As the host country counterparts dealing with a specific issue may be limited in number and more easily identified, building closer relationships and confidence among interested parties may be possible, and can lead to more effective and targeted advocacy. Due to its specialized nature, thematic monitoring may be less able to identify systemic problems in the justice sector than systemic trial monitoring.

<sup>19</sup> The term “war crimes” is used in this manual as a generic term to refer to of grave breaches of the Geneva Conventions and other violations of the laws of armed conflict, crimes against humanity and genocide.

## ➔ Ad Hoc Trial Monitoring

Ad hoc trial monitoring, in the experience of the OSCE, refers mainly to projects that are developed in direct response to specific events that give rise to criminal proceedings and are tailored specifically to monitor these. Such events may concern post-election violence, volatile political situations or the prosecution of persons active in human rights protection. The life of these projects is commensurate to the duration of the proceedings in question and their output is generally limited to issuing a report with observations and conclusions. Further possible advocacy might be undertaken by the OSCE or by other interested actors outside the monitoring framework.

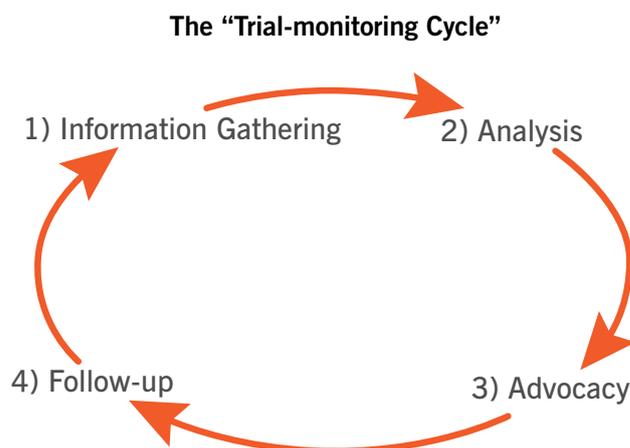
### 1.3.2. Description of the working methodology – The “trial-monitoring cycle”

All OSCE trial-monitoring programmes apply a similar working methodology once they are operational. In broad terms, this follows the sequence of 1) information gathering; 2) analysis; 3) advocacy; and 4) follow-up on the implementation of recommendations. Since the final step normally includes further information gathering and may give rise to additional analysis, advocacy and follow-up, conceptually this process resembles a cycle. This process is, therefore, known as the “trial-monitoring cycle”, and its particularities are described in more detail in later chapters.

The initial step, information gathering, includes trial monitoring and all other techniques used to gather necessary information. Subsequently, the findings are reviewed and analysed in relation to domestic and international law, allowing for conclusions to be drawn. Usually, a report is then drafted and a decision taken as to which means of advocacy are most suitable to ensure the recommendations are taken into account and put into effect by the authorities. It is then important to follow up on their implementation through targeted monitoring activities.

In spite of what seems to be a clear sequence, the steps frequently overlap. For example, advocacy may be needed in order to gain access to monitor or further information may be sought to substantiate the analysis of previously gathered information.

Acquiring a thorough understanding of the trial-monitoring cycle and the different activities covered by each of its steps is crucial to a programme for a multitude of reasons related to all phases of project implementation. Indicatively, it ensures that information is not released haphazardly, but in accordance with a project’s strategy. It allows managers to compose monitoring teams with the appropriate expertise and number of staff required for each step of the cycle. It also permits the monitoring team to divide its workload effectively, according to the level of authority and competence of each member, and the time reasonably required to complete each task. Further, it enables the programme to develop properly substantiated and realistic project proposals for donors or for the host government. Finally, it facilitates evaluation of the progress of the team’s work, as well as forward planning of upcoming activities.



# PART II

## FIRST STEPS AND INITIAL CONSIDERATIONS IN ESTABLISHING A TRIAL-MONITORING PROGRAMME

## CHAPTER 2

# Conducting a Preliminary Assessment

An organization will often start with a general concept of how a trial-monitoring programme might support a process of justice-sector reform or improvements in the situation of human rights and rule of law. Specific problems with the administration of justice will already have been identified and some knowledge will have been developed regarding the domestic context. Even given this, a thorough preliminary assessment should be undertaken to define what the programme aims to achieve and to determine the most appropriate focus, scale and duration.

This chapter provides an overview of issues that should be covered in a preliminary assessment, including evaluating various in-country conditions and assessing an organization's own capacities and the resources it possesses to organize and run a successful monitoring programme. Operational issues, such as access and how a programme's focus impacts its scale and duration, are also addressed. A preliminary assessment should provide an informed basis for selecting the type of monitoring programme and the institutional model that will best serve a programme's aims and meet its anticipated operational needs.<sup>20</sup> The preliminary assessment will help with programme planning and securing external funding.<sup>21</sup> It can also be used as a baseline for future assessments of the progress and impact of the programme.

An assessment should be carried out not only before the start of a monitoring programme but also when a programme considers expanding into additional fields or changing its thematic focus or priorities.

### 2.1 Evaluating in-country conditions, organizational capacities and access issues

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 the programme's aims and to identify the focus of monitoring.

#### 2.1.1 In-country conditions

Most importantly, a preliminary assessment should evaluate the current situation in-country with regard to the functioning of the justice system and realization of fair trial rights. This may include reviewing those justice issues that have been previously identified as problematic, including any issues related to compliance with fair trial standards and other practices having an impact on the effective and fair functioning of the system overall, or in regard to specific types of cases. An assessment should entail a "desk-based" review of current laws and previous reports on the justice or court system, as well as consultations with judicial authorities and representatives of local and international organizations engaged in rule of law, police reform and relevant human rights work. The assessment will most likely identify a wide range of issues that might be addressed through a monitoring programme. The eventual programme does not, however, have to be limited to issues identified in the

<sup>20</sup> See Chapter 3, "Choosing an institutional model".

<sup>21</sup> On the impact of the choice of the donors on the principle of objectivity, see Chapter 1.2.2.

preliminary assessment. Programme staff should be encouraged to keep an open mind and identify additional problems that may fall within the programme’s mandate as it progresses.

In practice, criminal justice systems tend to attract the attention of most monitoring programmes, at least at the early stages. Nonetheless, the preliminary assessment should also carefully consider whether to monitor civil and administrative proceedings, since these can also have profound effects on a person’s rights and legal interests.

A crucial issue to assess is the level of political will or the authorities’ interest 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 on the need for reform. Meetings with justice-system officials can help identify where support for reform may exist in the government and what type of reforms are considered to be needed, as well as where indifference or resistance may be expected. The reactions expressed 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 individual officials are ready to co-operate in or resist a reform process. If it becomes apparent that the political will for comprehensive justice reforms does not exist in a country, or that an extensive trial-monitoring programme is unwelcome, an organization may endeavour to negotiate access for concrete projects, either ad hoc or of limited scope, in an effort to gradually build confidence. If no political will for such efforts exists, it may be the case that further engagement should be postponed.

A preliminary assessment should also take into account the interest and capacity on the part of local or international organizations to become partners in, or co-operate with, a monitoring programme. Consultations may reveal the existence of organizations able to engage in legal analysis or advocacy, or to help with programme development, training, staffing or other needs. In addition, meetings with local and international organizations are opportunities to determine whether prior monitoring efforts have been undertaken and whether sufficient capacity exists for domestic groups to conduct monitoring independently.<sup>22</sup> This process allows for an assessment of the past involvement of civil society in justice issues and a determination of whether there is a need to build domestic capacity through the programme. Moreover, such consultations will enable programme planners to design a monitoring programme that avoids the duplication or lack of co-ordination with existing efforts.

### 2.1.2 Organizational capacities

The decision on whether to undertake a trial-monitoring programme and what sort of methodology to adopt will depend on an organization’s mandate, resources and anticipated access. Taking these factors into account will help an organization to determine the focus, scale, form and duration of a possible programme and to avoid making plans that are not operationally feasible.

For some organizations, the mandate may shape the focus of monitoring. As an example, for an organization with a broad mandate, systemic trial monitoring or broad justice-sector monitoring might be appropriate, while an organization with a limited mandate might opt for thematic or ad hoc monitoring. This choice, in turn, will dictate the focus of the programme, the number of cases that should be monitored, the number and location of courts that should be followed, and the ideal duration of monitoring operations.<sup>23</sup> These factors then suggest the number of monitors that will be needed, as well as the monitoring methodology, e.g., whether all or only some hearings in a case should be monitored.

<sup>22</sup> See Chapter 3.3, “Domestic trial monitoring organizations or coalitions”.

<sup>23</sup> For example, the assessment should consider how long it will take to monitor enough cases to reach credible conclusions. Programmes that aim at capacity building may also require longer time-frames.

The human and financial resources available to a programme will also impact its potential scale and duration, as well as its ability to meet its declared aims. The availability of resources must be taken carefully into account as part of programme development. Sometimes available funding cannot provide for all needs, and priorities will have to be established. Available funding will determine whether an extensive programme over a long time-frame or requiring a large number of geographically dispersed monitors is feasible or, instead, only smaller monitoring teams covering fewer courts. The availability of funds and human resources for translation will also shape the programme's methodological choices.<sup>24</sup>

In addition to the above, the nature of an organization's past work may limit its ability to engage in effective monitoring. For instance, organizations that have engaged in political advocacy might not be perceived as objective monitoring presences on issues of justice reform. Consequently, state officials and judicial actors may be less likely to accept their findings. This possibility needs to be considered before undertaking a programme.

### 2.1.3 Access preliminary consideration

The extent to which monitors are likely to have access to courts and trials is an important consideration in determining the feasibility of different types of monitoring programmes. This is a key factor to be considered during the preliminary assessment. Limitations in access to trial schedules prevent a programme from identifying cases of interest, while barriers to physical access prevent monitors from attending hearings or observing cases in their entirety. Assessing access requires an analysis of the domestic legal framework governing public access to judicial proceedings, as well as an assessment of practical obstacles that may impede monitoring. These may include informal practices that prohibit the public from accessing courtrooms or may relate to ineffective case tracking or scheduling systems that prevent the identification of cases. Where access is an issue, programmes may have to prioritize their efforts towards implementing the right to a public trial before monitoring compliance with other standards.<sup>25</sup>

## 2.2 Main objectives and focus of trial-monitoring programmes

A key goal of the preliminary assessment is to define the objectives and focus of a trial-monitoring programme. These should address a country's specific challenges, so that a programme's findings and recommendations will be relevant to local actors.

In the OSCE context, systemic and thematic trial-monitoring programmes have aimed at carrying out a comprehensive assessment of either the functioning of the justice system as a whole or of parts of the system, for the purpose of identifying specific areas in need of reform. In this process, a focus on international fair trial standards and related domestic laws is usually of primary interest. Trial-monitoring programmes have also been used to increase awareness among the judiciary regarding the right to a public trial and other fair trial standards, as well as to enhance the realization of the right to a public trial in practice.<sup>26</sup>

The chart in Annex II A sets out a number of key substantive issues that might be monitored at different stages of the legal process. The preliminary assessment should take into account whether these or similar issues should be covered as part of a planned monitoring programme. A more comprehensive list of issues to consider is included in the companion volume to this manual, ODIHR's *Legal Digest of International Fair Trial Rights*.<sup>27</sup>

24 If international staff are deployed, interpretation and translation costs may be substantial.

25 See also Chapter 4, "Access to court proceedings and other access issues".

26 An overview of past OSCE programmes, including a description of their primary objectives, is provided in the Annex VIII.

27 ODIHR, *Legal Digest of International Fair Trial Rights*, *op. cit.*, note 2. A list of other sources for substantive standards is included in Annex VII.

A more limited focus on specific legal issues or procedures – or even on selected cases – may also be useful in a country’s particular circumstances. For instance, OSCE programmes have concentrated on specific issues or problems associated with new procedural codes and other reforms, the administration of justice in specific types of criminal or war crimes cases, or other practices relevant to the fair and effective functioning of the system.

In addition to assessing the functioning of the justice system or targeting specific justice issues, other intermediate goals may also be important. For example, the building of civil society’s capacity to engage in judicial reform and support the justice system may also be a priority. Where this is the case, programmes might seek to employ and train national monitors, to partner with domestic NGOs, or to facilitate the creation of a domestic monitoring group or network.<sup>28</sup> Such interaction with local civil society has been supported by OSCE field operations, with a view to transferring knowledge and skills to the local level and to support the development of domestic civil society trial-monitoring capacity.<sup>29</sup>

### 2.3 Drafting a programme paper

Once the preliminary assessment has been completed, an organization will have an informed basis on which to draft a programme paper. This document should define, at a minimum, a trial-monitoring programme’s:

- purpose, objectives and focus;
- methodology, including scale, structure, staffing, and other features; and
- anticipated time-frame for implementation.

To the extent possible, the paper should also estimate the costs of the programme.

The most important aspects of a programme paper are the description of why a programme is recommended and what it hopes to achieve. The paper should describe which type of programme was chosen (systemic, thematic or ad hoc) and why. Having a clear purpose and goals is essential to a programme’s success and to building domestic and international support. Moreover, a proper understanding of what needs to be achieved will give a sense of direction to programme staff and delineate expectations for managers. Including specific, realistic success indicators will help managers assess whether the programme is meeting its objectives.<sup>30</sup> The programme paper should also mention any risk factors, and possible responses.

The programme paper should describe the proposed methodology and how the scale, structure, staffing and other operational features of the programme have been designed to achieve the project’s objectives. It should mention any anticipated partnerships or planned involvement by civil society. Chapter 3 provides guidance on staffing issues. Chapter 5 provides guidance on establishing a tailored information-management system.

The programme time-frame should include: 1) a preparatory stage for drafting of programme materials and guidelines, hiring monitors and training;<sup>31</sup> 2) an implementation phase, during which access is secured and the actual monitoring is performed; and 3) a final date for the publication of the report and a period for engaging in related advocacy activities.

28 See Chapter 3.3, “Domestic monitoring organizations or coalitions” and Chapter 3.4, “Hybrid trial monitoring models – partnerships”.

29 For example, a capacity-building component for civil society has been a consistent element of the trial-monitoring project of the OSCE Mission to Montenegro from its inception through all follow-up phases of the Project, see Chapter 3.4, “Hybrid trial monitoring models – partnerships”.

30 Such indicators are described in Chapter 13.2.

31 Larger scale programmes may consider running a small-scale pilot monitoring activity, which may help in anticipating and resolving access issues, and fine-tuning the focus and objectives of the programme.

Although it may not be possible to prepare a detailed budget as part of the preliminary assessment or programme paper, it is important to at least estimate the likely costs of the programme. This is particularly important if the programme is to operate on donor contributions or if funding has not yet been secured.

In addition to the points set out above, a solid programme paper serves as a reference and guide for internal programme development and a basis for drafting other informational materials. It also provides institutional memory, as programmes develop and as changes in aims, focus, personnel or monitoring methodology are considered.

## CHAPTER 3

# Choosing an Institutional Model

While the different types of trial-monitoring programmes as described in Chapter 1.4.1 refer to monitoring methodologies based on a programme's scope, aims, manner of operation and outcomes, the institutional models for trial monitoring described in this chapter refer only to the structure of the team carrying out these activities. There are a number of institutional models 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.

The resources available to an organization in a given field setting, including staff and funding, will heavily influence the choice of an institutional model. Nevertheless, consideration must be given to how particular models will best fulfil a programme's aims, as well as the intended scope and duration of trial-monitoring operations. The results of the preliminary assessment and its evaluation of in-country conditions, organizational capacities and access will provide a basis for choosing the appropriate institutional model.

Two basic institutional trial-monitoring models have been utilized most commonly within the OSCE context: the staff model and the project model.

### 3.1 Staff model

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

The staff model has been used by several OSCE field operations, primarily in South-Eastern Europe. Overall, OSCE field operations 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. The staff model has been utilized by six OSCE field operations in the region: the Presence in Albania, the Mission to Bosnia and Herzegovina, the Mission to Croatia<sup>32</sup>, the Mission in Kosovo, the Mission to Serbia and the Mission to Skopje. As a result of the legal status and history of these field operations, monitors are viewed as staff of an international organization. Likewise, in issuing reports, making recommendations, and engaging in advocacy, staff models are supported by the mandate and particular political role of the field operation in question.

Within OSCE staff-model programmes, supervision is usually provided by international staff, with monitoring teams comprised of international or local staff, or a combination of both. In all of these

<sup>32</sup> The OSCE opened its first field presence in the country, the Mission to Croatia, in April 1996. The Mission was closed at the end of 2007, to be replaced by the OSCE Office in Zagreb, which opened on 1 January 2008. Following a decision by the 56 OSCE participating States that the Office's mandate had been successfully completed, it was closed on 17 January 2012.

programmes, the reporting language is English and public reports are translated into the local language(s). Training and other field support activities are usually provided by the field operation out of annual core budgets.

As to their duration, OSCE staff-model programmes are subject to the annual renewal of the field operation's mandate, its 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 enabled the continuity of staff-model programmes for several years. As a result, the staff model has proven effective for systemic trial-monitoring programmes of extended duration in support of long-term justice-sector reform.

### **The OSCE Mission to Bosnia and Herzegovina: supporting systemic criminal justice reform efforts**

As part of a post-conflict transition, the criminal justice system of Bosnia and Herzegovina and its institutions underwent major reforms. Foremost among the changes was the adoption of a new criminal procedure 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 Mission members stationed in the Mission's field offices to provide systemic coverage of more than 63 trial and appellate courts throughout the country. Although the programme initially focused on observing the application of the new criminal procedure, over time its focus broadened to monitoring compliance with human rights law in general. In 2005, an additional section was created for monitoring and reporting on the cases transferred for trial from the International Criminal Tribunal for the former Yugoslavia (ICTY) to the Court of Bosnia and Herzegovina ("Rule 11bis" cases), pursuant to an agreement between the OSCE and the ICTY Prosecutor.

Through 2011, the programme had published 14 major reports on the functioning of the criminal justice system covering a variety of topics.<sup>33</sup> The findings of these reports provided judges and other legal actors with information on how significant parts of the justice system actually function. They also informed the substance of the criminal law curricula in judicial and prosecutorial training centres, were used in training for defence counsel, and served as a catalyst for further important criminal justice reforms.

## **3.2 Project model**

In OSCE programmes using the project model for monitoring, trial-monitoring activities are undertaken by contracted lawyers and project co-ordinators under the overall supervision of ODIHR or an OSCE field operation. Therefore, monitors are not OSCE staff, but outside lawyers (or, occasionally, non-lawyers) who have been trained to take part in the programme as contractors. These monitors are generally subject to a code of conduct in connection with their trial-monitoring responsibilities.<sup>34</sup> OSCE field operations and ODIHR have organized programmes using the project model in Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova and Tajikistan.

Like those based on the staff model, project-model programmes can engage in comprehensive trial-monitoring efforts of extended duration. One of the primary characteristics of project model is that it may involve other local actors or organizations as partners in trial monitoring more intensively than the staff model and, thus, build more local capacity among legal practitioners. Such partnerships have involved dividing or sharing responsibilities for the preparation of reference materials, organizing training or recruiting monitors. However, unlike domestic monitoring groups (discussed below), project models undertaken by the OSCE are operated as an official activity under the mandate of the OSCE field operation or ODIHR.

<sup>33</sup> For a list of the major public reports of the OSCE Mission to BiH, see <http://www.oscebih.org/Default.aspx?id=7&lang=EN>.

<sup>34</sup> See Annex I for a sample code of conduct for trial monitors.

The project model may, thus, be a useful approach for organizations that do not have a large field presence in a host country or that seek to build the capacity of local lawyers while still retaining control over a monitoring programme. Consistent with the emphasis on local ownership, reporting in OSCE project models is usually done in local language(s), with final reports translated into English and/or Russian.

#### **Project model 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 programmes using the project model in Kazakhstan and Kyrgyzstan, respectively. These programmes entailed the recruitment and training of 25 local lawyers in each country to monitor criminal trials systematically. Under the direction of the project co-ordinator, these recent law school graduates and young practicing lawyers were assigned to monitor trials in designated courts.

A primary objective of both programmes was to obtain reliable information on criminal justice practices to support ongoing efforts to improve compliance with fair trial standards and reform of the judiciary. Other important aims were to train and build the capacity of local lawyers to monitor and report on criminal trials, and to publish widely the findings of their monitoring. Among the achievements of these programmes was the attainment of greater access to criminal trials, including an openness on the part of criminal courts, judges and prosecutors to the presence of monitors, consistent with the right to a public trial.

### **3.3 Domestic trial-monitoring organizations or coalitions**

Another alternative for organizing a trial-monitoring programme is for an international organization to provide support to an independent domestic monitoring organization or coalition. Unlike an international trial-monitoring operation, a domestic monitoring organization may operate as a local NGO or coalition of NGOs under domestic law and usually consists entirely of national citizens. Relevant local law should, therefore, be reviewed to determine the need to register an organization or any other requirements.

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

Domestic observer groups may adopt either a staff model or a project model, using their own staff for monitoring or engaging monitors on a contract basis, respectively. Tapping a wide coalition of NGOs has the advantage that it may provide a wider geographic presence and coverage. On the whole, domestic organizations represent the greatest level of local ownership in the process of trial monitoring.

This form of co-operation with domestic organizations may encounter certain challenges. Capacity-building to carry out monitoring activities may be of primary importance. Capacity, however, will usually develop slowly, and difficulties should be expected. These can relate both to monitoring operations and to organizational issues such as management, funding and the development of expertise.

Furthermore, since domestic organizations tend to be independent in their operations, they might have different perceptions or approaches to methodology than would be followed by the OSCE in the same context. For instance, unlike OSCE programmes, domestic NGOs may focus on the merits

of cases or may be outspokenly critical in ways that would not be appropriate for an international organization.

Moreover, in supporting a coalition of NGOs, challenges may arise as to decision-making, especially when the number of participating organizations increases, making management more cumbersome. In addition, even when domestic groups or coalitions are able to perform monitoring functions independently, they may often require donor funding to continue operations. Consequently, building an organization's capacity to raise funds may also be required for it eventually to operate autonomously.

#### Coalition All for Fair Trials, a domestic observer group

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 in accordance with domestic law, with a general assembly, executive board and a network of 80 observers throughout the country. 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 problems in the judiciary as a means to illustrating the need for legal and institutional reform.

Since the publication of its initial report in 2004, the coalition has been commissioned to undertake several monitoring projects not only for the OSCE but also for other international organizations, such as the Swedish Helsinki Committee for Human Rights and the Soros Foundation. These trial-monitoring activities have included projects and public reports focused on selected aspects of criminal justice related to the prosecution of cases of trafficking, election-related offences, corruption and organized crime.

With its trial-monitoring methodology fully developed and a permanent supervisory staff in place, the coalition worked with the Mission to strengthen its fundraising capacity. This included developing its capacity to engage independently in project development with donors without the need for financial support from the OSCE.

### 3.4 Hybrid trial-monitoring model – partnership

The term "hybrid model" is used here to describe a combination of the staff model and the project model as they have been used by the OSCE in partnership with domestic organizations. Such partnerships in trial monitoring are another strategy for building local capacity, as well as for raising the profile and effectiveness of trial monitoring by creating a coalition of groups engaged in monitoring and advocacy activities. From an operational point of view, partnerships are also mechanisms to share organizational responsibilities for programme management. In the OSCE, hybrid models 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, consideration should be given to formalizing the relationship, by entering into a memorandum of understanding (MoU) that sets out mutual obligations and programme aims and outputs. MoUs serve as references for operations and establish timelines for activities and responsibilities. When choosing a partner for a programme, it is important to agree on the programme's purpose, methodology and time-frame. The discussion and negotiation of an MoU is an important part of this process.<sup>35</sup>

The adoption of a hybrid-model partnership can also be seen as part of an exit strategy for international organizations engaged in trial monitoring, when conditions are appropriate and domestic capacity exists. This was the case in Croatia, where, in anticipation of the closing of the OSCE Office in Zagreb, which monitored war crimes proceedings for several years using a staff model, the Office

35 A sample MoU can be requested from the ODIHR Democratisation Department.

supported three national NGOs (Centre for Peace in Osijek, Documenta, and GOLiP) to gradually take over the monitoring, reporting and advocacy of war crimes cases.

### Using partnerships to support trial-monitoring operations

#### ***The Moldova programme:***

In organizing its 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 the American Bar Association Rule of Law Initiative, an international NGO that had for several years engaged in legal and criminal law reform in Moldova. The programme also partnered with the Institute for Penal Reform, a leading Moldovan NGO in the field of criminal law reform. Overall, the sharing of programme responsibilities not only broadened the participation of civil society in monitoring, but also allowed for the sharing of managerial responsibilities — subject to ultimate OSCE responsibility — for the programme, thereby greatly reducing the need for and demands on OSCE staff.

#### ***The Montenegro programme:***

Another example of a hybrid model is the partnership between the OSCE Mission to Montenegro with the Center for Monitoring (CEMI), a specialized domestic NGO, at the commencement of the trial-monitoring programme. In this case, after engaging in building the capacity of the programme staff, CEMI initiated monitoring activities in close co-operation with the OSCE Mission. In order to achieve better synergy of operations, initially three and later two OSCE staff monitors worked directly from the premises of the NGO. The NGO committed to carrying out trial-monitoring activities even beyond the duration of the agreement with the OSCE.

### 3.5 General comparison of staff and project models

Both the staff and project models constitute viable options for establishing a programme capable of supporting comprehensive monitoring efforts of extended duration within the host state. While the essential outcomes of monitoring are largely similar in both models, certain operational issues related to the different functional capacities of the models should be considered prior to selecting one or the other for a programme. The following chart provides a comparative overview of some of the advantages and disadvantages of the two models.

36 See Chapter 4, “Access to court proceedings and other access issues” and Chapter 9, “Information gathering and verification in systemic trial monitoring”.

Comparative overview of OSCE experience with staff and project-model programmes	
Organizational issue	Overview of OSCE experience
Access to courts and case information	<ul style="list-style-type: none"> <li>• Staff model programmes provide better standing to overcome access barriers, as monitors operate as members of an international organization.</li> <li>• Staff models face no particular challenges in sharing information among colleagues, as they are all subject to the same obligation of confidentiality.</li> <li>• Project models may face more obstacles in obtaining access, but can improve this access over time using strategies applicable to both staff and project models.<sup>36</sup></li> <li>• Project models that engage outside partners to any degree may encounter obstacles to sharing classified or other sensitive information.</li> </ul>
Coverage capacity: geographic spread and number of cases	<ul style="list-style-type: none"> <li>• Both models are capable of staffing and supervising geographically dispersed monitors to provide coverage of regional courts. However, this may pose a difficulty for project models relying on NGOs if these organizations are tied to a specific location or area.</li> <li>• Both models provide an organizational platform that allows monitors to attend and report on three or four hearings a week and to monitor cases as needed.<sup>37</sup></li> </ul>
Administrative and logistical issues	<ul style="list-style-type: none"> <li>• The staff model enables programmes to benefit from a field operation's administrative and other support structures, including field offices, transportation and computers; this model allows for longer employment of staff and may also confer certain privileges and status of a diplomatic nature to monitoring personnel.</li> <li>• Project-model programmes place additional administrative responsibilities upon programmes, including the obligation to recruit staff and administer contract payments in the absence of field-operation structures.</li> </ul>
Management issues	<ul style="list-style-type: none"> <li>• The Staff model has the advantage of using the existing management structure of a field operation to supervise monitors.</li> <li>• Staff in project-model programmes can be effectively managed and held accountable through contractual obligations requiring adherence to a code of conduct, specific guidelines and other obligations<sup>38</sup>. Management may not take the same form where monitoring is conducted by domestic organizations that are more loosely connected to the OSCE. Moreover, in partnership arrangements the decision-making process may prove to be more complicated.</li> </ul>
Language and related staffing issues	<ul style="list-style-type: none"> <li>• Staff model programmes are subject to the hiring and reporting requirements of the organization, often requiring fluency in English or other official languages of the organization. This may limit the pool of qualified national candidates.</li> <li>• Project models are usually conducted in the local language(s), given that they utilize and aim to train 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 model programmes are often self-sufficient. However, they create no barriers to partnership and there have been examples of the hybrid model functioning in partnership, e.g., in Croatia.</li> <li>• Project-model programmes generally partner extensively with other local organizations and experts on operational matters, such as hiring, training, the drafting of manuals and report writing.</li> </ul>

38 *Ibid.*

37 See Chapter 7, "Programme structure and staffing issues".

Capacity-building and local character	<ul style="list-style-type: none"> <li>• Certain staff-model programmes have engaged in building the capacities of local NGOs as monitors, either from their inception or as part of their exit strategy. Additionally, these programmes engage and train local lawyers (exclusively or in addition to international lawyers) to form their monitoring teams.</li> <li>• Many local staff members in staff-model programmes have the opportunity to develop professionally within the OSCE and, should they depart from the field operation, carry their expertise to other domestic institutions or NGOs.</li> <li>• Project models contract and train local lawyers as monitors, including NGO-affiliated lawyers and, thus, contribute to building local professional capacity.</li> <li>• Project-model programmes help condition courts to having citizens in court as monitors and give the programme an added dimension of local character among legal actors and participants. The Staff model may achieve the same effect, to a certain degree, by employing local monitors to follow trial proceedings.</li> </ul>
Duration of programme	<ul style="list-style-type: none"> <li>• Staff-model programmes have, historically, shown a high level of continuity, as the funding of field operations is generally subject to less fluctuation.</li> <li>• Project-model programmes are of fixed duration, making continuation of activities subject to further funding. Some such projects have not been renewed, thus preventing follow-up monitoring on recommendations.</li> </ul>
Capacity for advocacy activities	<ul style="list-style-type: none"> <li>• Both models have the capacity to draft and issue public reports presenting their findings and recommendations. However, intergovernmental organizations like the OSCE may at times be limited in the manner of criticism they can express. NGO-led project-model programmes may be more openly critical.</li> <li>• Staff-model programmes enjoy the benefit of the OSCE's reputation and status, as well as its experience in human dimension issues, its extensive network, and the ability to fund thematic trial-monitoring projects aside from core systemic monitoring.</li> <li>• Project-model programmes may enjoy the same advantages, especially if the local organization has acquired a recognized status or if the OSCE lends its support in this regard. Furthermore, depending on the leverage and network of engaged NGOs, project-model programmes can expand advocacy activities accordingly.</li> </ul>

## CHAPTER 4

# Access to Court Proceedings and Other Access Issues

A key step for any trial-monitoring programme is to assess how much access it might be able to gain to judicial proceedings, materials and other related information. There are two main types of access issues: those related to case identification, and those pertaining to monitoring as individual cases progress. The main challenge related to case identification is to achieve a regular system of access to information that permits the fullest identification of cases or proceedings relevant to monitoring. The principal challenge related to case monitoring is to achieve a level of access to materials and hearings commensurate with the goals of the programme.

Securing regular access permits programme personnel to identify cases and adapt 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. Securing appropriate access requires an analysis of the 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.

### 4.1 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. In international law, programmes may always look to the fundamental right to a public trial as a basis for trial monitoring. The right to a public trial is enshrined in Article 14 (1) of the ICCPR, as well as in relevant regional treaties, such as Article 6 (1) of the ECHR. Therefore, most states will be subject to international legal obligations that require them to allow access to trials and the monitoring of proceedings.

All OSCE participating States have made a specific commitment, under paragraph 12 of the Copenhagen Document, to allow the monitoring of trials by observers from other participating States, NGOs or other interested persons. For some OSCE field operations, such as the Mission to Bosnia and Herzegovina and the Mission in Kosovo, trial monitoring is an explicit element of their mandates. Some field operations have also attempted to gain access to closed hearings, which generally will be granted only on the basis of concrete agreements.<sup>39</sup> Certain OSCE field operations were established with robust mandates, including unhindered access to courts and the judiciary. For example, trial-monitoring programmes set up by the OSCE Mission to Bosnia and Herzegovina and the OSCE Mission in Kosovo have capitalized on the concept of unhindered access and have obtained the agreement of the authorities for far-reaching access to proceedings, including those not open to the public.<sup>40</sup> In these circumstances, to a large degree, monitors were not perceived as members of the public, but as professionals carrying out a concrete role requiring more privileged access.

<sup>39</sup> See also Chapter 4.5, “Access to closed hearings”.

<sup>40</sup> In the case of the OSCE Mission in Kosovo, this was true during the whole period of the UNMIK administration of the territory.

Beyond international obligations on the right to a public trial, monitoring programmes should also review all domestic legislation for provisions that allow such access, as well as provisions that expand or limit the right to attend public criminal or civil proceedings, or that regulate access to indictments, verdicts or other such court documents. If programme managers also seek access to non-public hearings for their monitors, they may examine whether domestic procedural codes provide ability for certain professionals to access even non-public hearings, as may be the case for social workers in criminal proceedings involving juveniles. Depending on the interpretation of codes and judicial practice, programme managers may wish to pursue establishing a similar practice for monitoring staff.

Identifying the legal framework is, however, only the first step in a comprehensive approach to ensuring the access needed to monitor trials effectively. Even if the legal framework supports monitoring, practical barriers can 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 and disseminated, or when local authorities hinder access. As a result, international law, domestic law and the programme's mandate are only starting points in securing the necessary level of access.

## 4.2 Methods to increase overall programme access

OSCE trial-monitoring operations have utilized various methods to increase programme access to proceedings and case information. These methods seek to involve and inform domestic stakeholders at all levels of the justice system, from representatives of institutions to legal actors involved in specific cases under observation. Building consensus with local authorities regarding the purpose of monitoring trials and the advantages monitoring has for rule of law and human rights has been the most successful way to increase access.

The implementation of the steps outlined below requires careful planning and execution. Misunderstandings or scepticism on the part of the authorities are common, and failure to resolve these promptly can have adverse effects on the success of monitoring. Suggested steps include conducting initial meetings with representatives of courts, prosecutor's offices and bar associations; developing means to identify monitoring personnel and generate information about the monitoring programme; and reaching agreements on monitoring operations.

It is crucial to prepare exhaustively in advance for meetings with officials, both in terms of making an effective presentation and in anticipating their likely reactions. When preparing, it is important to remember that only half as much time is actually available to make the necessary points if interpretation is required. Moreover, it is useful to brief the interpreter in advance, to ensure he or she understands the key concepts and terminology.

### 4.2.1 Memorandum of understanding

An MoU or agreement on access is a formal agreement setting out rights and obligations between the monitoring organization and relevant local institutions, such as the Ministry of Justice or the Supreme Court.<sup>41</sup> An MoU should not be viewed as a legal prerequisite to conducting trial monitoring, but as a method to secure and maximize access, as well as an opportunity to build relationships with, and buy-in by, the local authorities. This will, in turn enhance the effectiveness of advocacy activities. An MoU may be sought at the commencement of a trial-monitoring programme or later, if the programme expands into a field where additional access is required. If extended access is

<sup>41</sup> Although an MoU can cover the entire duration of a programme, it can also be more specific. For instance, the OSCE Mission to Montenegro renews its MoU for every phase of its project. The Montenegro MoU is signed by all 17 monitored courts, as well as by the Supreme Court and the State Prosecution. MoUs have also been concluded with other self-administered bodies, as was done by the programme in Moldova with the Superior Council of Magistrates.

provided *de facto*, a programme should seriously consider the pros and cons of seeking to also formalize it through the conclusion of an MoU. The same effect as an MoU can also be achieved by an “exchange of letters” between high-level officials. For instance, the ad hoc programme to observe the trials in Minsk of individuals criminally charged in connection with the events following the 19 December 2010 Belarusian elections was based on an exchange of letters between the Permanent Representative of Belarus to the OSCE and the Director of ODIHR. This exchange of letters set out the modalities for monitoring these trials.

Face-to-face meetings regarding the conclusion of an MoU provide an opportunity to explain the programme’s purpose and methods, as well as to build trust and understanding with local officials. To this end, meetings should be used to inquire about and take into account the concerns of actors in the justice system. For instance, managers may consider including in their list of issues to be monitored any topics that justice officials deem significant for monitoring, such as problems with resources or personal security. In this way, the MoU process furthers the principle of agreement at the operational level, and the programme can be presented not only as putting the conduct of justice officials under the microscope, but also as an opportunity to help overcome problems identified by these officials. This approach can increase the programme’s acceptance.

Consistent with diplomatic protocol, an MoU should be negotiated by a representative of the monitoring organization commensurate in rank with the representative of the local authority. Whenever possible, it is better to have programme managers participating in the negotiations.

Depending on the circumstances, an 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 and the right to a public trial as set forth in international and/or domestic law;
- a statement specifying the scope and purpose of monitoring, potentially including which courts and kinds of proceedings will be monitored;
- a detailed specification of the right of access, including, if possible, access to closed hearings, specific court documents and other files; and
- other obligations and reasonable concerns of the parties.

Further to the last two points, some MoUs negotiated for OSCE programmes have provided access to proceedings and documents beyond what is stipulated in domestic law. For example:

- the right to request files through the Ministry of Justice if they cannot be obtained from courts (OSCE Office in Zagreb);
- the obligation of the prosecutor-general to identify to the trial-monitoring co-ordinator any cases involving domestic violence (OSCE Mission to Moldova); and
- the right to monitor investigative proceedings and closed hearings (OSCE Mission in Kosovo).

For their part, programmes have undertaken reasonable obligations in MoUs, including agreements to:

- assume a non-interventionist role with respect to individual cases;
- maintain as confidential certain information obtained in the course of monitoring;
- issue and disseminate a public report on its findings; and
- share reports with domestic authorities in advance of their publication.

Even if authorities are unwilling to sign a formal MoU, informal consent can often be obtained. Thus, at a minimum, the relevant authorities will have been advised in advance of the purpose and methodology of monitoring.

### 4.2.2 Contacts with court presidents, chief prosecutors and heads of bar associations

In practice, obtaining access to court dockets, hearing schedules and case information depends greatly on the willingness and the capacity of local courts and officials to co-operate with the programme. Even where local courts are open to monitoring, access is often limited by inadequate case-tracking systems or other scheduling or posting practices that hinder case identification and selection. Letters to and follow up meetings with court presidents, chief prosecutors and heads of bar associations provide an important means to introduce the programme and to attempt to make arrangements to overcome these problems.

It is best for letters to be sent to the presidents of each court where monitoring will occur. The letters should explain the basis and purpose of monitoring, as well as make reference to the existence of any MoU. They should also politely request the support of the court, including in ensuring that all court judges are notified of the programme. Lastly, letters should request a meeting with the court to discuss the programme in more detail, answer questions, and address any issues or concerns.<sup>42</sup>

Initial meetings can next be scheduled with court presidents, chief prosecutors and heads of bar associations. Given the status of such judicial officials, it is important to attend with a person of commensurate rank within the monitoring organization. Meetings, like letters, may be used to introduce the programme, including its purpose, methodology and planned outputs. They can also address concerns as to the monitoring itself. The meetings should seek to build a working relationship and obtain buy-in regarding the programme's goals. Meetings should also be used to establish an agreed methodology for identifying cases and obtaining documents. These meetings present a good opportunity to ask court presidents, chief prosecutors and heads of bar associations about the challenges they face in their duties, as well as any challenges they see in the domestic justice system as a whole. Programme managers may wish to make themselves directly available for the communication of any concerns that arise. Where a specific monitor is assigned to the court, the meeting should be used to make this introduction. If a monitor is not yet assigned, another introductory meeting should be scheduled when one is. Finally, the manager should inform court presidents, chief prosecutors and heads of bar associations if courtesy meetings with individual judges and prosecutors of the court will be sought to introduce the programme to them.

### 4.2.3 Contacts with individual judges, prosecutor, and defence counsel to introduce the trial-monitoring programme/monitor

Apart from meeting with court presidents and any other high level officials, it is good practice for monitoring programme representatives to offer to meet with each judge whose proceedings will be followed, to introduce their activities and individual monitors.

The same pattern as outlined above can be used in such meetings, which may be conducted by the manager or by the trial monitors themselves, as appropriate. In meetings with justice officials at all levels, trial monitors should demonstrate respect for the officials' functions and express support for overcoming problems that judicial actors may face. It is especially important to convey that monitors are committed to observing proceedings comprehensively and objectively. Monitored officials may be defensive, critical or even aggressive towards trial monitoring if they perceive it to be an intrusive activity that questions their competence and authority. Against this background, meetings with justice officials represent a unique opportunity to show the programme's good intentions and professionalism, as well as to dispel possible misunderstandings.

Meeting with individual judges enables them to recognize the presence of monitors in their courtroom and be aware of their functions in advance of monitored proceedings. Experience indicates

<sup>42</sup> A sample letter to a court president can be requested from the ODIHR Democratisation Department.

that meeting judges in advance improves access to hearings and materials, and facilitates the resolution of any problems that may arise. Moreover, a programme's eventual recommendations are more likely to be implemented if there is mutual trust between the programme staff and justice actors.

Good practices regarding introductory meetings with individual judges apply *mutatis mutandis* to individual prosecutors covering the monitored courts, as well as to defence counsel active in the relevant courts, if this is possible. These meetings help build the perception of a monitor's objectivity vis-à-vis all actors involved in the process, can lead to access to information that may be unobtainable otherwise, and can increase the effectiveness of advocacy addressing the conduct of these categories of actors.

#### 4.2.4 Identification and informational materials on the monitoring programme

In several programmes, initial access and co-operation were greatly increased by presenting identification and informational materials, such as a copy of the MoU, letters issued by local authorities to the courts regarding co-operation, or letters issued by programme managers to court presidents or other officials describing the programme. Experience also indicates that access progressively improves as monitoring continues and legal actors become more familiar and comfortable with the role of monitors.

In general, programmes seek to make their monitors easily identifiable for a variety of reasons. These include the security of monitors, the desire for transparency and the wish to demonstrate the programme's presence as a means to increase co-operation with the justice sector. This applies also when a programme intends to gain access to non-public proceedings.

More specifically, to help ensure access to each individual hearing, monitors should be ready to present all official documents regarding the programme when they carry out their duties. In addition, some programmes have prepared brochures to introduce the programme to judges, court officials and other legal actors. To maximize transparency, brochures should contain information regarding the programme's purposes and scope, as well as identification of the implementing partners and names of the individual monitors. Such materials are best presented well in advance of a hearing, such as at the introductory meetings.

The preparation and use of identification badges stating the name of the monitor and affiliation with the programme have also had a positive effect in securing access. Such badges may be particularly helpful when monitors are not OSCE staff and where gaining physical access to courthouses or courtrooms is difficult. In project-model programmes, badges may also provide a measure of confidence to the monitor through her/his identification with the monitoring programme. Once inside the courtroom, identification materials alert all actors and participants to the presence and identity of the monitor.

Certain programmes have sought at times to monitor public hearings without previously announcing themselves to the legal actors involved or identifying themselves as staff of the monitoring programme. In following such an approach, monitors have observed that court officials often act differently when they are unaware that they are being monitored. For instance, concerns have come to light regarding the court's treatment of the parties or the lack of public access to trials. Although monitoring hearings unannounced may reveal a more "realistic" picture of the proceedings, trial-monitoring programmes should consider carefully whether the value of this outweighs the advantages generated by a more transparent approach.

### 4.3 Access to the courtroom and hearings in individual cases

In seeking access to hearings, monitors may be confronted with a range of practical obstacles, from policing practices in courthouses to informal barriers. For example, a lack of courtrooms may necessitate that hearings take place in a judge's private chamber. The process by which monitors seek access to hearings is not only a logistical issue, but should be viewed as part of a wider strategy to expand the right to a public trial. For these reasons, and to facilitate access in particular courtrooms, it is important that programmes adhere to certain principles and good practices outlined below:

- Monitors should arrive in advance of a hearing to give them sufficient time to locate and enter the courtroom;
- Monitors must be prepared to show programme documents and identification, as well as being able to articulate clearly the legal basis, purposes and objectives of the programme to all court officials and legal actors, particularly if access is denied;
- If access is still denied, the monitor should request a meeting with the judge to explain the legal basis, purpose and objectives of the programme. If denial persists, the monitor should inquire as to the specific legal basis or reason why the right to a public trial in the case is limited;
- Monitors should report and analyze the reasons for denial of access to the judicial hearing, as required by the programme's reporting methods; and
- Monitors should never threaten court officials, but should remain professional at all times in exercising their responsibilities.

Some potential problems may be avoided if monitors are able to meet with judges or court officials before the trial to explain the programme and its purposes, and to reach advance agreement on access, as described in Chapter 4.2.

### 4.4 Access to documents

Court-case files constitute another primary source of information and often provide important information on proceedings that occurred prior to a monitored hearing. While the extent of collection and review of such documents depends on the scope and focus of a specific monitoring programme, obtaining access to these documents may be important for monitors seeking additional information on a case or wishing to elaborate on issues that arise in the stages prior to the public trial. Case files may, for instance, provide information on whether the defendant's rights might have been violated in pre-trial stages; on the grounds for pre-trial detention; on delays in gathering evidence that can relate to a breach of the right to be tried within a reasonable time; on the investigative statement of the defendant and whether defence counsel was requested and present; and on other proceedings that occurred prior to the trial. Case files can also include the records of hearings, the submissions of the parties and written objections made during the trial, thus presenting the monitor with the full picture of the case.

The ability to obtain documents depends on domestic law and practice.<sup>43</sup> In many OSCE participating States, a number of court documents are public by virtue of laws on access to public documents. In other states, however, the court file, indictments and court decisions are not publicly available, as they can be obtained only by parties involved in the case.<sup>44</sup> For programmes operating in such countries, the review of such documents may not be a part of monitoring. Programme managers must understand how access to documents will affect the scope and methodology of a particular monitoring programme.

<sup>43</sup> In some cases, for example the OSCE programmes run by the Mission in Kosovo and the Mission to Bosnia and Herzegovina, the Mission mandate provides for "unhindered access" and, therefore, the right to review all documents. In the case of the OSCE Mission in Kosovo, this was true during the whole period of the UNMIK administration of the territory.

<sup>44</sup> It should be noted that the right of the defendant to access or receive 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 public interest in a transparent proceeding.

The following are good practices to consider when seeking access to documents:

- Whenever possible, the right to access documents should be 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 their provision, should also be specified, as far as possible;
- For the convenience of the court, documents should be obtained in a systemized manner. For instance, the monitors may be authorized to arrange an appointment with a judge's legal officer or secretary to gain access or might request that such documents be sent by e-mail whenever requested or at regular intervals;
- Where monitoring methodology includes the review of court documents, case files should ordinarily be examined in advance of the hearing, to enable the monitor to become familiar with the relevant aspects of the case. The case file may be accessed subsequently as well, but an effort should be made to avoid multiple requests;
- If the photocopying of court documents is not permitted or possible, another option may be inspecting documents and taking notes at a convenient time in the courthouse;
- When accessing case files, monitors should be careful not to misplace documents or change their order. It may be agreed that access to a file is only allowed with the assistance of a court officer, to ensure that the file remains intact;
- Since case files may be kept by individual judges, monitors might first request these from the registry and/or other court staff, who will then locate the file;
- Depending on the access agreement, it is generally preferable under the principle of impartiality for monitors to access the court's case file rather than that of the prosecution; and
- Monitors may also make arrangements to be able to access case files when they have been transferred to higher courts for adjudication.

#### 4.5 Access to closed hearings

The right to a public trial is one of the means to limiting judicial arbitrariness. Although it is mainly seen as a defendant's right, it also benefits the public and the judiciary, since it strengthens confidence in the justice system. International standards, however, do provide for the exclusion of the public from hearings in specified circumstances.<sup>45</sup>

Attendance at closed hearings can be important to monitoring programmes that follow proceedings involving juveniles, vulnerable or protected witnesses, or that are characterized by some other special circumstances. Furthermore, monitors will be interested in reviewing whether closed hearings and the decision to close a hearing to the public comply with fair trial standards. In some instances, a programme's mandate may provide authority for monitoring closed hearings.<sup>46</sup> Most programmes, however, must negotiate this access with the court or make an application to judges on a case-by-case basis. As mentioned above, access could be negotiated based on domestic legal provisions granting expert personnel access to closed hearings.<sup>47</sup> In any case, such access should be established through an MoU (see above).

To gain 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. They must also be prepared to explain the confidentiality policy of the programme and that such information will be held in confidence. If, despite a contrary agreement,

<sup>45</sup> Pursuant to Article 14 (1) of the ICCPR, the 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."

<sup>46</sup> For example, the OSCE programmes set up by the Mission in Kosovo and by the Mission to Bosnia and Herzegovina provide for "unhindered access". In the case of Kosovo, this was true during the whole period of the UNMIK administration of the territory.

<sup>47</sup> In the Croatia, for instance, the presence of monitors at closed hearings was granted on the basis of their qualifications as legal experts.

access to a closed hearing is denied, monitors should report and analyze the denial of access as required by the reporting methods of the programme. They can then seek to obtain any redacted or other form of transcript the court might release.

Access to closed hearings presents additional operational challenges that must be addressed. The most important of these is the challenge for managers of putting into place a system that protects the confidentiality of information acquired during closed hearings. Monitors may be required, as part of their contract or code of conduct, to be bound by any court order prohibiting the public release of information, particularly involving the identity of witnesses, specific evidence and other confidential information. Furthermore, managers will have to establish clear information-sharing controls, which might require special steps to ensure the confidentiality of reporting. Reporting methodology should include special procedures for conveying and storing confidential or sensitive information. Moreover, programmes will generally have no professional interest in reporting or recording some confidential information, e.g., the names of protected witnesses. Where such controls are not established, or where confidential information is released, both the judicial process and the programme's credibility might be compromised.

Another operational challenge in monitoring closed hearings relates to heightened security concerns that may arise if a monitor is privy to confidential information, such as the identity of protected witnesses. In OSCE experience, such instances have been rare. Nonetheless, in cases involving organized crime, war crimes or other high-profile criminal matters, programme managers should carefully balance the benefits of monitoring closed hearings against any security concerns this might generate, keeping in mind the importance of ensuring the personal safety of monitors.<sup>48</sup>

In general terms, the duty to maintain confidentiality covers the protection of the information that warrants the application of a closed hearing under international or domestic law. This does not prevent analysis and disclosure of problems with general procedures. For example, reporting on the repeated lack of legal representation for juvenile defendants in criminal proceedings would not breach the obligation of confidentiality, provided that reports do not share any information that would compromise the protection of the identity of the juveniles.

#### 4.6 Access to investigation and pre-trial proceedings and materials

The need for access to investigative proceedings will largely depend on whether a programme has reason to be concerned about the human rights compliance of investigative actions, and the access to such proceedings will depend on whether an access agreement can be reached with the authorities. Observing a number of issues during the pre-trial period might add value to programme outputs. Annex II.B lists the degree of protection of several pre-trial rights that might be observed, such as the suspect's right to be informed of the charges against her/him and of the reasons for her/his detention in a language that s/he understands. Monitoring investigative proceedings can also shed light on reasons why certain types of cases rarely reach the trial phase, or why others where there appears to be insufficient evidence go to trial nevertheless. The monitoring of the pre-trial stage will be revisited in the section on thematic monitoring.<sup>49</sup>

To gain access to investigative proceedings, programmes will either need to be backed by a robust mandate or will need to convince the authorities of the benefits such monitoring can have for the justice system.<sup>50</sup> An MoU can include the agreement with the authorities for this type of monitoring and the obligations of each party. Negotiating such an agreement on access may be easier after a programme has already gained the authorities' confidence and demonstrated its compliance with strict confidentiality clauses. An agreement should set out the scope of a programme's access, al-

48 See Chapter 8.5.7, "Structures for ensuring trial monitors' security".

49 See Chapter 16, "Main themes encountered in trial monitoring programmes".

50 Also see Chapter 4.1, "Identifying the legal framework".

though this might be expanded over time. For example, the agreement might refer to the types of cases, such as detention hearings or those dealing with trafficking in human beings, for which investigative proceedings provide essential information. The scope may also relate to the timing of a programme's access to investigations, e.g., only after a suspect has been notified of proceedings against her/him. Any agreement should provide sufficient guarantees to the authorities that confidential information will not be released.

Managers will also need to establish a system for the early identification of cases to be monitored at the investigative stage. In the past, certain OSCE programmes reached agreements with prosecutorial authorities on systems of notification of a certain type of cases. Others relied on daily police reports, which summarized criminal incidents and noted the arrests of suspects, to the extent that these reports enabled monitors to approach the authorities and inquire about developments in a case of interest.

Monitoring investigations and pre-trial proceedings can provide a programme with a more complete view of a justice system's functioning, particularly in sensitive cases where human rights abuses are likely to occur at these stages. If a programme cannot gain formal access to investigative proceedings, it can seek to obtain information indirectly. It might inquire with the parties about known cases or seek access to the case file at the trial stage to gain knowledge of procedural actions that took place during earlier stages.

## CHAPTER 5

# Establishment of an Information-Management System

Another major activity at the preparatory phase of setting up trial-monitoring operations relates to the organization of reports, notes, documents and other relevant records. Managers have to anticipate the types and amount of information that will be obtained through the programme's activities, to develop a system for the efficient organization and circulation of these records internally as well as their effective external communication.

With all of this in mind, managers must choose a suitable information-management system for collecting, storing, systematizing and easily retrieving the information gathered. It is usually the scale and complexity of the trial-monitoring programme that determines which type of information-management system is chosen. Possibilities range from simple information-storage systems, such as case-registration charts, to more sophisticated sorting systems that generate statistics and enable searches, or to truly advanced information-management systems that offer even more complex functions.

Depending on their degree of sophistication, these systems can:

- collect, store and systematize information;
- provide an overview of cases monitored;
- provide a list of available documentation;
- facilitate the finding and accessing of previously collected information and reports;
- generate statistics;
- sort qualitative and quantitative types of information;
- enable thematic information searches and compilations of findings;
- provide guidance and training for monitoring staff's reporting and first-level analysis;
- facilitate systematic analysis and well-founded reporting; and
- help measure the progress of justice reforms and the impact of programmes.

The more perceptive and discerning a programme manager is at the planning phase, the less are the chances of losing information or wasting time and effort to find it later. Functional and needs-based information-management systems should help to secure the overall quality and efficiency of the programme.

Experience on good practices and lessons learned from OSCE trial-monitoring programmes is discussed in this chapter.

### 5.1 Case-registration charts

For programmes with a narrow focus that draw findings and recommendations from limited amounts of information, a simple information-management system that keeps a register of cases and a corresponding filing system, either electronically or in hard copy, may be adequate. If monitoring is limited in its scope (i.e., a relatively small number and type of cases monitored or focus of

advocacy on narrow set of issues), well-organized filing systems and a spreadsheet may provide adequate means to track and compile relevant information and analysis.<sup>51</sup>

## 5.2 Advanced information-management systems

For large-scale and complex programmes, it is more appropriate to develop an advanced information-management system than to use a simple case registration chart.<sup>52</sup> This is because such systems also enable the compilation, systematization and comparative analysis of many discrete practices, with a view to drawing overarching conclusions about systematic issues and challenges across many cases. To cater for these needs in complex programmes, a more sophisticated information-management system should be considered a useful and cost-effective tool. These systems are often realized technically as electronic databases.

An advanced information-management system is able to store and systematize case information and compile qualitative and quantitative data in any number of combinations for which the system is programmed. An advanced information-management system also ensures that the institutional memory of the programme is preserved, including by making older monitoring results readily accessible for new staff. The maintenance of and access to past monitoring records is crucial to comparing and measuring changes over time.

Advanced information-management systems can help ensure consistency, precision and quality of information at all stages of trial-monitoring activities. They can help to guide the process of identification and collection of the relevant data. It is also paramount that they allow both quantitative and qualitative analysis of the information collected.

To achieve this objective, an advanced information-management system has first to identify the set of categories of information — also known as metadata — relevant for quantitative analysis of cases.<sup>53</sup> By processing this information the system provides aggregated data on the number and type of cases monitored, the procedural stage of the cases and their locations, information about defendants and their legal representation, and key data about judges and court services, as well as applicable legislation and other relevant case details.

In addition, an advanced information-management system can help disaggregate information along qualitative lines. For this purpose it is recommended that the system use fair trial standards to classify or sort the substantive or procedural issues of the cases. This rights-based approach to the system helps to identify systemic challenges, as well as specific problematic cases. In turn, this can help the programme to identify the issues while continuing to gather relevant data.

As an example, one of the issues commonly monitored by programmes is the right to defence counsel. A large-scale programme may monitor more than 1,000 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 might be meaningful in providing a broad overview of the right to defence counsel is the frequency of appearance of defence counsel in monitored cases. In a simple information-storage system, such information could be obtained through a review and hand count of case reports. An advanced, computer-based information-management system would eliminate the need for counting and might, within seconds, provide the following types of statistics from the same reports:

- the number of cases involving serious crimes involving long-term imprisonment in which no defence counsel was present at trial;

51 The OSCE Mission to Serbia and the former OSCE Office in Zagreb are examples of such a system.

52 A few OSCE field operations, including Bosnia and Herzegovina, Moldova and Montenegro, have developed such advanced information-management systems in the form of electronic databases.

53 This information will include, for instance: the case number, the name of the parties and the name of the judge.

- the number of cases in which no defence counsel was appointed for an indigent defendant;
- the number of cases in which no instructions were given to the defendant on the right to counsel and no counsel was obtained; and/or
- the number of cases in which defendants without counsel were convicted.

In addition to generating statistics, a database is able to produce issue lists or issue reports with narrative information or analysis. For each example above, a database might provide an “issue report” compiling from various case-monitoring reports the monitors’ conclusions on whether the absence of defence counsel constituted a violation of domestic law and/or international fair trial standards.

An issue report generated by a database on cases where no defence counsel was present during a specific time period might look as follows:

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 that he wanted a lawyer, but could not afford one. The preliminary hearing judge did not respond and did not enter the request into 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. Although it appeared that in the interests of justice ...
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 ...

Another advantage of electronic databases is that they enable monitoring staff based in different locations to enter their monitoring data, information, analysis and findings directly into one centralized system. Entering information into the database can be labour intensive. Therefore, programme managers and database users should regularly share views on how database inputs can be optimized to allow monitors to manage their reporting time effectively. It is also important to establish a good dialogue between the technical developers of the system and the staff of the monitoring programme. Staff need to be consulted at all stages of the development of an electronic database.

While electronic databases are important tools, they do have limitations. If not constructed appropriately, they may not be able to generate useful data. They may also be unable to reflect more elaborate problems that arise in the course of operations and which were not thought of initially without being modified or expanded. Moreover, despite their powerful information-management capacity, databases can provide reliable output only where legal analysts continue to be engaged in all facets of reporting. Legal analysts must still review case reports and analyze issues. It must be remembered that a database is only an organizational tool. It is still the monitor and legal analyst who need to ensure that issues of concern are entered properly into the database, and it is still the legal analysts who must oversee the quality of monitoring information as to its accuracy and pertinence. They must also provide the legal and analytical framework for synthesizing information.

### 5.3 Systems for recording other types of information

In addition to information and data obtained from hearings and courts, trial-monitoring operations gather other kinds of information, which may or may not be related to specific cases monitored. These include:

- information obtained from non-monitored cases. Such information can be used to support existing findings or present good practices;
- information on cases or legal trends that is received through interviews and meetings with stakeholders;
- records of advocacy activities, such as meetings held and roundtables organized to present monitoring findings and recommendations;
- media reports on interesting issues and monitored cases;<sup>54</sup> and
- follow-up action by authorities to recommendations issued by monitoring missions.<sup>55</sup>

These types of information can be referred to as “soft” data.<sup>56</sup> Programmes record soft data in e-mails, notes for the file and internal reports. However, this valuable information is often dispersed and not readily available when needed. Preserving such information in operations with high staff turnover presents an important challenge. Losing this information might lead to missed advocacy opportunities or the duplication of work. Consequently, it is wise for programme managers to implement systems at the initial stage of a programme that can record and categorize such soft data. The creation of folders according to category and the ability to search the data by keywords in a computer may be helpful. Alternatively, the programme’s electronic database can be designed to include soft data.

### 5.4 Protecting confidential and sensitive information

Any information-management system must make special provision for the storage and handling of confidential or sensitive information. This may include information obtained from closed hearings, pre-trial proceedings, personal interviews or any other information that was obtained on the basis of confidentiality.<sup>57</sup> The principle of confidentiality<sup>58</sup> requires that strict controls be in place to ensure that confidential information is not available to those who do not need access to it and that such information is not released by mistake.

Each monitoring programme will need to pay special attention to protecting confidential or sensitive information in ways that will not disrupt the necessary flow of information within the programme. There are many ways to protect such information. Among the simplest is to mark documents as “confidential” or “sensitive”, in order to alert users that some or all information in the document may not be released. If only some information in a document is confidential or sensitive, then the appropriate sections could be highlighted. Monitoring personnel should carefully plan how notes on privileged information deriving from interviews can be shared within the organization or recorded in any electronic database. An information-sharing protocol<sup>59</sup> may be issued by programme managers to clarify exactly what kind of information may be shared with other organizations, and in what circumstances.

54 See Chapter 9.5 “Review of media reports on trials and other cases”.

55 For instance, the Legal System Monitoring Section (LSMS) of the OSCE Mission in Kosovo endeavoured to record follow-up actions to recommendations. The undertaking resulted in the publication of a report entitled “Reforms and Residual Concerns (1999 – 2005)” in March 2006, which looked at the extent to which the authorities had addressed the concerns raised in the LSMS reports and the level of implementation of LSMS recommendations.

56 “Soft” data is used in this context colloquially to refer to information other than that gathered through hearings, which is more official in nature, constituting “hard” data, in that sense.

57 See also Chapters 4.5, “Access to closed hearing” and Chapter 4.6, “Access to investigation and pre-trial proceedings and materials”.

58 See Chapter 8.1.4, “The duty of confidentiality”.

59 See Chapter 12.3, “Confidential and semi-public reporting”.

Technical means can also be used to protect data within an information-management system. Such means include placing passwords on certain documents or files, or instituting electronic-access controls so that only certain personnel have access to particular files.



# PART III

## SYSTEMIC TRIAL MONITORING

## CHAPTER 6

# Main Aims, Outputs and Methods of Systemic Trial Monitoring

Systemic trial monitoring describes a long-term programme that not only concentrates on the trial as its main information-gathering source, but also looks into the functioning of other parts of the justice system. The main aim of such programmes has been to contribute to broader reforms in justice systems. The end goal is to support the development of judicial structures that are independent and that function effectively and in compliance with human rights standards.

Systemic programmes generally rely on a “bottom-up” approach to gather their findings, but they issue their recommendations based on a “top-down” analysis. Namely, trial monitoring identifies in detail any problems with court or other legal practices, and attempts to track the root causes as high up in the system as possible. For instance, in observing excessively lengthy proceedings it may identify problems such as the lack of legal provisions for default judgements in civil cases or shortages in judicial personnel. In issuing recommendations, systemic programmes address the top levels of the system, first by, for example, suggesting changes to legislation, and then by addressing the conduct of actors in the administration of justice, such as by highlighting the need for further training of judges.

Systemic programmes work best in environments where local stakeholders have acknowledged that reforms are needed and are prepared to take steps towards reform. Systemic trial monitoring also endeavours to develop the capacity of actors within the justice system to identify and remedy any problems on their own.<sup>60</sup> In theory, the development of such capacity, together with the implementation of reforms, would signify the point at which a systemic trial-monitoring programme has completed its work.

Information gathered through systemic trial monitoring has been used in a variety of ways. Issuing reports is the principal means of alerting the authorities to challenges observed. These reports always include recommendations directed at bodies that can effectuate changes. However, in light of the expertise that such programmes are able to develop, their continuous presence on the ground and their leverage in the field, they have also been able to accelerate reforms through additional advocacy activities. Other outputs have included commenting on draft laws, building the capacity of justice actors, providing advice on human rights aspects of institutional reforms, promoting outreach to the public in war crimes cases, and other such activities.

Systemic trial-monitoring programmes are generally based on a wide mandate that provides broad access to information. Correspondingly, they extend their operations to as many courts and fields of law as their capabilities allow, as part of a long-term commitment. In practice, their scope of monitoring does not exclude any area of law. While priorities are identified, they may change over time.

<sup>60</sup> For instance, if a programme is noting that defence counsel routinely does not challenge decisions that declare the proceedings closed without any justification, this may lead defence counsel to readjust and consider more frequently to appeal such decisions before the trial court or before higher courts, in line with the programme’s recommendation, thus enabling a change in those practices that contravene the right to a public trial.

Systemic trial-monitoring programmes seek to strike a balance between trial monitoring and broader monitoring of the justice sector. While the focus is on monitoring proceedings, the programmes also address interrelations between the courts and other aspects of the administration of justice, such as procedures for hiring, promoting and disciplining judges. The programmes adopt a working methodology that can apply to the different kinds of proceedings followed. Although such programmes can operate autonomously, they should take into account that other actors are often involved in promoting justice reforms. Consequently, they may strike partnerships or establish co-operation with other organizations to maximize efforts and avoid the duplication of work.

Apart from monitoring proceedings, systemic programmes also provide analysis of information gathered, identify good practices and remaining challenges, and assess the development of reforms. They further empower their staff – to different degrees – to undertake an advisory role, both internally to the organization and externally directed to the national authorities, through advocacy activities.

While the chapters in this part of the manual relate, in particular, to systemic trial-monitoring programmes, much of the information they contain is also relevant to thematic and ad hoc monitoring programmes, which will be covered in Parts IV and Part V.

# CHAPTER 7

## Programme Structure and Staffing Issues

Trial-monitoring programmes carry out activities that require a staff and structure capable of supporting a complex system of information gathering, reporting and advocacy. At the working/monitoring level, trial monitoring requires specialized knowledge, accurate legal reporting and co-ordinated activity by monitors over sometimes large geographic areas. At the supervisory level, programmes usually require the active channelling of findings into reform processes, ensuring that information is effectively managed and reported to a wide variety of stakeholders. Whatever institutional model is chosen,<sup>61</sup> the programme's internal structure must provide the capacity to meet the basic operational demands. For instance, a programme with robust resources to collect information but with little ability to process it will be limited in its efforts to impact reform processes in a timely manner.

This chapter describes the structure and functions of the basic components of a trial-monitoring programme. Staffing issues are addressed with a view to meeting the basic operational demands. Past experience suggests that a well-defined division of labour among programme staff is key to meeting organizational requirements.

### 7.1 Trial-monitoring field structure and organization

The three main steps of the trial-monitoring cycle<sup>62</sup> – information gathering, analysis and advocacy – cover the three core responsibilities of professionals engaged in trial monitoring programmes: monitoring, analyzing and advocating. A programmes' structure usually consists of three levels: the monitoring level, the analyst level (which can also be considered mid-level management), and the senior management level, which is usually responsible for advocacy, in addition to supervision of the team.

Monitoring programmes are further reliant on support personnel to operate effectively. For example, interpreters might be essential for communication among staff and domestic stakeholders or for the translation of material. Legal or other assistants can perform various research, secretarial or administrative duties. There might be a need to engage database developers for some time to facilitate the creation and implementation of an electronic database, as described in Chapter 5.<sup>63</sup> As the role of support personnel is essential to monitoring operations, programme organizers and managers should budget adequately for such posts and engage people who have sufficient skills to work in the demanding legal environment of trial-monitoring programmes. For the purposes of this manual, the responsibilities of support staff will not be examined in detail. Nevertheless, managers should assess and plan for aspects of operations that will require the aid of support staff and the qualifications each category of assistants should have.

61 See Chapter 3, "Choosing institutional models".

62 See Chapter 1.3.2, "Description of the working methodology - the trial monitoring cycle".

63 As an example, the Mission to BiH employed a full-time database developer to assist with the creation and maintenance of the electronic database.

The chart below provides an overview of core programme activities and how these activities may be divided between monitoring and supervisory responsibilities.

General division of responsibilities in a monitoring programme	
Responsibilities of monitors	Responsibilities of management and supervisors
<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;</li> <li>• reporting internally, including filing regular case reports and other reports;</li> <li>• including a first-level analysis of the observed findings in reports;</li> <li>• performing advocacy at the field level;</li> <li>• reviewing programme reference materials, internally-shared and published reports, and available jurisprudence; and</li> <li>• attending scheduled training sessions and engaging in other educational and capacity-building activities.</li> </ul>	<ul style="list-style-type: none"> <li>• leading and guiding the programme's work;</li> <li>• providing monitoring strategy;</li> <li>• overseeing, guiding and supporting monitoring activities and methodology (e.g., involvement in identifying cases for monitoring, ensuring monitors' access);</li> <li>• reviewing, synthesizing and summarizing case reports;</li> <li>• preparing public reports and other external information-sharing materials;</li> <li>• keeping up to date with and sharing relevant jurisprudence and reports of other organizations;</li> <li>• representation and advocacy;</li> <li>• addressing the media;</li> <li>• administrative and other management responsibilities, including overseeing personnel issues; and</li> <li>• providing support to monitors in the field.</li> </ul>

The structure above sets out a division of labour that ensures a monitoring capacity separate from supervisory functions. Certain systemic programmes treat the separation of responsibilities as serving the principle of non-intervention, since monitors focus on information gathering, while supervisors advocate with stakeholders.<sup>64</sup>

## 7.2 Supervisory structure and responsibilities

To ensure proper attention to all supervisory functions, a division of labour between higher and middle management levels may be required. Therefore, a programme should have an overall programme co-ordinator or head, who is responsible for overall management, operational and strategic planning, and high-level advocacy, as well as a sufficient number of legal analysts responsible for legal analysis, reporting, providing advice and carrying out lower-profile advocacy activities.

In practice, the division of responsibilities may not be so rigid, depending on the specific programme. 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 might also be desirable to ensure continuity during staff turnover. However, the sharing of responsibilities should never blur the basic division between programme management and courtroom monitoring. Clear division of duties further allows for a level of review of activities and information, as well as a final decision-making structure that has ultimate responsibility for the programme's operations.

<sup>64</sup> See Chapter 1.2.1, "The principle of non-intervention in the judicial process".

### 7.2.1 Higher management responsibilities and staffing

The programme manager, regardless of her/his specific title, is the trial-monitoring programme's highest operational authority, charged with three main categories of responsibility: leading and guiding the programme's work; managing the administration of the programme; and advocacy, including representing the programme externally. The chart below lists the most common types of activities for the senior management of trial-monitoring programmes.

#### Higher management responsibilities

- programme implementation, including setting policies on focus and methodology, developing programme strategy, determining the scope of advocacy activities, and assessing the programme's impact;
- oversight of operational issues, including case selection and identification, ensuring access and approving the content of public reports;
- providing regular support to monitors, including periodic training and educational materials, addressing security and psychological-support issues;
- administrative management responsibilities, including managing the budget and overseeing personnel issues, such as hiring and evaluations; and
- programme representation, advocacy and lobbying at senior levels, including with domestic and international partners, stakeholders and the media.

The trial-monitoring programme manager reports to and is under the supervision of another professional, who is usually outside the core programme structure. This might be, for example, the director of the human rights department or the head of mission. Most of the time, strategic planning of monitoring operations, projects, reports and higher level advocacy are approved by the programme manager's supervisor. Despite their significance, the functions of these top professionals outside the monitoring programme are not addressed in this manual, except as they affect more operational issues.

In engaging the programme manager, supervisors should ensure that the individual has sound substantive knowledge of human rights standards and legal proceedings, demonstrable managerial experience and excellent communication and representational skills. Prior experience as a lawyer or justice actor is significant in understanding the challenges faced by the domestic justice system, while prior engagement in trial monitoring equips the manager with first-hand knowledge of lessons learned and good practices on helping programmes function effectively. Managers of systemic trial-monitoring programmes should ideally commit themselves to their post for a substantial length of time. Although this is desirable for all team members, it is particularly important for the higher-level posts, as the results of trial-monitoring activities can take a long period to materialize. Since one of a manager's duties is to assess the effectiveness of a programme's activities and outputs – and to redirect resources if appropriate – a long-term commitment can ensure that a monitoring strategy is implemented as planned and benefits from a manager's institutional memory.<sup>65</sup>

For OSCE or ODIHR programmes using the project model, the post of programme co-ordinator might best be filled by an OSCE staff member, even if monitors and legal analysts are engaged as contractors. Such standing can provide a better basis for the programme co-ordinator to discharge advocacy responsibilities.

The choice between engaging a national or international manager should be based on a number of factors, including the local context, domestic capacity to staff such posts and the likely perception of the local authorities towards dealing with a national or international manager. If managers are international staff members, they should avoid “transposing” through the programme's output aspects of a foreign legal system that may not be easily adapted to the hosting country. Rather, while

65 A sample terms of reference for a monitoring team leader can be found in Annex V.A.

they can be inspired by foreign practices, they must be acutely aware of the need to adapt their proposals and strategies to the domestic context. For national managers, examining the functioning of other justice systems can provide fruitful ideas for the programme's output.

Establishing close communication at the managerial level among different trial-monitoring programmes, especially in neighbouring countries, can be beneficial to the exchange of experiences and ideas. Such bilateral or multilateral communication can also lead to monitoring trans-border legal issues that emerge in a spirit of co-operation.

Although managers are not responsible for day-to-day monitoring, it is advisable for them to make time to attend proceedings at a local court. They can thus gain valuable insight on the work of monitors and the challenges they may face, in addition to first-hand experience of how the judicial system functions.

### 7.2.2 Middle management responsibilities and staffing

Systemic trial-monitoring programmes generally require mid-level managers to connect the monitors, who channel raw information into the programme, with the manager, who has overall responsibility for the programme. This function is usually performed by legal analysts or legal advisers. OSCE programmes have used the titles “legal analyst” or “legal adviser” for positions that are vested with similar or identical duties, including the responsibility to manage monitors.<sup>66</sup> The term “legal analyst” is used in this manual to refer to both legal analysts and legal advisers. Legal analysts fulfil the following main types of duties: analyzing case reports; drafting reports on the legal system; guiding and co-ordinating monitors in their everyday work; providing advice to managers; and conducting advocacy activities.

#### Middle-management responsibilities

- reviewing case reports regularly and providing substantive feedback to monitors on observation of trials and case reports;
- co-ordinating the work of monitors at the operational level, advising and guiding them in their work;
- synthesizing and summarizing case reports, including maintaining statistical data;
- conducting legal research on domestic and international law;
- drafting internal secondary reports;
- drafting public and other external reports;
- informing and advising management on the status of the legal system, on operational aspects of the programme and on substantive legal issues;
- representing the programme and carrying out advocacy activities at the operational level, in consultation with management.

The division of labour between the manager and legal analyst posts ensures the capacity to fulfil all programme functions and facilitates a sharing of other responsibilities, as needed. Except where the programme is of a very small scale, one person will not be enough. In cases where there is doubt, the need for continuity in trial-monitoring activities supports the practice of having a dual managerial structure.

<sup>66</sup> Choosing to name the middle-management post “legal analyst” may indicate that the professional will be mainly involved in legal analysis of reports by monitors, in compiling findings into reports for external distribution and in reviewing draft legislation. The OSCE Mission in Kosovo is an example where the title given to middle management of the monitoring programme is “legal analyst”. The title “legal adviser” may imply that the professionals, in addition to analysis, also provide advice to supervisors on the functioning of the justice system and on advocacy. The Mission to Bosnia and Herzegovina uses the title “legal adviser” both at the field and head office levels.

Staffing levels for legal analysts should reflect: the scale of the programme and the number of monitors; the frequency and complexity of internal and external reporting; and other duties assigned to legal analysts, including involvement in advocacy, capacity-building or field support. On average, programmes that seek to engage in regular public reporting or advocacy may consider employing at least one legal analyst for every five or six full-time monitors.<sup>67</sup>

As programmes expand and reporting, advocacy or other requirements become more complex, information management and other organizational demands will increase. In larger programmes, additional supervisory responsibilities may need to be delegated to legal analysts. Such responsibilities can include oversight of court-access issues, the preparation of training modules, drafting of policy papers and engaging with local officials. In turn, responsibilities may also be divided or shared among individual legal analysts by subject matter, issue and region, or according to skill sets or programme needs.<sup>68</sup>

In recruiting legal analysts, primary emphasis should be placed on candidates' legal reasoning and writing skills. A written test, in addition to an in-person interview, may be administered to assess the candidates' skills in these areas. Previous experience as a practicing lawyer is preferred, as analysts not only have to dispense legal guidance to monitors, but must also organize and analyze a large amount of information, as well as formulate the programme's legal findings and conclusions. Ideally, candidates should be familiar with both the domestic justice system and international legal standards. Strong communication skills will enable them to liaise more effectively with team members and to address external stakeholders persuasively. Importantly, they should have the ability to see both "the forest and the trees", since they will be required to know the details, yet present the larger picture both in reports and in advice to managers. Where one candidate cannot fulfil all these roles, analysts with complementary backgrounds should be sought.

As was suggested for senior managers, legal analysts should devote some time to observing proceedings themselves, in order to gain first-hand knowledge regarding the monitors' work and the functioning of the particular justice system.

## 7.3 Monitors

### 7.3.1 Size of the monitoring team

The main responsibilities of monitors were listed in the chart in Chapter 7.1. The number of monitors required by a programme depends on a variety of factors.<sup>69</sup> First, it depends on the programme's scope and objectives. For instance, monitors may cover all courts throughout the host state or only selected ones. For systemic programmes, the size of the team should be sufficient to provide a meaningful sample of cases and cover a significant number of courts.

<sup>67</sup> This ratio is based on the experience of OSCE field operations engaged in full-time monitoring, with the expectation that each analyst/adviser will review 15-24 case reports weekly, in addition to providing substantive feedback, engaging in regular internal reporting, and drafting external reports on a semi-annual basis. By way of example, the OSCE Mission in Kosovo has consistently staffed the lowest ratio of monitors to legal analyst staff (about three to one). In turn, the LSMS has engaged in the most regular and prolific public reporting. Conversely, programmes that expect to publish reports infrequently or only at the completion of a lengthy monitoring term may not require as many analysts per number of monitors.

<sup>68</sup> In the Mission to Bosnia and Herzegovina, for example, the division of the field operation into four regions and the large number of monitors (over 20) account for the 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 the legal advisers at the head office. Legal advisers in head office are assigned to thematic portfolios. Through thematic working groups they consult with field staff, *inter alia*, to discuss trends, develop activities and assess on going programmatic activities.

<sup>69</sup> OSCE programmes have been organized with a wide variety in the number of monitors. For example, the Mission to Bosnia and Herzegovina has operated with 22 to 25 full-time monitors; the Mission in Kosovo with six full-time monitors; the Mission to Croatia with 20 Rule of Law staff monitoring war crimes trials as part of broader obligations; the Mission to Skopje with approximately five monitors. Project-model programmes have also differed vastly in size, ranging from eight monitors in Tajikistan to 262 monitors in Moldova.

The number of cases to be monitored in a given programme will also play a major role in determining staffing needs. A full-time monitor may be expected to monitor and report, on average, on three or four hearings per week. Factors affecting this range include: the methodology of monitoring (e.g., hearing observation or hearing observation combined with file review and possible interviews); the complexity of reporting requirements (e.g., simple reproduction of facts or also first level analysis of observations); and the assignment of other responsibilities, such as other regular reporting.

In practice, budgetary considerations and the availability of qualified candidates also impact upon the size of a monitoring team, as well as on the decision to opt for international or national monitors, or to seek a partnership with another organization to conduct monitoring.<sup>70</sup>

A final consideration is whether a programme requires monitors to cover proceedings individually or to work in monitoring pairs.<sup>71</sup> A number of OSCE field operations, including those in Kazakhstan, Kyrgyzstan, Moldova and Tajikistan, have opted for pairs, so that two monitors work as a team observing cases and writing the internal reports. The benefits of pairings are most pronounced at the early stages of a programme or where there is resistance to the presence of monitors in courts.

### 7.3.2 Recruitment

When recruiting, a manager should endeavour to assess not only the candidates' professional and academic credentials relating to law and human rights, but also their communication skills and ability to internalize the trial-monitoring principles of non-intervention, impartiality, confidentiality and professionalism.

Experience indicates that it is preferable to seek monitors with full legal degrees. This helps ensure that the monitors are familiar with legal proceedings and the challenges justice actors face in their work. Legal qualifications provide monitors with the requisite background to engage in legal reporting, and can also increase confidence among the local judiciary in the quality of the monitoring. However, significant prior legal experience is not a prerequisite. OSCE field operations in Bosnia and Herzegovina, Kazakhstan and Moldova have found freshly admitted lawyers well placed to monitor new reforms and absorb new concepts, including in the implementation of fair trial standards. Some programmes have experienced problems in hiring law students, given the perception of the judiciary towards non-graduates, the competing priorities imposed by their studies on their time, and wavering levels of interest. Although individuals without a legal background have been successfully trained as monitors, this has generally been the exception.<sup>72</sup>

Managers should ensure that candidates have no conflict of interest that could compromise monitoring, such as practicing in a court 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 can often prove to be positive, a monitor should not have a special relationship that could compromise their impartiality. If too close a relationship exists, a monitor may be hired for a different court or area of responsibility. For lawyers who have been associated with NGOs involved in advocacy, the interview process should investigate the nature of the advocacy, to determine whether the candidate will be perceived as sufficiently impartial/objective. Job applicants who are active in politics might also not be seen as impartial by some courts.

### 7.3.3 Contract obligations

For staff-model programmes, OSCE contracts should describe the requirements of the post and the need to comply with staff rules and the OSCE Code of Conduct.

<sup>70</sup> See Chapter 3.4, "Hybrid Trial Monitoring Models – Programme Partnerships".

<sup>71</sup> See Chapter 8.5.4, "Monitor pairing".

<sup>72</sup> A sample terms of reference for a trial monitor can be found in Annex V.B.

For project-model programmes involving non-OSCE staff, contracts should include, at a minimum: the name of the project and the contract period; the timing, terms and conditions of payment; the obligation on the part of the monitor to adhere to all programme requirements and guidelines, including the code of conduct; and the status of monitors as independent contractors, rather than employees of the organization. It is not necessary for the contract to include all programme documentation, such as guidelines and manuals. Instead, it may specify that the monitor will receive copies of all applicable materials and instructions, and accepts all duties and responsibilities.

#### 7.3.4 Nationality of monitors

Initially, OSCE trial monitoring was conducted largely by international monitors. Today, however, national monitors conduct the vast majority of OSCE systemic and thematic trial monitoring.<sup>73</sup> Experience has shown that both international and national monitors can achieve excellent results as monitors (or legal analysts). Employing national monitors is also a means of building local capacity. Staff costs for national monitors are generally lower, and national monitors require less logistical support, such as interpretation.

Despite these considerations, the managers must still assess in each context whether international or national monitors should be engaged. Experience has shown three situations where international monitors might be preferable:

- Where trial monitoring serves as a confidence-building measure, such as in contexts of post-conflict ethnic tensions or other such polarized situations, national monitors may be perceived as biased. In these situations, the fact that a monitor is international can greatly enhance the appearance of impartiality.
- When trial monitoring involves cases where security concerns are prominent, an international monitor is less exposed to threats or other pressures. Specifically, war crimes cases, organized crime and corruption prosecutions and other high-profile proceedings may put extreme pressure on all judicial actors, as well as on monitors. Attendance at the proceedings, particular if this makes them privy to closed hearings and confidential information, might subject national monitors to outside pressures. In such instances, international monitors affiliated with an international organization might be freer to report, engage and even criticize actors without the same concern for personal or family safety.
- When the subject matter of monitoring requires more elaborate legal knowledge of international standards or of monitoring techniques, international monitors with appropriate backgrounds can successfully jump start monitoring programmes, with a view to later handing work over to national monitors.

In several missions, international monitors have worked side-by-side with national monitors, as in the programmes run by the OSCE Office in Zagreb, the OSCE Mission in Kosovo, or the Rule 11*bis* Project of the OSCE Mission to Bosnia and Herzegovina. These mixed teams have built local capacity and have yielded positive results through complementary strengths.

73 See Annex VII for information regarding the trial monitoring programmes of OSCE field operations.

<b>Overview of OSCE experience with the nationality of monitors</b>		
<b>Consideration</b>	<b>National monitor</b>	<b>International monitor</b>
Monitoring experience and knowledge of applicable laws	<ul style="list-style-type: none"> <li>• less likely to find candidates with monitoring experience and skills</li> <li>• need training on programme methods and requirements</li> <li>• more likely to be familiar with domestic law and practice; may need additional training on international human rights standards</li> </ul>	<ul style="list-style-type: none"> <li>• 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 human rights standards, including on fair trial and legal practice in a foreign state; will need to become proficient in domestic law.</li> </ul>
Language	<ul style="list-style-type: none"> <li>• can observe and review documents without interpretation</li> </ul>	<ul style="list-style-type: none"> <li>• requires local language skills or an interpreter.</li> </ul>
Cost	<ul style="list-style-type: none"> <li>• less expensive, as already resides in local area and is paid at local rates</li> </ul>	<ul style="list-style-type: none"> <li>• more expensive to hire and support.</li> </ul>
Perception of impartiality	<ul style="list-style-type: none"> <li>• less likely to be viewed as unbiased, especially where monitoring is of post-conflict cases involving war crimes, ethnic violence or other sectarian issues</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 depending on the monitor's nationality or other factors.</li> </ul>
Susceptibility to pressure	<ul style="list-style-type: none"> <li>• more likely to be deterred by access limitations or other pressure to not report critically</li> </ul>	<ul style="list-style-type: none"> <li>• less likely to be deterred by access issues, given that there is no permanent connection to local actors</li> </ul>
Capacity-building/long-term commitment	<ul style="list-style-type: none"> <li>• likely to remain in the 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>• less likely to continue working in the country after the completion of the project; likely, however, to continue in a monitoring, advisory or capacity-building role in other field operations.</li> </ul>

## CHAPTER 8

# Conduct and Capacity-Building of Trial-Monitoring Staff

Trial monitoring requires a high level of co-ordination and consistency of methodology, although monitoring and reporting is mainly performed individually or in pairs. Maintaining the integrity and consistency of a programme requires basic operational controls, including in procedures and in the provision of adequate support.

### 8.1 Standards of conduct for trial-monitoring staff

The establishment of a code of conduct safeguards the monitoring programme and, in particular, the perception of its activities and professional staff by external actors and the public. A code of conduct should incorporate the principles of the programme into the working methods of the team by providing overarching professional standards of conduct. As an internal mechanism, a code of conduct helps ensure that monitors adhere to common standards. Hence, codes of conduct provide a basis for establishing accountability on the part of monitors. Unlike monitoring guidelines or instructions, which focus on case monitoring and reporting responsibilities, a code of conduct applies broadly across all monitoring activities.<sup>74</sup>

In the development of a code of conduct specific to trial monitoring, managers can benefit from efforts in recent years to develop a model set of ethical commitments for human rights professionals.<sup>75</sup> Managers should acquaint their staff with these ethical guidelines and discuss their applicability to trial monitoring. These overarching principles can play an important role when unprecedented or complex situations arise, in which monitors may have a dilemma regarding which course of action to take. For instance, the ethical guidelines state that “the primary commitment of human rights professionals is to the human rights of the individuals, communities and peoples they serve; in cases of professional dilemma or uncertainty, this commitment shall be the fundamental consideration.”<sup>76</sup> The OSCE Mission to Bosnia and Herzegovina, for instance, organized a meeting of its human rights staff in 2007 to discuss the applicability of these principles in the work of the department.

Codes or principles of conduct should be put in writing and included as part of a programme’s guidelines for all staff. Where monitors are contracted and not subject to OSCE staff rules and regulations, the code of conduct may also be included as an annex to their contracts, to emphasize the monitor’s professional obligations.<sup>77</sup> Since programmes may adopt different operating principles, there is no unified OSCE trial-monitoring code of conduct. Codes have been drafted in the OSCE, however, that serve to further the four basic working principles set out in the following sections.

<sup>74</sup> See Annex I.A for a sample code of conduct.

<sup>75</sup> See the Guiding Principles of Human Rights Field Officers Working in Conflict and Post-conflict Environments, launched in 2008 at the Palais des Nations, Geneva, by the Permanent Representative of Ireland to the United Nations, with the participation of diplomats, NGOs and representatives of the major human rights field officer-deploying inter-governmental organisations.

<sup>76</sup> See the first principle of the Statement of Ethical Commitments of Human Rights Professionals.

<sup>77</sup> This was the case in Moldova and Montenegro.

### 8.1.1 Duty of non-intervention

Non-intervention in the judicial process is an overarching principle that serves to support a fundamental requirement for the rule of law: the independence of the judiciary. OSCE monitoring programmes have incorporated the principle of non-intervention, which can be reduced to the following duties for monitors:

- 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 a trial;
- Monitors must never instruct or advise legal actors with regard to a course of legal action to take or not to take;
- When asked questions about the judicial process, or invited to engage in it, monitors must explain their role as an observer, the principle of non-intervention, by which monitoring is conducted, and the purpose of monitoring, while declining to comment;
- When engaging for the first time with actors or participants who are not familiar with the monitor's function, monitors should explain their role as an observer, as well as the principle of non-intervention, by which monitoring is conducted.

These duties apply also to legal analysts and managers of programmes, should they observe proceedings. In sum, there is a common agreement in OSCE programmes that monitoring personnel should not interfere with the course of an ongoing case, particularly during trial proceedings, nor appear to do so.

Trial-monitoring programmes may, however, take different approaches to the application of this duty, especially concerning monitors' communication with judges and whether monitors should conduct advocacy activities with justice actors.

Certain programmes may impose an absolute prohibition on monitors communicating with judges, reserving communication or other advocacy to programme managers, who should themselves limit communications to roundtables or similar activities. However, most programmes allow monitors to introduce themselves to judges, to inquire about administrative issues, or to gauge the justice actors' general legal opinions not connected to a particular case. There are also programmes that foresee monitors discussing concrete cases with judges, prosecutors and defence counsel, albeit in broad terms and not criticizing or advocating particular courses of action.<sup>78</sup> In some contexts, monitors are also allowed to point out any obvious technical issue or clerical oversight.

Some programmes have introduced an exception clause from non-interference with the judicial process if monitors witness egregious human rights violations during their duties or where credible information about a human rights violation is brought to their attention. In such circumstances, monitors should immediately notify their supervisors, who will consider how to best address the issue. A variety of exceptional circumstances may be envisaged in which monitors can find themselves facing a conflict of duties, such as if they witness the physical ill-treatment of a suspect. From a human rights perspective, it would be essential to take steps to end such a violation, even if doing so might be at odds with the duty of non-intervention. Therefore, managers should prepare monitors for highly unlikely, yet extremely problematic situations, in which they need to use good judgement. To achieve this, managers may include in the monitoring guidelines both ethical principles on monitoring and other interests that need to be respected in operations, such as safeguarding the security of oneself and colleagues, promoting a positive image of the organization, and meeting

<sup>78</sup> For instance, a monitor would be permitted to ask a prosecutor or defence counsel whether s/he intends to file an appeal in a case. Or, should a deviation from the law be noted in a case, the monitor may be permitted to ask the stakeholder to describe her/his understanding of the legislative text or of any applicable international norms and standards. Further examples of this "questions approach" that some programmes take as part of proactive or thorough monitoring are provided in Chapter 9.3.1.

human rights imperatives. These can be discussed through examples of how managers would expect monitors to react in different hypothetical situations.

Finally, many programmes do not consider the principle of non-intervention applicable in their interactions with non-judicial actors, such as the police or personnel at detention centres. As an example, monitors would be encouraged to suggest in a straightforward manner to the director of a detention facility the need for separate accommodation for juveniles, as set out in international human rights standards.

### 8.1.2 Duty of impartiality

Closely related to the duty of non-intervention is the duty of monitoring personnel to carry out their responsibilities in an objective and impartial manner, as well as to avoid the appearance of doing otherwise. Carrying out activities impartially requires that monitors observe and examine equally the conduct of all actors involved, without showing any personal preference toward one side over another or toward a specific outcome in a case. Similarly, legal analysts and managers carry out their activities impartially by ensuring that challenges are identified, reported and followed up through advocacy, regardless of who may bear responsibility for them. This helps ensure that a programme's findings and conclusions are accurate. Externally, the appearance of impartiality helps provide assurance that the monitoring programme is not biased regarding individual cases and that no single category of actors is targeted for criticism.

In the courtroom, the duty of impartiality suggests that monitors should sit apart from the prosecution and defence if physically possible, so as to avoid the appearance of partiality.

To the extent that the monitoring programme allows interaction with legal actors, impartiality dictates that, if there is contact with one adversary in a case, there should be similar contact with the other. This helps establish that the monitor is not taking sides in gathering information. In contacting the different sides, however, monitors must not share information on ongoing proceedings, as this would engage them in the judicial process.

Gathering information and reporting in an objective manner is of particular importance in fields of law where public opinion or the general circumstances tend to favour one side of the argument. This can be the case for cases of trafficking in human beings and terrorism or for those involving human rights defenders or journalists, where there is often a prevailing prosecutorial bias. Likewise, in war crimes proceedings or other politically charged cases, there may be a tendency of bias in favour of one or the other side in the process.

The need for impartiality also extends to the manner in which reports are drafted. If only negative points and drawbacks are reported, justice officials may perceive the monitoring programme to be biased towards offering criticism, rather than presenting a balanced view of overall challenges and achievements. In such instances, a programme may endeavour to appease the authorities by reflecting both positive and negative practices almost symmetrically in reports. Other programmes operate on the assumption that the spirit of human rights work is to flesh out problems and encourage their resolution, rather than praising the judiciary for basically doing its work. Somewhere in between there lies yet another approach: highlighting challenges observed, but also noting any particularly good practices, with a view to encouraging the authorities to follow the latter examples. Reports may also underscore instances where the organization's recommendations have been implemented. Each programme needs to consider which approach will be adopted.

### 8.1.3 Duty of professionalism

Given the formal 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. Since monitors are the most visible members of the programme, their conduct directly affects the perception of the programme on the part of justice-system actors and the general public. 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.<sup>79</sup> In the OSCE, codes or principles of conduct have provided three categories of obligations for monitoring personnel: those pertaining to their appearance, those relating to their behaviour and those connected with their attitude towards work. They include the following rules:

#### Examples of rules related to the duty of professionalism

- Monitors shall always arrive promptly at court;
- Monitors shall wear appropriate clothing;
- Monitors shall wear a badge identifying them as monitors, when required to do so by the programme;
- 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 and must devote their full attention to the proceedings and take comprehensive notes, even if the hearing is recorded;
- Monitors shall be familiar with all programme guidelines and procedures, and take their continuing education responsibilities seriously.<sup>80</sup>

In addition to any specific code of conduct for court monitoring, monitors in OSCE programmes should be expected to abide by the general OSCE Code of Conduct, which begins by stating that “OSCE officials shall conduct themselves at the highest personal and professional level at all times while on duty and off duty, in order to successfully represent the OSCE.”<sup>81</sup> Therefore, whether during or after working hours, monitoring personnel should not engage in any conduct that may be criminal, unethical or otherwise liable to expose them or the organization to criticism. Examples of improper conduct would be visiting places that have been classified as off-limits or undertaking in parallel work that runs contrary to the OSCE principles.

In discharging their duties, team members should never use inappropriate language or body language, or behave disrespectfully. They should never use mobile phones in the courtroom and should always silence phones during proceedings or meetings. They should treat all actors politely, regardless of position or rank, and phrase their requests in a clear and respectful manner. Proper behaviour is crucial, especially in situations where access is denied or when a monitor is faced with a stakeholder s/he feels is acting in an aggressive or condescending manner. In such circumstances, monitoring personnel should remain even-tempered, patient and focused on the subject, and should avoid either engaging in an argument. Supervisors should give detailed guidelines to monitors on how to react in difficult situations, how far to push a request or argument, when to engage in a difficult discussion, and how to disengage from a tense environment. Such guidelines should include how to react if the programme or its findings are questioned in public forums in which it may be appropriate for monitors to defend or clarify the organization’s position.

<sup>79</sup> See Annex I, for a sample code of conduct.

<sup>80</sup> These principles are, among others, reflected in the Code of Conduct of Trial Monitors of the OSCE Mission to Montenegro.

<sup>81</sup> See Article 1 of the OSCE Code of Conduct.

The duty to exhibit professionalism also suggests that monitoring staff, apart from fulfilling the requirements of their job to the highest standards they can achieve, should actively seek to enhance their knowledge of the law and their monitoring, advocacy and language skills. They may do this independently or by attending formal training sessions.

#### 8.1.4 Duty of confidentiality<sup>82</sup>

The duty of confidentiality protects the integrity of a monitoring programme by providing basic controls over the release of information by monitors. This serves two critical purposes. Most importantly, the duty of confidentiality helps prevent the release of information obtained by virtue of a programme's access to non-public information. This could include, for example, the names of protected witnesses, sensitive information revealed in an *in camera* hearing, or opinions offered privately to monitors by the prosecution or defence. Such information must never be shared by monitoring personnel.<sup>83</sup>

In addition, even when a monitor gathers information that is in the public domain, the duty of confidentiality protects against the ad hoc release of information prior to appropriate review and analysis. This supports other strategic and operational programme interests, such as ensuring accuracy and consistency in presenting findings. For instance, without approval from supervisors, monitors should never share with external actors the programme's internal case reports, even if they are for public hearings. Monitors should never make comments to the media or outside actors on their findings or conclusions about a hearing they have just attended. Such confidentiality protects the integrity of the monitoring programme by ensuring that it speaks with one voice and achieves the best possible results through the public release of information in an organized and strategic manner. Supervisory staff and managers also have confidentiality duties, in line with the information-sharing policy of the programme.<sup>84</sup>

#### 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."<sup>85</sup>
- "The observers ... [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."<sup>86</sup>

The duty of confidentiality does not prohibit monitors from providing information regarding the programme in general. Monitors should always be prepared to explain to interested actors or the media the purpose and methodology of the trial-monitoring programme, including its principles and code of conduct.

82 See also Chapter 5.4, "Protecting confidential and sensitive information".

83 The policy of the LSMS, OSCE Mission in 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 monitors' respect of a very high level of confidentiality is a necessary condition for LSMS access to court files and proceedings."

84 The topic of information-sharing and the requirement that programmes develop information-sharing controls for the release of information are addressed in Chapter 12.3 and Chapter 12.4.1.

85 See "Confidentiality" in the "Guidelines for Trial Monitors" prepared for the OSCE Mission to Moldova's Trial Monitoring Programme.

86 See "Confidentiality of Data" in the Code of Conduct of the Coalition All for Fair Trials, the former Yugoslav Republic of Macedonia.

## 8.2 Monitoring instructions

The purpose of monitoring instructions is to provide guidance to monitors and other staff on how to carry out basic job responsibilities. Instructions help ensure adherence to common standards, thereby enhancing the consistency of monitoring methodology, and establish a basis for accountability. Monitoring instructions may be broken down into areas covering the different aspects of trial-monitoring operations. It is best that they be in writing, in the form of guidelines or internal policy papers, for example.<sup>87</sup> Many of these areas are covered more extensively throughout the manual. This subchapter serves as a reminder for managers of basic areas on which guidelines or instructions should be provided. These are as follows:

- *Case-identification methodology and case-selection criteria.* These instructions clarify who is responsible for identifying cases and how to select from among different cases, including identifying priority cases by type of crime or relevant provision of the criminal code, the age of the perpetrator or victim, or other criteria.<sup>88</sup>
- *Case-monitoring methodology.* These instructions relate to procedures on securing access to hearings,<sup>89</sup> guidelines on how to monitor<sup>90</sup> and to procedures related to documents, closed hearings and interviews.<sup>91</sup>
- *Reporting methodology.* These instructions provide guidance on the focus and content of reporting, as well as on how to complete reporting forms.<sup>92</sup>
- *Advocacy methodology.* Such guidelines assist monitoring staff in becoming acquainted with advocacy aims and techniques and knowing the methodology and the limitations that a programme places on the advocacy role of team members at different levels.<sup>93</sup>
- *Other instructions, policies, and responsibilities.* These may include guidelines on the protocol for information-sharing,<sup>94</sup> security<sup>95</sup> or other responsibilities.

Some programmes have specified further monitoring responsibilities, including minimum obligations, to achieve monitor accountability. Defining minimum obligations may be especially helpful in project-model programmes, where monitoring is a contracted activity rather than the responsibility of full-time staff. The following box provides a sample of the minimum monitoring obligations in the Moldova programme.

87 As an example, Annex I. B. “Guidelines for Trial Monitors”, contains the “Instructions to and Responsibilities of Monitors” prepared for the OSCE Mission to Moldova’s Trial Monitoring Programme.

88 See Chapter 9.1 for further details on identifying cases.

89 See Chapter 4.3, “Access to the courtroom and hearings in individual cases” and Chapter 4.6, “Access to investigations and pre-trial proceedings and materials”.

90 See Chapter 9.2, “Trial observation in courtrooms”.

91 See Chapter 4.5, “Access to closed hearings”, Chapter 4.4, “Access to documents” and Chapter 9.3. “Interviews with justice actors and stakeholders”.

92 See Chapter 11, “Internal reporting system”.

93 See Chapter 12.4, “Supporting other advocacy and capacity-building activities”.

94 See Chapter 12.3, “Confidential and semi-public reporting”.

95 See Chapters Chapter 8.5.6 and Chapter 8.5.7.

### Example of instructions on minimum monitoring obligations<sup>96</sup>

#### “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 her/his own notes, but each team will work together to prepare and submit a single report to the national co-ordinator. 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.”

## 8.3 Legal reference materials

Legal reference materials, including legal codes, secondary sources of law, commentaries and legal articles, are essential to the monitoring and analytical capacity of programme staff. It may be difficult for individual monitors to obtain these on their own, so the programme should acquire and make available to its staff all possible legal reference materials. Managers should also consider the usefulness of developing a legal reference manual.

### 8.3.1 Considerations regarding legal reference materials

Legal reference materials made accessible to monitoring staff should include:

- copies of international and regional fair trial standards and relevant case-law, including secondary reference materials, such as commentaries and compilations of jurisprudence. Of particular relevance is ODIHR’s *Legal Digest of International Fair Trial Rights*,<sup>97</sup> which is the companion volume to this manual;<sup>98</sup>
- copies of the domestic procedural and criminal codes applicable to the cases that will be monitored; codes on civil and administrative proceedings if these are to be followed; and domestic legal commentaries on the codes, if they exist;
- landmark domestic jurisprudence by higher courts;
- copies of administrative laws relevant to monitoring, including laws regulating the posting of case schedules, regulations on the functioning of courts and codes of ethics for legal professionals;
- information – e.g., brochures or an organization chart – on the domestic legal system, including on the organizational and jurisdictional structure of the courts, prosecutors’ offices and of other relevant organs, such as bar associations;
- other materials, articles and reports on relevant legal issues or practices published by international and national organizations. This includes subscribing to local legal periodicals and obtaining relevant reports and documents of other OSCE trial-monitoring programmes; and
- a list of websites where legal reference materials of hard and soft law may be accessed, including case law of the European Court of Human Rights (ECtHR) and the United Nations Human Rights Committee.

Since many of these materials will also be known to local legal professionals, making them accessible to monitoring staff enables a programme to have common points of reference with justice professionals. Monitoring programmes can, therefore, use standards familiar to the recipients of their reports. Moreover, having access to these materials enables monitoring staff to identify any

<sup>96</sup> See “Sample guidelines for monitors” in Annex I. B.

<sup>97</sup> ODIHR, *Legal Digest of International Fair Trial Rights*, *op. cit.*, note 2. A list of other sources for substantive standards is included in Annex VII.

<sup>98</sup> Many other relevant documents exist; a selection is included in Annex VII.

contradictions between domestic legal documents and binding international standards that might explain any breaches observed. Staff can also use good analysis provided by local practitioners to reinforce the programme's findings and promote broader acceptance.

OSCE reports and documents from trial-monitoring programmes in other countries may be searched online. Additionally, legislation from other countries that can be used as inspiration for analytical and comparative purposes can be accessed through the ODIHR-based web portal [Legislationline.org](http://Legislationline.org).

Staff should share with their colleagues any interesting articles and jurisprudence they come across. Some programmes have assigned focal points to share summaries of interesting articles or the tables of contents of legal periodicals relevant to the monitoring. It is a good practice to keep a central archive where all relevant materials that may be useful for analysis can be stored and, if possible, searched by keywords.<sup>99</sup>

Where laws are amended frequently, programme managers should consider assigning a focal point to keep abreast of developments and provide consolidated versions of legal documents to monitoring staff. It is advisable for the focal point to cross-check regularly with the responsible justice-system officials that the version used by the judiciary is the same as that of the monitoring programme, and to resolve any discrepancies.

Since copying such materials may often place a strain on resources, programme managers may consider maintaining legal reference materials at central locations or providing them online. All monitors and staff should be aware of the existence of these materials and of how to access them quickly and easily. Managers must examine the budgetary and technical possibility of providing all monitoring staff with free access to the Internet, and train them to use it for legal research if they lack the skills.

### 8.3.2 Creating a legal reference manual as a field support tool

Where resources permit, programmes may also consider creating a legal reference manual. In OSCE programmes, this has included incorporating domestic legal provisions and cases into the presentation of international and domestic fair trial standards to identify how such standards have been applied locally.

The development of such a manual should be considered for a number of reasons:

- The research required to compile a manual often identifies gaps and areas where domestic laws are not compliant with international standards;
- A reference manual can be structured to correspond to a programme's internal reporting template, providing guidelines to monitors on how to report their findings;<sup>100</sup>
- 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 development of a manual provides an opportunity to consult and obtain input from domestic legal experts and other organizations, expanding the reach of the programme and obtaining feedback that draws on local legal knowledge.

The creation of a legal reference manual need not be unduly time-consuming. Where the manual will only collect and organize relevant laws, secondary sources and other easily obtainable 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

99 This may be taken into account when creating database, as set out in Chapter 5.2.

100 See Chapter 11.4.1, "Using instructions to ensure a clear reporting methodology".

of creating the manual should be one of the first activities undertaken in organizing the programme. Manuals should be reviewed and updated as needed.

#### Example: Amended version of the Manual of the Trial Monitoring Programme, OSCE Mission to Bosnia and Herzegovina

The OSCE Mission to Bosnia and Herzegovina Trial Monitoring Manual (amended version) was adopted in September 2006. Its 85 pages outline the policy framework within which the programme operates, its principles and the roles of the justice actors. It also sets out monitoring techniques and good practices, and introduces the new reporting template of the electronic database. Its main novelty was the explanation of more than a dozen international human rights standards applicable in criminal proceedings, on the basis of authoritative international documents (ECHR, ICCPR, soft-law), case law of international courts and bodies, and analyses by scholars and international organizations. It includes the main problems faced in practice, sets out domestic provisions for each standard, and provides reference questions to assist monitors in identifying breaches of legislation and/or standards. The manual also outlined special considerations pertaining to war crimes, trafficking in human beings and witness-protection matters.

### 8.3.3 A manual as an educational resource for building domestic capacity

In addition to providing a useful resource for a programme, a legal reference manual may be shared with other local institutions, allowing it to serve as an educational tool for the local legal community. This may be 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

The Moldovan trial-monitoring manual, adopted in 2006, provides an comprehensive overview of international fair trial standards, including specific focus on ECtHR decisions involving Moldova and relevant domestic case law and criminal procedures. In addition, the substantive provisions of the criminal code were 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 intended not only as a reference for monitors in the day-to-day observation and analysis of fair trial standards but also as an educational resource for the local legal community.

## 8.4 Training sessions

In general, comprehensive training should be provided at the inception of a programme to ensure that staff acquire the necessary knowledge of domestic legal issues, observation and reporting methodology, and advocacy. Thereafter, training should be provided on a regular basis, especially for newcomers or each time the programme changes the substance and methodology of monitoring. The following subchapters provide guidance in organizing trial-monitoring training, based upon the experience of OSCE programmes.

### 8.4.1 Scope of training

Initial training sessions should, at a minimum, address the following 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. Trainers and trainees should be encouraged to discuss non-obvious breaches of standards, as well as other “grey zones”, namely problematic subjects for which there is

conflicting or unclear jurisprudence and where other standards need to be invoked to strengthen an argument.

- *Monitoring methodology and responsibilities.* Training should clarify monitoring methodology, including case identification and selection, access and monitoring methodology, code of conduct issues, reporting requirements and instructions. Trainers should anticipate problems that may arise and provide examples.
- *Monitoring and other information gathering skills.* Training should build the skills needed to monitor, including observation, reviewing documents, meeting with officials and other actors and reporting. Mock courtroom proceedings and mock interviews with officials, defendants and vulnerable persons are excellent ways of building observation and interviewing skills. Exercises that require monitors to report after such mock trials can promote 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, involve staff directly in activities, and permit follow-up discussion.
- *Advocacy skills.* Training should clarify advocacy possibilities and any limitations, as well as develop the capacity of each level of staff to meet the necessary requirements. Particularly for management-level staff, it can elaborate on legal writing skills, in accordance with the reporting requirements, and on skills to enhance communication with officials, to negotiate and persuade stakeholders, and to write press releases and address the media.

#### 8.4.2 Using external trainers and experts

The programme co-ordinator or head, with the support of the legal analysts, should determine the content of all training sessions and tailor them to the needs of the programme. Internal training – that is, training developed by the programme's staff – may prove more cost effective and easier to organize than that involving external trainers. Nevertheless, programmes will sometimes have to rely on external trainers for instruction in such areas as substantive law, methodology and monitoring skills.

International experts may be particularly useful for training on international fair trial standards and monitoring skills, such as observing hearings in court, legal writing or negotiation skills. As programmes develop, external trainers should be sought to strengthen weak or unexplored areas of the programme. Programme focal points should work closely with trainers on defining the methodology and agenda for training. OSCE Institutions, including ODIHR and partners, may also provide valuable support and expertise in organizing training.

Local experts, including judges, prosecutors, law professors and lawyers, may also make excellent trainers or speakers, as they possess significant expertise on domestic law and practice. Using such trainers is also an opportunity to build connections with the local legal community, as well as to reinforce local ownership of and buy-in to the programme. For instance, when the legal system monitoring programme in Kosovo<sup>101</sup> expanded its activities to follow civil cases, local judges and lawyers were engaged to provide training on the laws and problems encountered in the civil justice sector.

#### 8.4.3 External educational opportunities

International and domestic organizations engaged in justice reform in a host country may conduct conferences, seminars or training sessions on issues related to monitoring-programme activities. Programme managers should take advantage of the opportunity to include monitors and other staff in these activities. Not only can such events provide continuing education to staff, but conferences and other forums may provide opportunities to share monitoring results more widely and

<sup>101</sup> There is no consensus among OSCE participating States on the status of Kosovo and, as such, the Organization does not have a position on this issue. All references to Kosovo institutions/leaders refer to the Provisional Institutions of Self Government.

to interact with domestic legal actors. Given the time and financial resources required to prepare training sessions, most programmes will have the capacity to schedule their own training sessions for monitors only once or twice a year.

A multitude of training courses are organized on a regular basis internationally, both by the OSCE and by other organizations, which focus on specialized themes that may be relevant to a programme's activities. If budgets allow, managers may wish to encourage monitoring staff to attend such courses. Alternatively, there are also a number of distance-learning courses offered over the Internet that can enhance particular skills and may be of interest to managers and monitors.<sup>102</sup> Educational opportunities of these types can be particularly beneficial for local OSCE staff members or partner NGOs, and can help fulfil a programme's objectives in building domestic capacity.

## 8.5 Other field support activities and mechanisms

Monitoring programmes require a high level of co-ordination and continuous support for monitors who might be working alone in geographically disparate areas. The mechanisms described in this section will help ensure regular co-ordination, consistency and an improved quality of monitoring. These techniques will also help to promote a positive attitude, team spirit and corporate sense of belonging among monitoring staff.

### 8.5.1 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 to accelerate the professional development of monitors. Such feedback is critical at the inception of a programme or during a shift in focus, when 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, the requirement of regular feedback ensures that case reports are thoroughly read and assessed by legal analysts. The discussion of case reports helps legal analysts seek explanation on points that may not be clear. The consultation process often reveals additional issues that may not have been included in the original report.

### 8.5.2 Regular team meetings

In larger-scale programmes, another co-ordination tool is holding monthly meetings among all monitors or those in a particular region. To be effective, such meetings should be regularly scheduled and be presided over by a legal analyst or other supervisor. These meetings bring a team together in an informal and constructive atmosphere and serve as a management tool to exchange information, raise issues and consult on plans. They can also identify and discuss specific legal issues and limitations in methodology.<sup>103</sup> If feasible, meetings should not always take place at the head offices, but rotate in the field as well. In the case of budget or time constraints, programme managers may examine using other means of communicating, such as telephone conferences or Skype.

Meetings of legal analysts at regional and head office levels are also effective ways of ensuring co-ordination at the middle level of management, while meetings between legal analysts and higher management facilitate overall programme co-ordination and keeping abreast of all developments. Some programme managers hold routine morning meetings to ensure everyone is on the same page on

<sup>102</sup> See, for example, the Internet-based learning courses by Human Rights Education Associates, HREA.

<sup>103</sup> As an example, the LSMS in Kosovo regularly schedules monthly meetings for all monitoring staff. They are used to highlight specific legal issues, re-direct the focus of monitoring, and provide training, as necessary. These meetings allow for sharing and comparing experiences, as well as discussion of national or local legal developments. Meetings also provide an opportunity to build consistent practices.

daily activities, while other programmes have deemed weekly or monthly meetings to be sufficient. Ad hoc, thematic meetings have also supplemented regular meetings.

### 8.5.3 Internal report sharing

Trial-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 seek to compensate for the natural tendency of information only to flow upward. The direct sharing of case reports among monitors may help counter this tendency. Report sharing serves as a method to improve monitoring and reporting skills through the exposure of monitors to other practices. A number of OSCE 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 the sharing of reports among monitors on an informal basis through e-mail. Reports are also available in a computer database accessible to all monitors, subject to the protection of confidential information, which is not accessible. In whatever manner reports are shared, the process allows monitors to compare their monitoring and reporting to the work of other monitors. It allows insight into the issues identified by colleagues and can enhance their own reporting. Sharing reports can thus be an inexpensive and efficient way to facilitate improved quality and consistency in reporting.

### 8.5.4 Monitor pairing

Assigning monitors to work in pairs has been found to be an effective way to support inexperienced monitors, including national monitors and NGO members in project models. Pairing provides additional support in the case of external pressure, especially where there is institutional resistance to monitoring in the early stages of a programme. In addition, pairing allows for a sharing of monitoring responsibilities, including observation of cases and report writing. In the early stages, joint responsibilities may also result in more thorough monitoring and a fuller consideration of issues. Moreover, it can be useful to pair monitors of different genders or backgrounds, to bring more than one perspective to the task. As monitors achieve the necessary level of experience and skill, the benefits of pairing may be outweighed by the costs of duplicating efforts at the expense of wider monitoring coverage. Thus, the duration of monitor pairing can vary from a few days to several months.

### 8.5.5 Monitor rotation

In many large-scale programmes, monitors are assigned to a particular court or region. There are many advantages to having a monitor become familiar with a specific court. It can promote increased knowledge of local practices and enhanced working relationships with court officials that permit access and benefit advocacy. Especially in rural areas or smaller courts, however, such an assignment may result in monitoring a limited spectrum of cases or repeated appearances before the same judges. Over a period of time, this can result in underexposure to other cases or issues, or too close a relationship developing between the monitor and local legal actors. To allow for broader monitoring experiences that will better ensure continued monitor independence and development, programme managers may consider rotating monitors among different regions and courts. Managers may further require that monitors do not always access the same courts, but observe all courts within an area of responsibility.

### 8.5.6 Structures for supporting the trial monitors' well-being

Often, trial monitors will be required to listen to accounts of traumatic experiences, review evidentiary material that depicts the scene of a crime, or monitor cases involving dangerous individuals

in a tense court environment. These experiences might create secondary trauma for monitors exposed to them. War crimes, domestic violence, trafficking in human beings, rape and other violent crimes are priority cases for trial-monitoring programmes, but they can also be a source of stress for those directly observing them. Sometimes, trial monitors may not realize or may deny symptoms of secondary trauma. Programme managers should alert staff about such stress and establish referral mechanisms that can provide psychological support and advice to staff who need it.

Some OSCE programmes have examined this issue more closely. For instance, the programme in Bosnia and Herzegovina organized seminars for its trial-monitoring personnel, conducted by local and international psychologists. These confirmed that stress affects monitors in different ways. While many monitors develop mechanisms to cope with stress on their own, others appreciate being able to talk to peers, supervisors or a psychologist. Legal analysts followed up on the meeting by reviewing ways to provide support, including providing a forum for monitors to debrief among themselves. A number of organizations involved in human rights and humanitarian assistance, such as the International Committee of the Red Cross or the ICTY, have specialized personnel to assist their staff to deal with the impact of stressful situations.

### 8.5.7 Structures for ensuring trial monitors' security

The security of monitors is an issue of concern for many programmes, especially those operating in post-conflict or other unstable contexts. Programme implementation rightly comes down on the side of safety when balancing the security of monitors against the collection of information. Monitors should be mindful not only about their own safety, but also about the safety and well-being of their support staff, such as interpreters. Experience indicates that national monitors are aware of risks involved in sensitive cases, such as organized crime proceedings, and are generally confident and willing to carry out monitoring, especially when they know that they are supported by an organization that trusts their assessment and is willing to protect them as needed. Overall, events triggering a programme's protection mechanisms have been rare in the OSCE.

OSCE programmes have developed certain practices to minimize risk. These include informing candidates for monitoring positions that they may be required to observe and report on sensitive cases, to make them aware in advance of possible risks, and to gauge their disposition toward such circumstances. Many programmes, such as those run by the OSCE Mission to Moldova and the OSCE Mission in Kosovo, issue ID cards to monitors as a means of enhancing their security. Another important step is informing authorities and parties to proceedings in advance about the non-interventionist role of monitors; this can minimize misunderstandings or expectations that monitors can influence the outcome of proceedings. If monitors do develop any concern for their security, programme rules should require them to discontinue the activities in question and immediately advise their supervisors. Supervisors may then take appropriate action, including assigning another monitor to the case, pairing the monitor with a legal analyst, or taking other precautions based on an assessment of the threat. An example of this approach is provided below, drawn from the programme in Moldova.

#### 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 Co-ordinator ....
- Report all security-related incidents to the National Co-ordinator immediately, even those that may appear to be minor."<sup>104</sup>

104 See "Security of the Observer" Annex I. B, "Sample guidelines for Trial Monitors" prepared for the OSCE Mission to Moldova's Trial Monitoring Programme.

## CHAPTER 9

# Information Gathering and Verification in Systemic Trial Monitoring

Trial-monitoring programmes rely primarily on observing case hearings to gather information, but they may also draw on other sources, such as documents and interviews. The present chapter outlines how to identify cases to monitor. It provides good practices regarding the actual monitoring and recording of hearings. It describes practical considerations that monitoring staff should take into account in conducting interviews to gather information.<sup>105</sup> Since direct interviews may not always be possible, this chapter also describes good practices in using questionnaires as means to obtain information relevant to monitoring activities. It discusses the need to be informed of media reports on trials or other issues that concern the programme. Finally, the chapter notes a few points on the treatment of confidential or sensitive information gathered by monitoring personnel.

### 9.1 Identification of cases to monitor according to monitoring priorities

The identification and selection of cases to monitor will depend on a programme's focus and objectives. Although systemic monitoring programmes have a broad, general mandate, they may nonetheless concentrate on certain types of cases, such as criminal trials.<sup>106</sup> A first step for programme managers, therefore, is to prepare general guidance for legal analysts and monitors on the types of cases and courts to be monitored. Within these general categories, a broad plan and more specific criteria for case selection should be established. The plan should take into account the need to cover a sufficient, representative sample of cases to enable the monitoring programme to draw well-reasoned conclusions. This will usually require that the selected cases, as a whole, result in monitoring different courts, judges, types of crime, types of cases in civil or administrative justice, and geographic areas.

To identify priority cases, a variety of elements that can be tracked in court records need to be taken into account. These may include the classification of the crime; the age of the perpetrator or victim; their ethnicity, in the in case of interethnic crime; or other factors. However, to identify other priority aspects, such as the mental capacity of parties or the motivation of a crime in cases of hate crimes, the substance of a case may need to be reviewed.

When monitors assume primary responsibility for case identification and case selection, programme guidelines or instructions should be provided on these responsibilities. It is important for supervisors to provide regular oversight of how cases are chosen, to ensure that overall case selection results in a sample representative enough to meet the programme's objectives. Some courts may be inclined to steer monitors towards cases heard by model judges, and there may be a natural tendency among monitors to seek out judges who are more efficient in providing hearing schedules or more sympathetic to monitoring. Managers must ensure that overall case selection is consistent

<sup>105</sup> Information gathering depends on access to courts, documents and individuals; Chapter 4 discusses access issues in more detail.

<sup>106</sup> See Chapter 1.3, "Description of the different trial monitoring methodologies".

with the methodology of the programme and will enable them to identify and address any systemic practices that may be problematic.

After the general parameters of the programme for case selection are decided, it is essential to establish procedures that enable monitors to identify specific cases and proceedings to be observed. To this end, administrative regulations should be reviewed, since they may require court officials to provide hearing information. In many systems, administrative regulations or court rules explicitly require the public posting of hearing schedules. However, individual judges might wish to maintain control over their case schedules and there may be internal resistance to consolidation of scheduling information within the court. By raising such rules with the court president or registry official in connection with trial monitoring, programmes may provide the court with external support for better consolidation and greater openness in case scheduling. This can have an impact not only on improving case identification, but also on enhancing court practices related to the right to a public trial.<sup>107</sup>

Even when there are no barriers to court access, the process of identifying specific cases, based on pre-determined programme selection criteria, may be complex, for a variety of reasons. For example, cases may not be centrally tracked once assigned to a judge, hearings may not be announced, or case-tracking systems may be antiquated. Further, custody hearings and other proceedings can be held on short notice or rescheduled without notice. Moreover, within any host country's legal system, individual courts may track cases differently, necessitating different arrangements for different courts.

Given the significant differences in how individual courts operate, programme managers and monitors may have to make different types of arrangements to identify specific cases and obtain hearing dates and times. These arrangements can be made at the central, regional or local level and will depend on the programme's organization and the responsiveness of local officials and actors. When possible, arrangements should be formalized by letter. They may, however, also be informal, if court clerks and officials are co-operative in providing regular information on the scheduling of cases in a particular court.

Requests to court staff for the preparation of lists of specific cases, the faxing of schedules or other special arrangements may entail work beyond what is required by law or the officials' professional responsibilities, and might place additional demands on court staff. Therefore, it is important for monitors to be flexible and meet court officials more than halfway.

In sum, in identifying specific cases to be observed, monitoring staff should:

- suggest to court presidents that a specific official at the court be designated to provide registry and hearing information to the monitor;
- 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 arrange with the court registrar, prosecutor's office or other officials to send notification of cases. In the OSCE programmes, this has included co-operation with officials who agree to fax lists of new cases with hearing schedules; and
- resort to alternative sources of information. These include police reports, regular review of newspapers and other media, information-sharing arrangements with other international organizations or NGOs, complaints by interested actors to monitoring staff, or discussions with legal actors and the community.

<sup>107</sup> For example, the LSMS in Kosovo reported repeatedly on deficiencies in making trial schedules available to the public. This prompted the competent authorities to issue additional administrative instructions and to achieve wider compliance in practice with the right to a public trial.

## 9.2 Trial observation in courtrooms

Once in the courtroom, there are a number of good practices that monitors should follow, as well as practices they should avoid. To start with, monitors need to sit where they can hear the proceedings clearly and have clear sight of the bench and the parties involved. In keeping with the principle of neutrality, a monitor should not sit with any of the parties or among groups supporting the victims or the defendant.<sup>108</sup> If for any reason this is unavoidable, monitors should try to rotate their seating in the public area at intervals in the course of the same hearing, to avoid being associated with any party. Certain programmes instruct monitors to mix in with the public so that they cannot be visibly identified as monitors. Other programmes prefer that the presence of the monitor be easily identifiable.

If whisper-translation will be provided by an assistant, monitors should consider alerting justice officials in advance, to avoid any misperceptions.

Monitors are required to follow hearings through to their adjournment, even if no problems are immediately identified, as an early departure will deprive the monitor of an informed opinion about the whole hearing and might be viewed as a sign of contempt for the court or might disrupt proceedings.

Monitoring instructions usually require monitors to take extensive notes of the proceedings. Taking notes, oftentimes almost verbatim, gives monitors an independent record of what is being stated and avoids the need to rely on court records, which may be difficult to obtain or inaccurate, in preparing their reports. Taking extensive notes also focuses the monitor's attention. Some programmes, however, are at ease with monitors recording only brief summaries of what is being stated and advise them, instead, to focus on observing other elements of proceedings, such as the demeanour of the actors. This approach may be particularly appropriate where court records are accurate and can be obtained easily. In general, monitors should always endeavour to obtain the court record of a hearing, as it can facilitate cross-checking the accuracy of personal notes or spotting any significant inaccuracies in the official record. If audio recording is allowed in the courtroom, programme managers may consider using equipment that allows for digital search or transcription. If the proceedings are audio recorded by the court itself, arrangements should be sought to obtain copies on a regular basis.

Managers should provide clear guidance to monitors on what to pay attention to during proceedings. This is a complex matter, considering the enormous scope of potential problems a systemic programme needs to take into account. Some programmes use questionnaires, which monitors fill in for each hearing they attend.<sup>109</sup> However, most programmes use questionnaires only as a starting point to assist monitors, while instructing them also to pay attention to any and all details of proceedings that could indicate breaches of human rights. Good training on international standards and domestic law,<sup>110</sup> together with appropriate reference materials, such as manuals,<sup>111</sup> should enable monitors to reach well-reasoned conclusions on whether breaches have occurred.

It is good practice for monitors to observe the conduct of all judicial actors and parties, including defendants, victims, witnesses, the court's administrative staff, interpreters and so forth. This entails listening to their submissions, but also noting their tone of voice, body gestures, general

<sup>108</sup> This can become a practical issue if monitors take notes on a laptop and courtroom plugs are available only in proximity to the prosecution or defence benches. In such cases, staff should prepare in advance by carrying extra batteries or a long cable that will permit them to sit in the public area.

<sup>109</sup> See Chapter 11.3 and the sample questionnaire in Annex I.I.C.

<sup>110</sup> See Chapter 8.4, "Training sessions".

<sup>111</sup> See Chapter 8.3.2, "Creating a legal reference manual as a field support tool".

behaviour and interaction (e.g., showing up late, falling asleep or treating only one party in an informal and friendly manner).

Annex II. B contains a list of issues that may help identify problems relating to compliance with human rights standards. Detailed checklists of specific fair trial rights may be found in ODIHR's *Legal Digest of International Fair Trial Rights*.<sup>112</sup>

### 9.3 Interviews with justice actors and stakeholders

Meeting with actors directly or indirectly involved in the justice system can yield a wealth of information to supplement or verify findings from monitoring hearings or reviewing documents. Interviews may reveal aspects of the system's workings that are not easily perceived by trial monitoring alone. This subchapter captures various elements that monitoring programmes should consider when formulating their working methodology with respect to interviews. The practical advice on interviews provided below is supplemented by Annex III, which lists various issues that monitoring staff may wish to explore with interviewees and provides two sample questionnaires for interviews to be used or further developed by monitoring programmes. Also, Chapter 12.1 illustrates the importance mapping the relevant stakeholders, including justice actors, in order to ensure their buy-in.

Some programmes operate on the basis of a strict or absolute interpretation of the principle of non-intervention.<sup>113</sup> For such programmes, the types of interviews described in this chapter are not possible. Alternative approaches for such programmes are to address inquiries through programme managers to court presidents, or to raise issues in seminars, where multiple judges are invited to share their general views.

It is common for staff conducting interviews to be required to prepare a note for the file or include in internal reports the information deriving from interviews. It is also advisable for managers to develop a system for the proper organization of such notes.<sup>114</sup> Programme managers and interviewers will need to consider how to protect any confidential or sensitive information gathered during an interview. In addition to the duty of confidentiality and the inclusion of confidentiality clauses in codes of conduct, basic professionalism requires that confidential or sensitive information not be shared with anyone beyond the persons who need to know, even internally.

Interviewers will need to understand what types of information they can share with interviewees in a meeting. Monitoring personnel may choose to be general or more specific in the examples that they bring up, but should always refrain from referring to confidential data, both for professional reasons and because it could give rise to criminal or disciplinary liability. Supervisors should make clear to monitors and legal analysts in advance what kinds of data they may or may not share with interlocutors in discussions. If monitors are in any doubt in a specific instance, they should refrain from sharing.

#### 9.3.1 Interviews with judges, prosecutors and legal representatives

Interviews with judicial officials<sup>115</sup> and legal representatives of defendants or of opposing parties present a significant means of gaining insight on the strengths and weaknesses in the administration of justice. Their views can shed light on challenges they encounter that may be difficult to discern otherwise, especially when it comes to determining the root causes of problems identified

<sup>112</sup> ODIHR, *Legal Digest of International Fair Trial Rights*, *op. cit.*, note 2. A list of other sources for substantive standards is included in Annex VII.

<sup>113</sup> See Chapter 8.1.1, "Duty of non-intervention".

<sup>114</sup> See Chapter 5.3, "Systems to record other types of information".

<sup>115</sup> Namely, court presidents and individual judges, or individual prosecutors and their supervisors.

through the observation of trials. Lawyers might also be able to portray systemic shortcomings related to the rights of defendants or litigants in civil and administrative proceedings, particularly if a programme does not have access to the parties themselves. The subsections below offer practical tips for monitoring staff to consider in setting up and conducting interviews. It is important that monitoring personnel endeavour to establish contacts with all sides in given proceedings, not only to gain a full view of a matter, but also to avoid any appearance of breaching the principle of impartiality.<sup>116</sup>

#### ➔ *Considerations in setting up interviews with justice actors*

Not all judicial systems are open to having judges communicate directly with monitors and, instead, may urge monitoring staff to channel any communication through court presidents or focal points. Monitoring programmes should accommodate such wishes, but should remain open to any meetings individual judges may suggest. In any case, monitoring personnel should inform any focal points of their wish to interview practising judges and politely ask for their co-operation in arranging meetings. Access to judicial personnel can be facilitated if the programme managers or monitors have meetings with court presidents when setting up the programme; this is particularly so if managers inform the judges and court presidents during these meetings that interviewing is one of the information-gathering methods and if they stress the application of the principle of non-interference in individual cases.

Monitoring personnel should request meetings well in advance of the proposed meeting date, be flexible to accommodate the judge's schedule, and be prepared to briefly describe in advance the purpose of the meeting. Informing the interviewee of the subject of the meeting and its expected duration will allow the interviewee to prepare her/his thoughts and relevant data for a more effective meeting, and describing the purpose of the meeting can help reduce any scepticism the judge may have in that regard. The interviewer should avoid requesting multiple meetings on separate subjects with a single justice official, trying instead to concentrate on different themes in a single meeting, to the extent possible.<sup>117</sup>

Interviews with prosecutors may need to follow a protocol where superiors are contacted first, similarly to the process with judges, where court presidents may need to be informed. The practical tips on meeting with judges described above apply also to meetings with prosecutors.

Arranging interviews with defence counsel and lawyers representing clients in civil cases will usually not require any special protocol. The same practical tips on meetings described above can also facilitate meetings with defence counsel and other lawyers representing clients. Programme managers may wish to establish criteria for selecting which counsel to contact for interviews. The selection may be random or may be based on such factors as their specialization, their years of experience or their representation of a particular case.

#### ➔ *Practical issues to consider in carrying out interviews with justice actors*

Monitoring personnel should prepare carefully for each interview, to render it as productive as possible. In addition to obtaining any background information on a problem or case, they should put sufficient thought into phrasing their questions. Programme managers should develop the interviewing skills of personnel who will be expected to conduct interviews. This can be done by establishing interview guidelines and building skills through mock exercises or demonstrations.

In line with the principle of non-intervention,<sup>118</sup> interviewers should be careful not to instruct or advise justice actors or parties on actions to be taken in specific monitored cases. Questions need to be phrased in a neutral and non-judgemental manner. Certain programmes have developed guidelines

<sup>116</sup> See Chapter 8.1.2, "Duty of impartiality".

<sup>117</sup> In foreseeing the duration of a meeting, the time needed for interpretation should be factored in.

<sup>118</sup> See Chapters 1.2.1, "Principle of non-intervention in the judicial process" and 8.1.1, "Duty of non-intervention".

to clarify the relationship between advocacy and non-interference. Guidelines could also suggest when to use open or closed questions,<sup>119</sup> as well as whether or how to bring up specific cases in interviews, either as examples of a general trend or as the focus of the discussion. Interviewers should ask the interviewee if their statements may be used in reports or advocacy activities.

Finally, judges, prosecutors and defence counsel can often provide interesting suggestions on how to remedy problems within the justice system that may be used in advocacy activities, without attribution unless permission is obtained.

### 9.3.2 Interviews with bar associations, legal clinics or legal aid groups

Through interviews and regular communication, bar associations can convey information to monitors that is significant in understanding the challenges that defence counsel and lawyers generally face in their work. These organizations may themselves be advocates of justice-system reform and, as such, can be a valuable source of information on general problems in the justice sector and practical proposals for reform. Meetings with bar associations can also extend a programme's circle of contacts and, thus, also be extremely useful for advocacy.

Legal clinics and other legal aid groups can often provide unique insights into aspects of the justice system and problems faced by defendants who are indigent or otherwise disadvantaged. It can, therefore, be extremely useful for the personnel of trial-monitoring programmes to make contact with these groups.

Lawyers may have only a loose relation with their bar. This heightens the need for monitoring personnel to consult not only with bar associations, but also with individual lawyers, in order to gain a more complete picture of the difficulties lawyers face.

The practical tips mentioned earlier for interviews with judges, prosecutors and defence counsel can also be used in preparing for meetings with bar associations and other groups.

### 9.3.3 Interviews with defendants, especially when deprived of liberty

Meeting with suspects or defendants is yet another means of gathering information on human rights challenges in the justice system. The paragraphs below underline issues that programmes should consider if they decide to hold interviews with defendants or seek access to persons deprived of their liberty. Some of the following suggestions can be also applied to interviewing parties to civil or administrative proceedings

#### ➔ *Practical issues to consider in interviewing defendants*

Many OSCE monitoring programmes exclude communication with defendants and deem it sufficient to learn from defence lawyers the problems faced by their clients. This approach avoids the risk of exposing monitors to potentially dangerous individuals or raising false expectations among suspects that the OSCE is representing their interests in a case. Some programmes also take this approach by necessity, due to limitations in gaining access to defendants.

Other programmes, however, include routine meetings with defendants, taking the view that such meetings can yield information that cannot be easily discerned otherwise. This is certainly true with regard to any problems pertaining to the effectiveness of legal representation. Also, suspects in detention are in a more vulnerable position than non-detained defendants, as the restrictions on their freedom of movement also hinder their ability to convey to the outside world any problems they face with their defence, access to justice or their well-being. Programmes that are proactive in

119 As described in Chapter 9.4, "Information gathering on the basis of questionnaires or surveys".

communicating with detained defendants are more likely to find out about human rights challenges facing these individuals, especially if the defendants are unrepresented.

A number of organizations with a human rights mandate have developed projects that look into the conditions of detention and the treatment of persons deprived of their liberty.<sup>120</sup> The OSCE has been involved in such activities through its human rights personnel and its partnerships with NGOs. However, OSCE trial-monitoring programmes that include communication with detained or convicted persons have generally concentrated their attention on issues related to “access to justice”. This focus has served to avoid duplication of efforts with groups monitoring conditions of detention. It has also helped to avoid “overreaching” in terms of expertise, as most trial monitors are not experts in psychology, hygiene or other fields that would provide the necessary basis for a thorough assessment of detention conditions. The focus on defendants’ access to justice has meant that trial-monitoring personnel seek to gather information directly relevant to the fairness of criminal proceedings, the right to liberty and related remedies, and the effectiveness of legal representation.

Besides the checklist on how to interview defendants, guidelines on interviews need to include methodologies to ensure that the interviewer duly conveys to the defendants the scope and limitations of monitoring.<sup>121</sup> It is especially important to convey to persons in custody how monitoring operates and to stress that monitors are neither their lawyers nor mediators, so that defendants should not expect any follow-up visit or reporting back from monitors. Such explanations avoid creating misperceptions or undue expectations. This is significant because, of all the persons involved in the justice system, the accused are those most likely to seek an intervention in their particular case, especially when in detention.

#### ➔ *Accessing persons in detention*

To gain access to persons in detention, programme managers should be prepared to contact directors of detention centres and prisons at the outset of a programme to present their activities and establish good co-operation.<sup>122</sup> Concluding an access agreement may be considered, although some OSCE programmes have had no difficulties in gaining access to detainees without special agreements. While projects that review the conditions of detention may employ “surprise” visits, this is not necessary for trial-monitoring programmes, where interviews with detained persons can be planned and announced to directors of detention centres. In this way, the consent and availability of detained persons can be confirmed, while the staff of the detention centre can make the appropriate security arrangements.<sup>123</sup> Prior to conducting the interviews with detainees, monitors may wish to speak to the director of the detention centre to gauge her/his views on issues pertaining to the detainees – security concerns, for instance.

For the most part, monitors in OSCE programmes have arranged interviews with specific detainees whose cases they followed. In some instances, they have also made themselves available to other detainees who sought interviews and wished to share concerns that fell within the programme’s mandate.<sup>124</sup> In practice, however, detainee interviews tend to be time-consuming and may lead to the monitor being called repeatedly by individuals who misunderstand the programme’s mandate and seek OSCE intervention. Programmes can take measures to avoid such situations, for example,

120 For instance, the International Committee of the Red Cross, ombudspersons, and local and international NGOs have developed methodologies that seek to record, prevent or put an end to such problems as torture or inhuman treatment, inhumane conditions of detention and incommunicado detention.

121 See Annex III, for indicative issues for monitors to raise in interviews.

122 See Chapter 4.2.2 referring to introducing a programme to court presidents.

123 To avoid congestion, monitors may agree with the authorities to plan interviews on days other than those assigned to public visits.

124 Interviews on the initiative of the detainees can yield important information. For instance, in one OSCE programme, an interview with a suspect whose case had not been monitored until then revealed that the person had already been tried and acquitted by a different court for the same offence. The judicial authorities had not taken this into account, despite the principle of *ne bis in idem* or prohibition of double jeopardy.

by screening potential interviewees by asking them first to send a letter of invitation describing why they want a meeting.

Interviews should be carried out in a safe room within the detention centre – usually one used for meetings with relatives or lawyers – and with each interviewee separately. Monitors should insist that the meetings be unsupervised and private. However, for their safety, they should request the presence of security personnel in close proximity outside the door, but out of hearing range, and sit closer to the exit. Interviewing detainees without their handcuffs has generally fostered confidence as a sign of respect, as has taking extensive notes of what is being stated.

Programme managers will also need to consider whether or how they may report or share information received from interviews with detained persons. There are occasions when defendants wish to provide information to monitors under the condition of confidentiality. In other circumstances, detainees convey information that should be provided to competent actors for immediate action. Therefore, it is advisable for monitoring staff to inform interviewees how they apply the principle of confidentiality. Additionally, there may be recommendations that monitors can address to the detention centre authorities, to the extent that their programme does not apply the principle of non-intervention to actors other than those involved directly in court proceedings. The risk of retribution against persons who have shared concerns regarding the detention authorities should also be considered.

A particular issue that has concerned OSCE monitoring programmes is that of hunger strikes. There have been instances when suspects or convicted persons have gone on hunger strikes in support of their demands, one of which can be the request to speak to human rights organizations. Monitoring programmes should carefully consider whether and how they may react in such a situation, taking into account the complex human, political and professional aspects of the issue. Additionally, trial monitors will be interested in reviewing whether and how the courts have recorded such a protest.

#### 9.3.4 Interviews with injured parties, witnesses, and organizations involved in supporting vulnerable individuals

Many OSCE trial-monitoring programmes do not rule out meetings with injured parties or witnesses, particularly if they approach the organization on their own initiative to convey their concerns. Additionally, monitoring staff often communicate with organizations involved in supporting witnesses and vulnerable individuals.

When meeting with injured parties – particularly when heinous crimes are concerned – monitors should pay special attention to their psychological state and demonstrate gender sensitivity. If interviews with injured parties of gender-based violence are conducted, programmes may arrange for a monitor of the corresponding gender to conduct the interview, which can make it easier for victims to recount their experiences. Meetings are preferably conducted at the premises of the organization, unless there is good reason to arrange them at a different place where the interviewee feels more comfortable. As in meetings with defendants, interviewers should explain their mandate and limitations, and refrain from creating expectations that the programme cannot meet. However, monitors can raise awareness about existing mechanisms that can assist these parties.

In cases involving vulnerable persons, given the risk of re-traumatization, programmes usually rely on indirect sources of information, such as interviews with organizations of psychologists that support victims or with lawyers who represent them. Government centres for social work, NGOs and specialized sections within court registries may also play a crucial role in providing psychological and material support to vulnerable individuals involved in the justice system, whether in the capacity of witness, defendant or injured party. Therefore, they can provide an overview of the situation

on the basis of examples from their own experience and can be a valuable source of information to complement or serve as a substitute for direct interviews with vulnerable parties.

### 9.3.5 Interviews with police

Meeting directly with investigators or other police officials, including those specializing in witness protection, can enable trial monitors to gain a better understanding of aspects of trials in which the police are involved. A sample questionnaire on interviewing police can be found in Annex III.C. In addition, some OSCE field operations have specialized departments or units for building the capacity of police; their experience can yield a wealth of information that can be useful for trial-monitoring programmes.

Protocol issues need to be respected in arranging interviews with the police. To the extent that programmes do not apply the principle of non-intervention to actors not involved directly in court proceedings, they may address recommendations to the police.

### 9.3.6 Interviews with governmental officials, judicial and prosecutorial councils, training and disciplinary bodies

Monitoring programmes gather information regarding the functioning of certain aspects of the justice system by interviewing governmental officials at relevant ministries, i.e., the ministry of justice – or ministry of foreign affairs, when international obligations are at stake. Moreover, in many countries specialized councils independent of the executive carry out functions such as the selection and hiring of judges and prosecutors, the imposition of disciplinary measures, or training through judicial and prosecutorial training centres. Obtaining information from these bodies can enhance a programme's outputs. Interviews with such officials are best conducted by programme managers, including legal analysts, as information gathering from these sources is often combined with advocacy activities and discussion on how to resolve identified shortcomings.

In transitional justice systems where trial-monitoring programmes operate, there is often a need for a clearer delineation of responsibilities between ministries of justice and those of judicial bodies. Any recommendations addressed to such bodies need to specify clearly who should be in charge of implementing the recommendation. Clarifying competencies in advance through interviews and gauging the stakeholders' views on realistic solutions will enable a programme to issue targeted and realistic recommendations, as well as to have a partner for advocacy and other follow-up activities.

Moreover, establishing co-operation with governmental and judicial co-ordination bodies can facilitate obtaining statistical data that these actors keep in connection with the functioning of various aspects of a justice system. These can pertain to the staffing of courts and prosecutors' offices, the caseload each court has according to the types of cases, the efficiency of processing cases according to concrete criteria, the number of cases resolved by special procedures, such as plea agreements, and so forth. These statistical data may be used in combination with other statistics gathered by a monitoring programme to support its findings or when contemplating whether to direct monitoring operations to a different field in need.

### 9.3.7 Communication with the international community and NGOs in a host country

Establishing close contacts with representatives of the international community within a host country, i.e., embassies, donors, European Union (EU) or Council of Europe (CoE) offices, and other intergovernmental organizations or NGOs that follow justice issues, is not only important in terms of co-ordinating projects, but also facilitates sharing information. Meeting on a regular basis with organizations that have a stake in the functioning of a justice system provides a trial-monitoring programme with a wider perspective, which can often contribute to shaping reforms. International

community actors are often donors to projects and may play a political role in promoting reform. Therefore, they have a vested interest in gaining information about the justice system. To achieve this, they rely on monitoring programmes' findings, and also have additional sources of information in which a monitoring programme might be interested.

Communication between a field operation and such interlocutors is usually established at higher levels. However, it is important to maintain contacts at working levels as well, taking into account that most embassies have focal points for justice-sector matters.

### 9.3.8 Dealing with confidential or sensitive information in the context of interviews

During their information-gathering activities, monitors will inevitably come across sensitive or confidential information. Programme guidelines and practical advice will need to cover clearly and comprehensively how managers expect this information to be treated.<sup>125</sup> It should be borne in mind that, although all staff within an organization may be bound by confidentiality clauses, it is a matter of professional conduct not to share confidential or sensitive information beyond the persons who need to know, even internally. Interviewers will need to make clear whether any documents or notes that they include in programme files contain privileged information, so as to alert other users to handle the information with special care.

Additionally, a skill that interviewers will need to develop is the ability to understand what types of information they can share with interviewees in a meeting. Monitoring personnel may choose to be general or more specific in the examples they bring up, but should refrain from referring to confidential data, especially since this could lead to criminal or disciplinary liability. Depending on the circumstances, certain sensitive information may, nevertheless, be acknowledged in meetings. On these occasions, it is highly recommended that monitors and legal analysts consult in advance with supervisors about what data they may share with other interlocutors in oral discussions and, in case of doubt, opt for the safest approach.

## 9.4 Information gathering on the basis of questionnaires or surveys

Some monitoring programmes have relied on the use of questionnaires as a means to obtain information from stakeholders on matters of interest.<sup>126</sup> Questionnaires can be used to supplement direct interviews and other information-gathering methods. In certain circumstances, questionnaires filled out by justice actors may be good alternatives to personal interviews. This is particularly true when direct access to stakeholders is not available or when a programme seeks to obtain information on numerous issues from multiple interlocutors in a relatively short space of time. Depending on the specific circumstances, interlocutors may also feel more confident providing information, opinions and criticism in writing, especially if anonymity is preserved. Questionnaires have advantages and disadvantages as compared to interviews.

### ➔ The potential advantages of using questionnaires include:

- They can be administered relatively quickly and easily;
- They can cover multiple topics that would otherwise require extensive meetings;
- They can be issued to individuals who may be otherwise difficult to access, e.g., those who serve in a remote court or are involved in cases not regularly monitored; and
- The responses may be more easily compared and processed than information provided in the context of a discussion.

<sup>125</sup> See Chapter 5.4 and Chapter 8.1.4 also on dealing with confidential information.

<sup>126</sup> An example of a comprehensive report with information obtained mainly through questionnaires is the "Analysis of the Criminal Justice System of Albania" (2006), by the OSCE Presence in Albania.

➔ **Potential disadvantages of issuing questionnaires include:**

- It takes time and skill to develop questionnaires that can elicit proper answers to the questions posed;
- Questionnaires do not allow for building a rapport between the monitor and the recipient in the way an interview does;
- Set-response choices may limit the freedom of actors to express their views;
- There may be a low response rate; and
- Many individuals may prefer to tick a box rather than to comment on issues in a more elaborate and useful way, even if the questionnaire includes a space for comments. Hence, the respondent's stance may sometimes be confusing.

➔ **Good practices in preparing and formulating questionnaires:**<sup>127</sup>

- Have a clear concept of the questionnaire's objective and, more specifically, the information it is expected to generate;
- Make an informed list of the target recipients so as to cover the existing range of different viewpoints, in order to obtain more accurate results;
- Provide clear instructions as to the purpose and importance of the questionnaire, any confidentiality and anonymity clauses, the manner in which it should be completed, the suggested return date and the process for returning it. Preferably, instructions should be in writing. It is important to include a focal point's contact details in case clarifications need to be sought;
- Keep the length of the questionnaire as short as possible;
- Ensure that the questionnaire includes both closed and open questions;
- Formulate the questions clearly,<sup>128</sup> avoid leading questions, phrase questions in a neutral manner, and allow adequate space for responses;
- Consider placing the most important questions first, go from the factual to abstract, and from closed to open questions; and
- Test the questionnaire in advance, either internally, by using it in an interview, or possibly through a pilot stage, e.g., with a few actors or a single court;

Some trial-monitoring programmes, such as that implemented by the OSCE Mission to Skopje, have also carried out surveys with judges about their independence and public opinion surveys to assist them in understanding the problems faced by those in court, in whatever capacity, or the public's perception of the justice system. This usually requires the hiring of specialized professionals or companies to conduct the survey.<sup>129</sup> If a survey is outsourced, programmes should remain closely involved in formulating the questions used. Programme staff should discuss and agree with the external contractor on the methodology to be employed. This is particularly important to maximizing the usefulness of the surveys.<sup>130</sup>

## 9.5 Review of media reports on trials and other cases

Media reports can be a source of information on ongoing cases, criminal incidents, corruption allegations, expert opinions on judicial developments and countless other issues or events. Monitors have relied on such reports to identify cases for monitoring, to corroborate findings, to understand root causes of problems, to spot threats to judicial independence or statements breaching the

127 A number of papers exist giving guidance on the formulation of questionnaires, such as the one provided by the Loughborough University, UK.

128 If the questions will be translated into a different language (i.e., from English to the local language), the drafters should ensure that their wording is clear in the local-language version.

129 For instance, the Mission to Bosnia and Herzegovina engaged a local company to complete a survey on public perception of war crimes processing by domestic courts.

130 For instance, in 2008 the OSCE Presence in Albania procured a statistical analysis of court users' perceptions of access to the courts, their overall evaluation of the justice system, and their satisfaction with the services of judges and court administrative staff. The programme deemed that the study did not provide answers that were particularly useful for a comprehensive report on the judiciary. However, it considered that such a study, if repeated, would be able to show changes over time and could be a useful tool *inter alia* to measure the effectiveness of reforms.

presumption of innocence, and to gain an understanding of how the public perceives the functioning of the justice system.

Many OSCE field operations have press and public information officers, who follow the media and disseminate the news monitored to staff. Support staff within the monitoring team may also be charged with such a responsibility, since international staff may not speak local languages. In OSCE programmes, focal points for reviewing media reports have alerted colleagues to interesting developments and translated selected articles, as requested.

Although most programmes make use of media reports, they often have no system in place to archive them in a searchable manner. Hence, retrieving an interesting article or the transcript of an audio/television broadcast later may be difficult. Programme managers should, therefore, consider establishing a system to record and archive articles in the press and on the television, radio and Internet, so they can be searched and accessed, even after substantial time has passed.<sup>131</sup>

131 Also see Chapter 5.3, "Systems to record other types of information".

## CHAPTER 10

# Analysis of Trial-Monitoring Findings

This chapter describes the different steps in analyzing trial-monitoring observations for the purpose of drafting reports or pursuing advocacy activities. These steps include identifying and verifying problems, understanding their root causes, finding possible solutions, and monitoring developments after making the problem known. The term “monitors” is also used in this chapter to refer to legal analysts, unless a clear distinction is made.

### 10.1 Problem identification

A core responsibility for monitors is determining whether problems exist in a justice system and, if so, identifying what the problems are. This requires sound knowledge of the law and legal reasoning to identify practices contrary to human rights standards. As monitors observe proceedings, they must consider whether any breach of due process or other domestic or international law appears to have taken place.

In programmes where less experienced monitors are employed, legal analysts often take the lead in identifying the legal issues at stake, based on reports from monitors. Other programmes rely more heavily on monitors to spot matters of concern. This risks overlooking fair trial breaches if monitors have not been well trained.<sup>132</sup> While it is unrealistic to expect monitors to know all applicable laws in advance of monitoring a case, they should have sufficient training to be perceptive in spotting potential violations. They should also be able to find the relevant legal provisions to confirm or dispel any such suspicion and be eager to continuously expand their knowledge of laws, jurisprudence and legal practices.

At times, problems identified in proceedings are obvious and straightforward, as when an actor’s conduct clearly violates a legal rule. For example, if a judgement is not pronounced in a public hearing, this would contravene fair trial standards, and would merit reporting. It might often, however, be difficult to assess whether an observed action or omission is problematic. It is important for monitors to be alert and to explore further any uncertainties they have. In such instances, monitors should gather additional information to confirm whether their impression is corroborated.

Being well acquainted with local human rights jurisprudence and the case law of international bodies gives monitors a more informed perspective about types of conduct that may be prohibited. On occasion, however, case law may not provide clear answers on a particular matter.<sup>133</sup> Furthermore, the judiciary in transitional systems may encounter unprecedented problems that are not directly

<sup>132</sup> See Chapter 8.4, “Training sessions”.

<sup>133</sup> This is possible, for example, when there has not been a comparable case or when different courts have issued opposite decisions on comparable cases.

regulated by law and have not yet been the object of extensive review and debate.<sup>134</sup> To help identify whether practices in such cases constitute potential breaches, monitors can research soft law or scholarly opinions. They may also apply human rights standards to interpret conduct if there is a legal vacuum. Good practices from other countries might also be applied to the situation. Or they could decide to give the benefit of the doubt to the judiciary and conclude that a suspicious practice does not amount to a breach of fair trial standards. Most programmes call on monitors to alert supervisors when they suspect but are unsure that there has been a breach in a case. Legal analysts can then perform any required research and make a judgement whether the observed practice is problematic.<sup>135</sup>

Finally, it should be underscored that assessing a procedural action as not in accordance with human rights standards does not necessarily mean that the trial as a whole is not fair or that a court of appeals adjudicating the human rights compliance of the case would find a violation. Monitoring conclusions resemble the criticism that law scholars pose in their writings on judicial decisions and practices. An appeals court may have different variables to consider, based on the circumstances and the parties' submissions in a specific case, so it may not find a violation of fair trial standards where monitors have raised a concern. This does not necessarily mean that a programme's findings and conclusions are irrelevant or faulty.

## 10.2 Problem verification

A trial-monitoring programme's credibility and perceptions of its impartiality and professionalism can be damaged if it issues reports or takes positions that are not thoroughly defensible based on both facts and interpretation of the law. Programmes should, therefore, employ a variety of methods to ensure the reliability of their findings and conclusions, and to cross-check their facts for their accuracy and the authority of the legal standards they apply.

Monitors and legal analysts must ensure that the facts they convey in their internal reports are accurate. Therefore, breaches observed in proceedings usually undergo verification checks, independently and through co-operation among monitors and analysts, from at least two sources to establish whether there were omissions and verify the accuracy of dates, statements, actions and legal references. For instance, when a problem is identified, monitoring personnel may compare the notes taken during proceedings with the official court record or audio record of a hearing, review the translation of documents, obtain the relevant written submission of a party or the court decision, interview relevant actors who may corroborate or shed additional light on matters observed, or take other steps to verify information. If a legal provision is used or interpreted in a questionable manner in court, monitoring staff should obtain the original legal text and check whether it is updated and authoritative. Additionally, they should review whether there are contradictory versions of the law or different interpretations in court decisions and commentaries.

Although monitoring reports do not need to refer to all sources checked, programmes should keep a record of their sources and be prepared to back their findings if they are ever questioned. If sources provide contradictory information as to whether a breach of national and/or international standards

<sup>134</sup> The first two cases of defendants indicted by the ICTY and transferred to courts in Bosnia and Herzegovina provide an example. The Bosnian judges decided that the two defendants would continue being detained on remand in Sarajevo until their ICTY indictments were adapted into local law that was silent on the question. They reached this decision on the basis that the ICTY detention orders had primacy over local courts. The OSCE monitoring programme argued that, in reaching the above decision, the judges essentially rendered themselves powerless to examine the merits of whether detention should continue. Therefore, the defendants' continued detention was not reviewed by a judicial officer in the sense required by Article 5(3) ECHR. Based on this OSCE opinion, the domestic court changed its approach in subsequent cases that were transferred.

<sup>135</sup> For instance, in filling out the Daily Hearing Report within the electronic database of the Mission to Bosnia and Herzegovina, monitors are asked to flag any practice about which they are uncertain as a violation. The issue is then reviewed at the level of the legal advisers, who will further research the facts and applicable law to reach a more informed conclusion on whether there was a breach.

occurred, programmes will need to consider how much weight they attach to each source, and should probably seek additional sources.

Moreover, the principle of impartiality<sup>136</sup> requires monitors to consider all points of view and to establish as clearly as possible the extent to which different circumstances or actors may have contributed to a breach. For instance, if there is a general lack of proper reasoning behind verdicts, monitoring personnel should look not only at the responsibility of judges for this problem, but should also examine such issues as the clarity of legal requirements on providing sound reasoning of verdicts, the time allowed by law for judges to issue decisions, whether parties raise lack of reasoning as a ground for appeals, whether appellate and supreme courts overturn improperly reasoned verdicts, and whether higher courts' decisions can be taken as good examples for lower courts. In this way, shortcomings are examined from different perspectives and monitoring programmes are shielded from being perceived as biased in favour of one actor or another.

In determining whether a problematic practice is an isolated instance or a systemic challenge, a programme should have at its disposal adequate comparative data in terms of numbers of cases and/or their geographic distribution. If reports refer to an isolated breach or a problem that is infrequent, this would need to be mentioned.

Apart from verifying the facts, monitoring programmes also need to ensure that the legal provisions or jurisprudence they apply in their analyses are relevant, authoritative and convincing. If different interpretations of a legal standard exist, and if the programme's analysis is not based on the most prevalent one, it should be accompanied by a convincing explanation for choosing another opinion. In practice, ensuring the use of proper jurisprudence forms a substantial part of an analyst's duties.

### 10.3 Identification of root causes and appropriate remedies

Especially when the aim of trial monitoring is to foster justice-system reform, the programme should not rest at merely pointing to the symptoms observed, but should endeavour to identify the reasons that induced a breach of fair trial standards. In doing so, monitoring programmes can make informed recommendations on how to overcome challenges.

Since monitors are usually those who observed a problem, they are in a unique position to give a first impression on its possible causes. Consequently, they should be encouraged to include in internal reports their opinion on the possible cause of a fair trial breach. For example, their assessment might be that the breach was due to the court's compliance with a poorly drafted law, caused by contradictions in jurisprudence, resulted from ignorance of the law, was due to insufficient resources, or was caused by some other factor. This can provide legal analysts with an initial foundation upon which they can build their subsequent research.

Legal analysts are best positioned to have a more comprehensive understanding of the possible root causes of a specific type of breach, since they have an overview of numerous cases and are aware of wider political developments, institutional shortcomings and challenges in capacity-building. Thus, together with programme managers, they are able to formulate recommendations as possible solutions to the problems identified by the programme.

### 10.4 Monitoring developments after identifying and making note of an issue

Since monitoring programmes focus their attention on how the justice-system works, they should examine whether the system itself can identify any breaches of human rights and remedy them. For example, if a first-instance court does not pronounce its verdict publicly and the defence does not

136 See Chapter 8.1.2, "The duty of impartiality".

include this omission in its appeal, this could indicate weaknesses in the effectiveness of defence counsel. If the defence does mention this breach in the appeal, but the second-instance court rejects it without justification, this failure is a further sign of systemic dysfunction.

After a monitoring programme has identified a problem and notified the authorities, it has a vested interest in monitoring whether the authorities and the justice actors acknowledge the problem and make appropriate changes or reforms. If the problem persists, the monitoring programme or the authorities will need to adapt their approaches accordingly. Keeping a record of developments – after concerns have been communicated to the authorities, made public, and solutions proposed – enables the programme to evaluate the level of co-operation by the authorities and their willingness to promote reforms.<sup>137</sup>

Monitoring whether recommendations are implemented also offers one means of evaluating a programme's achievements. If remedies are not applied as foreseen, or if feedback indicates a flaw in the analytical process, a programme may need to revisit its approach and decide whether adjustments need to be made.<sup>138</sup>

137 The 2006 report drafted by the LSMS in Kosovo entitled "Reforms and Residual Concerns (1999 – 2005)" is a good example of how a programme can track actions taken by the authorities to implement recommendations and how it can further encourage the relevant stakeholders to intensify their efforts towards resolving shortcomings.

138 See Chapter 13, "Measuring the Impact of Systemic Trial Monitoring Activities".

# CHAPTER 11

## Internal Reporting Systems

Internal reporting is the way in which monitors provide information and analysis to supervisors, primarily through case reports prepared following their observation of individual hearings or cases. An effective case-reporting system must address the content and structure of case reports, so that reporting consistently provides information and analysis in line with the focus of the programme. This chapter is structured to help managers create an effective case-reporting system to meet the needs of a particular programme. Topics covered include characteristics of case reports, the basic components of a case report, types of case reporting systems, strategies to simplify and systematize case reporting, and types of internal reporting other than case reports.

### 11.1 Characteristics of case reports

As a trial-monitoring programme's primary sources of information, case reports must be factually accurate and provide clear legal analysis. All programmes, whether large or small, are faced with the challenge of compiling and synthesizing reports drafted by individuals with different legal skills, experience and perspectives. Large-scale programmes seeking to draw systemic conclusions about the functioning of the justice system may generate reports covering hundreds of different cases, involving unique procedural histories and a broad range of issues, and which develop progressively over time. As a result of these challenges, programmes should develop a standard reporting format to manage internal reporting. In developing a reporting format, managers should keep three basic elements in mind: accuracy, consistency and standardization.

#### ➤ Accuracy

The credibility of an entire programme may hinge the accuracy of the information contained in public reports. The accuracy of reports released to the public requires that their building blocks – case reports – be accurate, clearly presented and supported by observations made during the legal process, from extracts from court documents or from other reliable sources. Accuracy with respect to legal analysis requires that conclusions be clearly stated, as well as supported by reference to the relevant legal provisions, jurisprudence or other sources. If a monitor obtains information from secondary sources, such as interviews, then case reports must reflect this, in order to ensure that due caution is exercised regarding the use of such information for public reports or other external activities.<sup>139</sup>

#### ➤ Consistency

To help ensure consistency, monitors should report on a uniform set of issues (issue coverage) and use an identical legal framework for analysis. To achieve consistency in issue coverage, the focus of reporting must be well defined and reporting must target these issues. To achieve a consistent framework for analysis, monitors must understand and apply uniform legal standards. Additional issues or legal standards may also be included when they relate to a particular matter that arises in a case, as these can enrich the programme's analysis. However, monitors should not fail to report

<sup>139</sup> Also see Chapter 10.2 "Problem verification".

on a required issue or use a different legal framework in place of the applicable one indicated by supervisors.

### ➤ Standardization

Case reports should have a standard format that ensures that monitors do not omit any significant issue. This standard format also allows for sorting pre-designated types of information from different cases, thus maximizing the ability of legal analysts to make comparisons and to compile reports on specific issues. Aggregating information on specific issues contained in case reports enables analysts to draw more meaningful conclusions about systems or practices. This is especially important for programmes that seek to provide systematic findings based on a large number of monitored cases. The following subchapters provide examples of different standardized reporting formats used in OSCE trial-monitoring programmes.

## 11.2 Basic components of a case report

A case-reporting template for monitors should include three main components: case information, fact reporting, and legal analysis and findings.

### ➤ Case information

Case information is a fundamental component of every trial-monitoring case report.<sup>140</sup> This information is generally included at the beginning of an internal report, to identify the particulars of the proceeding. 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 avoid complicating reports unduly. Basic case information, such as the criminal charge, the custody order and the basic legal provision applicable to the given case, introduces the reader to the substance and particulars of the case as a starting point for analysis. Case information is objective data, usually obtained from the court file. Programmes without access to case files may obtain case information in the course of court proceedings or through interviews.

### ➤ Fact reporting

Fact reporting relates to the provision of information regarding the procedural actions taken in monitored proceedings and the evidence presented regarding the circumstances of the alleged crime. Specifically, this is evidence that either provides support for the prosecution's allegations prosecution or for the defence's case. Such reporting may involve or cover:

- public reading of the indictment;
- the explanation to the defendant of her/his rights;
- motions presented by the parties, closing speeches and requests for appeal;
- recitations or summaries of witness statements;
- in-court testimony;
- the content of documents, e.g., police reports or specific allegations in a complaint;
- other evidence presented in the case in favour of either the prosecution or defence, or related to the underlying crimes, allegations or defence; and
- rulings by the judge.

<sup>140</sup> Most commonly, the basic information on criminal cases includes: the name of the court; case-file number; names of the accused; names of legal actors, including the judge, prosecutor, and defence lawyer; name of the victim; other particulars of these actors, such as nationality, ethnicity or religion if they are recorded and play a role in sensitive cases; relevant dates, including the date of arrest, custody, indictment and type of hearing monitored; criminal charge(s) and the corresponding legal provisions; brief summary of allegations; and other basic case or hearing information relevant to monitoring, such as dates and a description of the different motions, orders and verdicts.

In civil or administrative proceedings, fact reporting would include reference to the main elements of the dispute in question and other elements described above, as applicable.

The importance of 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 time-consuming, programmes must carefully consider whether to emphasize or summarize, or even whether to include, references to evidence in their reporting. Chapter 11.4.2 addresses factual reporting in more detail, with a view to simplifying the reporting of facts.

### ➔ Legal analysis and findings

Legal analysis and findings are at the core of most case reports, as they constitute the conclusions of monitors on the specific issues selected for monitoring. The information included in a case report depends on the focus and purpose of the programme. In OSCE trial-monitoring programmes the following issues have been included:<sup>141</sup>

- compliance with fair trial standards, including right to liberty and detention issues;
- judicial independence and impartiality;
- implementation of domestic laws and reforms;
- functioning of the court system, including delays;
- issues related to facilities and resources;
- sentencing practices;
- the 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; and
- issues related to the administration of justice regarding specific crimes, such as war crimes or those involving trafficking, corruption or underlying human rights violations.

Even when different programmes have a similar focus, the manner of presenting the analysis in case reports may vary. For instance, depending on the reporting methodology, findings may be conclusive (e.g., “the defendant was not provided with adequate instructions as to the right to an attorney”) or more descriptive, including a narrative description of the judge’s instruction and the defendant’s response, as well as an analysis of whether the instruction 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.

## 11.3 Selecting a case-reporting system

There are two basic types of standardized case-reporting systems, which may be classified as “open” (or narrative) and “closed” (or questionnaire). These reflect different methodologies in analyzing and reporting legal findings. In the OSCE, both systems have been employed by programmes reporting on identical issues. Therefore, the choice of a reporting system depends on broader questions of programme methodology and is not directly linked to the focus or subject matter of monitoring. The following subchapters describe and compare these two basic reporting systems. It is possible to combine elements of each system in a “hybrid system”, and such a system is also described.

### 11.3.1 Open (or narrative) reporting system

A reporting system is open when the case-report template provides limited structure to the monitor and invites a narrative approach to presenting facts and analysis. An open system allows monitors greater discretion in reporting and analyzing issues as they arise. Under open systems, monitors are

<sup>141</sup> Also see the charts in Annex II. B and Annex VI and Chapter 11.3, “Selecting a case-reporting system”.

required to recognize problematic issues when they occur. After observing such an issue in a given case, the monitor prepares a case report that describes in detail the nature of the problem in detail, (possibly) recites the relevant procedural history, discusses the application of domestic law, and reaches a conclusion regarding the application of fair trial standards. In this way, an open system is conducive to in-depth treatment of specific issues or problems as they arise. At the same time, under an open system it is unlikely that a monitor will systematically report on or provide analysis of issues or practices where no problems are identified. Nonetheless, programme instructions may ask monitors to report especially good practices that they observe.

An example of an open reporting template, a tracking memo from the Legal System Monitoring Section, (LSMS) in the OSCE Mission in Kosovo is provided below.

Legal Systems Monitoring Section Tracking Memo	
To:	Chief of LSMS
Cc:	LSMS Legal Analysts
From:	
Date:	
Re:	<i>Case Name</i>
<b>I. Case Information</b>	
<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> <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>	
<b>I. Stages of the Proceedings</b>	
<i>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.</i>	
<ol style="list-style-type: none"> <li>1. <b>Police custody</b></li> <li>2. <b>Detention</b></li> <li>3. <b>Investigation pre-indictment</b></li> <li>4. <b>Indictment</b> <ul style="list-style-type: none"> <li>- <b>Summary of indictment</b></li> <li>- <b>Date of the indictment</b></li> </ul> </li> <li>5. <b>Confirmation hearing</b></li> <li>6. <b>Trial</b></li> <li>7. <b>Verdict</b> <ul style="list-style-type: none"> <li>- <b>Date of announcement of the verdict</b></li> <li>- <b>Date of the filing of the written verdict</b></li> </ul> </li> <li>8. <b>Retrial</b></li> <li>9. <b>While serving sentence</b></li> </ol>	
<b>I. Concerns/remarks</b>	
<i>(For use if the information does not fit into any of the above-mentioned stages.)</i>	

In open systems, monitors are usually provided with a checklist of issues to be monitored, to guide them in making their observations and analysis.<sup>142</sup> These checklists are often comprised of questions regarding the application of specific laws or fair trial standards, organized by stage of proceeding for ease of reference. These questions are not intended to be answered directly, but to serve as a reference to help alert the monitor to issues or problems that might arise during the observation of hearings or the review of files. In the above example, the monitor’s legal analysis would be provided in the relevant part of Section II or III. To easily distinguish new additions from older entries in a tracking memo, monitors may highlight the added parts.

### 11.3.2 Closed (or questionnaire) reporting systems

A closed or questionnaire reporting system requires monitors to answer a set of specific standardized questions in relation to the case being monitored.<sup>143</sup> 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. The questionnaires allow for findings to be more easily compiled and quantified.

**Example:** A section of a questionnaire employed by the ODIHR trial monitoring programme in Kazakhstan relating 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 section from the questionnaire above illustrates, closed reporting systems tend to provide detailed questions to record a monitor’s 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 and an objective indicator of broader standards being monitored. Questionnaires allow for a large number of specific practices to be documented in a systematic fashion that can be easily compiled and compared.<sup>144</sup>

A closed system is particularly useful when a programme’s focus is on specific issues that must be documented systematically, or when quantification is desired. It should be noted that some questionnaires do not ask the monitor to draw an overall legal conclusion. For instance, “Was the presumption of innocence violated?” is not asked per se in the above example. Instead, questionnaires often rely on specific objective indicators that can shed light on practices that affect compliance with local procedural codes and international standards. Other questionnaires, however, may seek legal assessments from monitors.

When questionnaires are utilized, they normally cover a wide range of issues, sometimes requiring monitors to respond to more than 100 questions for each monitored case. As a result, even if

<sup>142</sup> See Annex II.A. and Annex II.B. for samples of questions and issues that could be included in checklists for open reporting systems.

<sup>143</sup> Annex II.C. provides an example of questionnaire used in a closed reporting system.

<sup>144</sup> Also see Chapter 11.4.3, “Hearing-based monitoring”.

assessments are sought, there will be less opportunity for in-depth analysis than is offered by open reporting systems.

It is also possible that, despite the numerous questions included in questionnaires, a problematic practice arises in proceedings that is not foreseen in the questionnaire and is, thus, missed by the programme. This can concern an entirely different issue or one that is closely connected to the questions asked, but not explored specifically. For example, a questionnaire may ask whether the judge asked the injured parties whether they wished to file a property claim, but failed to ask specifically whether the injured parties understood the meaning of this right.<sup>145</sup> A questionnaire that does not foresee possible problems with this practical aspect may render findings that do not entirely correspond to reality, unless monitors are alerted in advance to such issues and provided space to comment on them. Generally, closed systems instruct monitors to pay attention to all details of proceedings — even if they do not appear on the questionnaire — that could indicate breaches of human rights. However, there is a risk that closed systems will limit the monitors’ attention during the observation, at the expense of those elements that are not covered by the questionnaire, which might then end up being ignored or overlooked. For this very reason, while closed systems may be suitable for use when monitors with little experience are hired, they are not as effective as open systems in further building the analytical legal skills of experienced monitors. Chapter 9.8, on “Information gathering on the basis of questionnaires or surveys”, provides guidance in drafting of lists of questions.

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

Each system has advantages and limitations that might make it more or less useful and effective given the purpose and focus of a programme. The chart below compares open and closed reporting systems.

Comparison of open and closed reporting systems		
Issue	Open (narrative) report	Closed (questionnaire) report
Depth of analysis in individual cases	<ul style="list-style-type: none"> <li>• This system allows for in-depth focus and detailed analysis on particular issues in individual cases, including the treatment of problems and detailed analysis.</li> <li>• This system may provide a greater level of detail for public reporting of serious fair trial or human rights violations in individual cases.</li> </ul>	<ul style="list-style-type: none"> <li>• The project may be structured to provide specific information and analysis on application of domestic laws and fair trial standards.</li> <li>• This system provides less in-depth narrative analysis in individual cases.</li> <li>• This system provides less capacity for examining more elaborate problems, or demonstrating “grey areas”, where breaches are not as straightforward.</li> </ul>
Ability to provide quantification of problems throughout the justice system	<ul style="list-style-type: none"> <li>• This option may make it more difficult to aggregate and quantify findings on numerous and diverse issues.</li> <li>• As open reports become more structured and focused, there is more capacity to quantify the nature or extent of identified problems.</li> </ul>	<ul style="list-style-type: none"> <li>• These systems are structured to enable an easy compilation of practices non-compliant with domestic laws and fair trial standards.</li> <li>• This format allows for a quantitative or survey-type approach regarding practices across all cases monitored.</li> <li>• The quantitative focus may provide a strong basis for conclusions about the need for systemic reforms.</li> </ul>

<sup>145</sup> Monitors have reported cases in which the legal language used in court proceedings was not understood by the layperson, rendering it ineffective.

Consequences of access limitations	<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 more elaborate issues characteristic of open reports.</li> </ul>	<ul style="list-style-type: none"> <li>Questionnaire format allows compiling information across many cases and drawing conclusions on specific issues, which are usually easier to observe, even without access to the entire record of an individual case.</li> </ul>
Number of reports	<ul style="list-style-type: none"> <li>As reports increase, conclusions may be more definite, but management of all information becomes more difficult, with a 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 quantifiable data directly increases the credibility of findings.</li> </ul>
Short-term monitoring/ monitoring of few cases	<ul style="list-style-type: none"> <li>The detailed analysis of individual cases and highlighting of problems can provide a solid basis for reporting on emerging issues, even on the basis of few monitored cases.</li> </ul>	<ul style="list-style-type: none"> <li>Conclusions based upon quantitative analysis require a longer time-frame to monitor and a sufficient number of monitored cases to make reliable findings.</li> </ul>
Monitor experience	<ul style="list-style-type: none"> <li>This option requires more monitoring experience and analytical ability to spot issues and independently apply standards to formulate conclusions.</li> </ul>	<ul style="list-style-type: none"> <li>Questionnaires provide more structure for less experienced monitors or those who have had less legal training.</li> </ul>
Strengths/ weaknesses	<ul style="list-style-type: none"> <li>This system is excellent where a programme seeks to take an in-depth look at proceedings in individual cases, uncover more elaborate problems, or focus on a narrow set of issues with a high level of analysis.</li> <li>The focus is on qualitative results, hence making quantitative conclusions (including statistics) may not always be consistent with this reporting format.</li> <li>There is a risk of undue focus on issues to the exclusion of good practices, if monitors focus only on violations.</li> <li>Monitors are given wider discretion to focus on various issues in reporting.</li> <li>This system encourages monitors to build narrative and analytical reporting skills, adding to their professional development.</li> <li>This option provides legal analysts with a first-level analysis that they can use <i>verbatim</i>, or upon which they can easily build their narrative for external reports.</li> </ul>	<ul style="list-style-type: none"> <li>The objective survey-type of approach is more suitable for providing quantifiable findings about how a system functions, both on problems and good practices.</li> <li>This allows for the collection of data on widespread and select issues during a monitoring term.</li> <li>There is a risk of a lack of in-depth analysis and being less nuanced in comparison with the open narrative report.</li> <li>With this system it is difficult to assess the quality of collected data.</li> <li>It is more difficult to provide in-depth and complete public reporting on individual cases.</li> <li>This option does not serve the purpose of building the analytical reporting skills of monitors.</li> <li>This system requires that legal analysts undertake the first step of “converting” the raw information into a narrative analysis.</li> </ul>

#### 11.3.4 Hybrid formats - open organized format

Some monitoring programmes have combined aspects of open and closed reporting systems to produce a “hybrid” system, also sometimes called an “open organized” system. A hybrid format is open in the sense that it requires narrative analysis of issues based upon the discretion of the monitor, but the reporting template is more tightly organized around specific issues, ensuring more consistent issue coverage and easier compilation of findings. Such a format may be helpful for a programme

that wishes to retain the option of in-depth case analysis, while also monitoring a large number of cases to make systemic conclusions using quantitative approaches.

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 III of the reporting template.

Example of an Open Organized Reporting Template	
I. CASE INFORMATION	
Hearing date:	
Nature of hearing:	
Defendant Name(s):	
Case name:	
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 age/ethnicity/gender/citizenship:	
Victim age/ethnicity/gender/citizenship:	
Court:	
Judge(s):	
Prosecutor:	
Defence Attorney(private/ex officio):	
Next hearing date:	
Verdict and sentence:	
II. PROCEEDING/HEARING INFORMATION	
Summary	
III. ANALYSIS OF ADHERENCE TO HUMAN RIGHTS STANDARDS	
1. Custody	
2. Independence and impartiality of the tribunal and presumption of innocence	
3. Instruction on rights	
4. Right to a public trial	
5. Right to have the free assistance of an interpreter	
6. Right to effective legal assistance	
7. Adequate time and facilities for the preparation of the defence	
8. Right to examine and have examined witnesses	
9. Reasonable length of proceedings	
10. Verdict: publicity, timeliness of delivery, reasoning, sentencing	
11. Right to appeal	
12. Witness related issues	
13. Mental incapacity	
14. Equality of arms principle	
15. Other issues	
16. Practices of relevance	

This template ensures that monitors devote their attention to 14 thematic issues relating to human rights standards on which the programme focuses, and also includes two sections (15 and 16) in which monitors can report on any human rights issues not covered in the detailed list. Allowing space in a template where monitors can raise additional issues at their discretion can be a means of encouraging initiative and extending observation skills.

## 11.4 Strategies to organize, simplify and systematize reporting

The following sections illustrate strategies to make reporting more effective and less time-consuming.

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

Instructions for monitors on how to complete case reports are critical to ensuring consistency in reporting and to enhancing the programme's capacity to manage and synthesize information. Without clear reporting guidelines, monitors may focus on disparate issues or bury relevant analysis among pages of extraneous facts and issues. Instructions may provide:

- an explanation or overview of the issue or issues to be reported;
- the sequence of the elements to be included in the analysis, e.g., facts first, legal standards second;
- the applicable international standards and domestic laws to be applied in analysis; 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 and help a monitor to identify issues to be monitored,<sup>146</sup> instructions go further, in that they are linked directly to a particular reporting format or reporting template. This, in turn, helps ensure not only consistency in issue coverage, but also consistency in reporting methodology, in terms of how issues are reported and analyzed. Instructions are equally important for closed and open reporting systems.

If a monitoring programme develops a manual for its operations, the manual should include a reporting template and instructions on how to use it. For example, the OSCE Mission to Bosnia and Herzegovina proceeded in this manner when it issued a revised version of its Trial-monitoring Manual in 2006.

The following example illustrates how reporting guidelines can be incorporated directly into a reporting template.

#### Example of reporting instructions within a reporting template<sup>147</sup>

##### 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.)  
...

<sup>146</sup> See Chapter 11.3.1, "Open reporting systems".

<sup>147</sup> For ease of reference, the basic report form is printed in black with the instructions on the form printed in blue. Due to space restrictions, the entire form with instructions has not been reproduced.

#### IV. ANALYSIS OF ADHERENCE TO HUMAN RIGHTS STANDARDS

##### *General instructions*

This is the heart of the report and the analysis set forth here is the key to success of the entire program. The analysis shall be primarily based on assessing the compliance of the domestic law and practice to the internationally recognized fair trial standards. The analysis shall be critical and shall identify fair trial concerns and human rights violations.

This section is divided into sub-headings to enable the evaluation the proceedings to be organized into general “subject” areas that are significant in assessing the adherence to fair trial standards. To provide guidance on the subject matter of each sub-heading, explanations, and relevant questions for analysis are provided below. Monitors must exercise careful judgment as to which category to use for each issue under analysis and refer to these guidelines or contact a legal analyst when in doubt. Monitors should include all important analysis in this section or else it may be lost.

Under each sub-heading:

a) Open with a statement of the problem;

State the problem and its consequences in 2-3 sentences.

b) Give a simple summary of the relevant applicable law that is being breached

- State domestic law;
- State international human rights law, especially if it affords better protection. (NB: Case law of international bodies can be relevant, in addition to the provisions of directly applicable conventions. Likewise, apart from “hard-law”, other international instruments may be of relevance, such as a body of principles.)

c) Apply the law to the facts – give details of the problem

- State the facts;
- Analyze compliance with the law;
- Identify concerns, potential or actual violations of the international fair trial standard. If you are not certain if there is a concern include the information nonetheless, or else it may be lost.

d) Recommendations

The recommendations should be related to addressing the identified issue/concern. They should:

- Be specific; and
- Have one or several addressees.

...

ii) Instructions specific to Sub-headings 1-14

...

5. Right to have the free assistance of an interpreter

Article 6 (3) ECHR: “... *to have the free assistance of an interpreter if he cannot understand or speak the language used in the Court.*”

If a defendant has difficulties in speaking, understanding, or reading the language used by the Court, the right to interpretation (oral) and translation (written) is crucial to guarantee the fairness of the proceedings. It must be noted that if the defendant does speak the language of the Court adequately, but prefers to speak another language, there is no obligation on the authorities to provide the defendant with the free assistance of an interpreter. Interpreters have to be provided free of charge regardless of the outcome of the trial. The European Court found a violation of the right to free assistance of an interpreter when the authorities sought reimbursement of the cost of the interpreter when the defendant was convicted [footnote: Case of *Luedicke, Belkacem, Koc v. Germany*, ECtHR judgement, 28 November 1978, paras. 47-50].

It is important to note that deadlines start to run from the moment a given document/instruction has been given in a language comprehensible to the defendant and not from the time of delivery of a document in a language he or she cannot understand [footnote: *Id.*, para. 42].

The domestic legal standard may be found in:  
 5 (1) BiH/5(1) RS/5(1) FBiH: Right to be given free assistance of an interpreter if he/she cannot speak/understand the language of law enforcement authorities;  
 185 (5) BiH/96(5) RS/99(5) FBiH: Right to free interpreter and translation.

### 11.4.2 Simplifying the reporting of facts

For programmes monitoring trials solely to establish whether particular procedural violations occur, the details of specific cases may be irrelevant to the programme's purpose of analyzing the application of domestic law or fair trial standards. When this is the case, detailed reporting of testimony, documents and other evidence presented at trial has the potential to unnecessarily complicate or lengthen reports, as well as to unduly shift attention from procedural issues to the merits of a case. For these reasons, programme managers should design efficient reporting systems that limit the reporting of evidence to what is strictly necessary to the purpose of the programme. This is relevant even for programmes where reporting on evidence and facts is important to the focus of monitoring.<sup>148</sup> In both cases, therefore, the strategies below should be kept in mind in order to limit and focus the reporting of evidence:

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

Reporting facts and evidence often helps illustrate the application of domestic laws or fair trial standards. In particular, the exercise of the right to confront witnesses, to present evidence and to be represented by effective defence counsel may be difficult to assess fully without some reference to the facts of the case. For example:

- 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 her/his rights, discussion of the content and significance of evidence may help illustrate the nature of the violation; or
- Where monitoring seeks to document the need for – or effectiveness of – witness-protection measures, such as where earlier statements are recanted, a comparison between an earlier incriminating statement and the testimony at trial may highlight such a need.

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 testimony or evidence is not whether it is relevant to the merits, but how the treatment of the evidence in the circumstances of the case illustrates the application of certain rules or standards. Often, it will be the case that such evidence should have been presented or, if it was presented, it should have been challenged or excluded. Evidence described for such reasons should be reported as part of the legal analysis, underlining how it relates to the application of specific legal provisions or standards, not as it relates to the merits of a case.

#### ➡ Analysis of impartiality and fairness through a comparative or statistical approach

Where the focus of monitoring on assessing the level of independence and impartiality of judges, it can be useful to adopt a comparative approach to analyzing and reporting on allegations, evidence and the substance of indictments, judicial verdicts and reversals by higher instance courts. This may provide objective evidence of systemic prosecutorial or judicial bias. In using such a comparative approach, reporting of the underlying allegations and verdicts will normally not require an analysis of

<sup>148</sup> Certain thematic monitoring programmes, for instance, focus not only on the procedure but also on the merit of the observed cases (Chapter 15.3). This includes detailed observation and reporting on facts, testimony and other evidence. War crimes monitoring conducted by the OSCE Mission to Serbia represents a case in point.

the merits of individual decisions.<sup>149</sup> Rather, conclusions are based more broadly on a comparative approach to the treatment of similar allegations and facts in different cases.<sup>150</sup> The box below provides an example from Croatia.

#### The OSCE Mission to Croatia's trial monitoring trial- monitoring programme: reviewing allegations and verdicts to assess the impartiality of the judicial actors involved

The primary focus of trial monitoring in the OSCE Mission to Croatia was to assess whether Croatian courts process war crimes cases in a manner reflecting professionalism and impartiality with respect to the defendant's national or ethnic origin.<sup>151</sup> In drawing conclusions regarding the existence of double standards based on ethnic origin in prosecutions, analysis and reporting have focused on allegations, evidence and factual findings in a number of ways, without necessarily assessing cases on their merits. For instance, the programme has drawn conclusions in a number of manners:

- 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; and/or
- 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.

#### 11.4.3 Hearing-based monitoring and reporting

Hearing-based monitoring and reporting refers to a 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 can provide an assessment of systemic practices and their compliance with fair trial standards. In this way, findings regarding the functioning of a justice system can be obtained 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 practical where access restrictions or time constraints preclude the monitoring of individual cases to completion. Hearing-based monitoring will not support in-depth review of individual cases for the purpose of drawing conclusions about the application of fair trial standards at the conclusion of a case, nor will it be suitable for most ad hoc monitoring programmes.<sup>152</sup>

In practice, the key to successful hearing-based monitoring is to identify in advance the procedures and issues that will be systematically observed in specific hearings. The reporting system used by ODIHR's programme in Kazakhstan was a hearing-based monitoring methodology.<sup>153</sup> The monitoring of specific procedures and practices was aimed at providing quantitative findings of practices that may not be broadly consistent with a justice system that incorporates international fair trial standards. While the Kazakhstan programme used a closed reporting system, hearing-based monitoring and reporting can be used in open systems as well.

149 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.

150 In addition to the example of Croatia in the box, see also the "Nine-Month Analytical Report Preliminary Findings on Monitoring Court Cases in Selected Basic Courts of the Host Country", OSCE Mission to Skopje (April 2008).

151 The OSCE Mission to Croatia was also engaged in other trial monitoring activities.

152 See Part V, "Ad Hoc Trial Monitoring".

153 The system used in Kazakhstan is described in Chapter 11.3.2.

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

- the frequency of legal representation in proceedings, particularly in relation to specific types of crimes and defendants;
- 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 pre-trial custody in criminal cases, as well as its duration;
- the ability of the public to access the courthouse or courtroom; and
- other procedures or practices that are mandated by procedure codes or proscribed in connection specific types of hearings.

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 many in a long trial may be problematic. Such an approach will run the risk of missing out on any actions taken by judicial authorities subsequent to the monitored hearing to rectify an observed problem. Not monitoring a case from start to finish will decrease the scope of issues that may be monitored and limit the depth of analysis. Nevertheless, hearing-based monitoring can provide a powerful methodology generating important findings regarding selected features of the administration of justice without having to draw definitive conclusions regarding the application of fair trial standards in individual cases.

## 11.5 Secondary internal reporting

This section provides an overview of secondary internal reporting, which is necessary to synthesize case reports, as well as to organize information for other purposes of the programme. Internal secondary reporting takes two basic forms: internal reporting by legal analysts that is directed to the programme itself; and other internal reporting by monitors.

### 11.5.1 Internal reporting by legal analysts

Internal reporting facilitates the process of compiling and synthesizing issues that emerge from monitoring. It helps to organize information for external use, as required by the programme. In determining the frequency and content of internal reporting, programme managers should consider the functions that it can ensure, including:

- regular oversight of the numbers and nature of cases monitored, so that problems with access and methodology are addressed quickly and adjustments made in a timely manner;
- that legal analysts are kept up-to-date on individual case developments;
- regular review of the monitors' work product, thereby improving quality control and ensuring timely follow-up; and
- that legal analysts are able to identify trends and issues during the course of a project and before focusing on the draft of the final report.

In structuring a secondary reporting system, programme managers should establish a regular, but realistic, reporting schedule for legal analysts, based on external reporting requirements and other organizational goals. Managers normally introduce a standard template for secondary reporting or define what should be included in such reports.

It is critical that programme managers examine closely the needs of the organization as to internal and external reporting, in order not to overburden legal analysts with drafting responsibilities. When possible, internal reports should be structured in such a way that they can easily be drawn on

when drafting other internal reports or public reports, as necessary.<sup>154</sup> Managers should also evaluate the usefulness of the internal reporting structure at reasonable intervals, to ensure that aims are being met as foreseen.

### 11.5.2 Other reporting by monitors

Monitors may also be required to provide secondary reporting to support the process of compiling and synthesizing information. This may be particularly helpful in programmes that employ fewer supervisory staff. Since monitors may often be assigned to a particular region or court, monthly reporting offers monitors an avenue by which to provide an overview of practices and issues observed in their court or region. This enables them to analyze issues unrelated to a specific case, such as general conditions related to a monitored court, including scheduling, delays, and equipment or facility issues and practices. Such secondary reporting may help identify what practices are confined to a particular judge or case, and what practices may be endemic to an entire court or system. It also permits more detailed treatment of serious violations or problems that occur systematically. From a capacity-building perspective, such reporting also provides an opportunity for monitors to perform legal writing and analysis outside the structured case-reporting format.

This separate type of secondary internal reporting by monitors can be especially valuable in instances where questionnaires are employed as the basic means to convey concerns about hearings, or where regular reporting templates do not provide space to monitors to offer additional analysis of themes.

<sup>154</sup> The LSMS in Kosovo provides an example of this approach. Court monitors at the regional offices send to the legal analysts and the chief of the LSMS on a weekly basis reports and tracking memos, which are then researched and analyzed by the legal analysts. See Annex IV.B. Legal analysts draft bi-monthly reports, which are disseminated to courts, prosecutors and lawyers. The reports are also used as a resource in drafting longer periodic public reports. In this way, bi-monthly reporting not only enables the ongoing synthesis of information for public reports, but also provides a basis to report regularly to local authorities.

# CHAPTER 12

## Advocacy Strategies

In the context of this manual, advocacy may be understood as the process of strategically using information and knowledge gathered by a trial-monitoring programme to persuade or influence those in positions of power to adopt and implement policies or practices that can yield a more human rights compliant and effective justice system.<sup>155</sup> Concretely, advocacy may take the shape of recommending or supporting a particular policy or course of action. Some OSCE trial-monitoring programmes have taken a very proactive approach to advocacy, while others have adopted a restrictive approach.

This chapter covers a variety of advocacy activities that may be undertaken by trial-monitoring programmes, particularly those of a systemic nature. The largest part of this chapter is devoted to public reporting of programme findings, since this is usually the principal means of advocacy. Other means of achieving a programme's aims, including the provision of advice and capacity-building, are also described here. In order to advocate effectively, programmes need to invest time and effort into ensuring that their work is perceived positively so it can, indeed, persuade the relevant actors to implement recommendations. In general, programme managers – rather than monitors – are responsible for advocacy activities, although monitors may also sometimes be involved. Managers should establish clear guidelines on which staff may engage in advocacy, and how.

### 12.1 Promoting a positive image of the trial-monitoring programme and establishing effective co-operation with the authorities

Programmes are often faced with scepticism and distrust on the part of some stakeholders, especially in their early stages. This can result in valid recommendations falling on deaf ears. It is, therefore, critical for programme managers to build a positive image of their work and win the co-operation of stakeholders. Programmes are most effective when they are proactive, rather than reactive, in building a positive public image.<sup>156</sup>

An already functioning programme – as well as new programmes – may still need to convince stakeholders of its relevance and value.<sup>157</sup> Although elaborating on specialized public relations techniques is beyond the scope of this manual, this chapter addresses some principal points of and good practices in effectively promoting the work of a programme with stakeholders. These points are premised on the understanding that a programme's success does not rely solely on the quality of its output, but also requires the active involvement of actors over whom the programme has no direct control.

<sup>155</sup> Translation of the term “advocacy” into local languages can be a challenge. Managers should ensure that all staff understand the concept of advocacy in the context of the programme.

<sup>156</sup> In addition to this chapter, see also Chapter 4.2. and Chapter 9.3.

<sup>157</sup> To a large degree, public relations principles and techniques are key to overcoming the actors' indifference or negativity. Consequently, it may be advisable for staff of monitoring programmes to review writings and attend professional training in public relations, communications and negotiation skills. A number of systemic trial monitoring programmes have organized such events.

## ➔ Mapping out stakeholders and their level of support

As an initial step toward developing an effective advocacy strategy, programme managers can perform a four-step “stakeholder analysis”, as follows:

1. Identify in detail all relevant stakeholders;<sup>158</sup>
2. Assess the level of each stakeholder’s importance in the success of the programme or of a specific activity;
3. Assess the level of each stakeholder’s support for the programme or specific activity (i.e., whether they are enthusiastic, dependable, neutral, reluctant or opposed); and
4. Juxtapose each stakeholder’s level of importance to their level of support to gain a clear picture of who can be an ally for programme activities and who may need to be approached and convinced. The more crucial the role an actor plays, the more imperative it is to build their support.

Performing such an analysis as early as possible in the programme enables managers to consider in advance the views of actors who will play a crucial part in a project. It can also help determine the sensitivities and interests actors have, as well as anticipate what influence they might exercise on others. Consequently, managers can develop targeted strategies to maximize support for the programmes’ initiatives.

## ➔ Building support among stakeholders

To build support for a programme and its activities when this is not at the desired level, programme managers will need to determine the causes of the given situation. Principles on how to approach the challenge can be drawn from the field of negotiation and conflict resolution, as well as from public relations.

More specifically, managers or staff may decide to meet actors with a negative or indifferent attitude towards the programme and listen actively to their concerns. In such meetings, the interviewer should seek to draw out any needs or fears the stakeholders have, or any issues they think the programme does not take into account.

Programme managers then need to decide how to overcome any concerns that were raised. Appealing to an actor’s professionalism and obligation to comply with agreements, domestic law and international standards is a common tactic used to invite co-operation on matters that have been agreed or promulgated by law. Nevertheless, at times this may not be sufficient.<sup>159</sup> Managers can explore additional ways to win over a stakeholder; they may explain the particulars of a project or of a recommendation clearly, the benefits it can yield, and the impact a successful outcome will have on the system as a whole and on the concerned stakeholder specifically. Involving supportive, influential actors in convincing the stakeholder of concern is another potential strategy for overcoming resistance. Managers may also consider incorporating suggested elements into a project’s design. If an unsupportive stakeholder’s motives derive from her/his low level of involvement in a project, managers may be able to offer a higher profile role.<sup>160</sup> In the end, if support is not likely to be obtained, it is important to consider how an actor’s opposition or inactivity could be neutralized, so that it does not affect the success of an initiative.

158 For instance, it is essential to establish whose co-operation is needed to obtain access; who has a vested interest in the monitoring outcomes and who benefits from them; who has expertise to contribute; who has the responsibility for implementing a recommendation or approving expenditures for its implementation; and who should be involved from a political or organizational perspective.

159 This may be true especially when a reminder of obligations is perceived as patronizing, when a programme’s role is not well understood, when an actor has a different interpretation of the binding texts, or when a programme’s output is seen as unrealistic.

160 As an example, if a judicial council with a co-ordinating and capacity-building role is negatively pre-disposed to the efforts of an international organization to deliver training or establish a case-management system, the programme can seriously consider persuading the council to assume a leading role in these initiatives that fall within its competences.

### ➤ Increasing the persuasiveness of arguments

In implementing strategies to increase support among stakeholders, monitoring personnel should work on improving their communication and persuasion skills. The following points can be useful in this regard:

- *Establishing a programme's credibility.* Establishing the credibility of a monitoring programme is essential, particularly when the qualifications or findings of monitoring staff are questioned. For instance, managers may need to reassure stakeholders about the credentials and expertise of their teams, the reputation of their organization, levels of control over confidential information, or the verification of programme findings for accuracy. When criticism is voiced as to the reliability of a programme's conclusions, especially in public, monitoring staff should respond promptly and decisively, while remaining polite and non-confrontational. Engaging higher level representatives of the monitoring programme in key meetings with justice system stakeholders can help boost a programme's credibility. Programmes should invest in the creation of networks that can promote their reputation. References to an OSCE programme's findings in reports issued by renowned organizations, donors or NGOs can all help promote a programme's public profile and credibility.
- *Finding common ground with stakeholders.* Identifying shared interests with actors involved in the justice system helps to build confidence throughout a programme.<sup>161</sup> A programme should convey that its role is to assist the local authorities in overcoming impediments in the administration of justice, rather than naming and shaming. To dispel antagonism, monitoring staff should demonstrate to counterparts that their concerns and suggested solutions are being respectfully considered in programme reports and activities. Including domestic actors' concerns in public reports is one means of building rapport and support for the programme.
- *Producing striking facts to support a programme's position.* Invoking vivid evidence to support the need for changes in the administration of justice can be an extremely effective advocacy tool. Therefore, programme staff should supplement their arguments with monitoring findings that can produce the desired impact among stakeholders, or describe specific cases that can make vague concepts tangible to the listener. Salient arguments underlined by carefully selected statistics can have this effect. However, overwhelming stakeholders with statistical data is rarely effective. A distinct advantage of trial monitoring is that it has access to human stories and examples from practice, which it should use whenever appropriate.

### ➤ Negotiating mutually beneficial outcomes

To achieve co-operation with stakeholders, a programme may also need to employ negotiation strategies on various occasions, as when discussing the implementation of a recommendation. The overall aim of a conversation should be to persuade an interlocutor of the logic of the programme's analysis and of the benefits that will result from implementing a recommendation. Programme staff should present their arguments clearly. It can be useful to prepare "talking points" in advance of a meeting, to ensure that key points are included and set out in a logical way. This is particularly helpful if different staff will be meeting different interlocutors on the same issue, to ensure that consistent arguments are presented.

If an interlocutor is not convinced by the initial presentation, programme staff should listen carefully to her/his views and arguments to the contrary. Staff should be patient and refrain from reacting emotionally or being confrontational. If the possible objections by the interlocutor can be anticipated, programme staff can prepare in advance for how these objections might be answered. It

161 For instance, while a programme may be concerned that judges take excessive time to produce written verdicts, judges may argue that the time limits prescribed by law are unrealistic in complex cases and when no legal assistants are provided. To deal with such concerns, a programme could advocate for judges to have more staff, or could work with local actors to develop a structured verdict-drafting system.

is especially important to consider carefully any counterproposals that are suggested. These might offer the opportunity for a “win-win” outcome, if the counterproposals incorporate the essence or significant points of the programme’s recommendation. Satisfying the other party’s interests at the same time that programme objectives are accepted – if this can be achieved – helps build rapport and local ownership of reforms, and benefits the reputation of all parties involved. It can also be advantageous to inform counterparts of the potential negative repercussions non-agreement may have, although this should be done without being threatening.<sup>162</sup>

## 12.2 Public reporting

Subchapters 12.2.1 to 12.2.4 provide an overview of the different types and functions of public reports issued by OSCE trial-monitoring programmes. Subsequent subchapters in this section relate to organizing monitoring reports, good practices and ways to maximize the impact of reports.

### ➤ Nature of public reports by trial-monitoring programmes

Public reporting is one of the primary tools available to trial-monitoring programmes in supporting the development of the rule of law consistent with a state’s domestic and international legal obligations and commitments. Reports, as the culmination of monitoring efforts, are the main vehicle for providing the findings, conclusions and recommendations of monitoring. At the same time, especially for systemic trial monitoring, the issuance of a report is only a first step in 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.

### ➤ Targets of public reports

Though reports may be public in the sense that they are freely available, the legal nature of trial-monitoring reports means that reporting is not usually aimed at the general public. Instead, reporting is targeted at bodies and individuals with official responsibilities for the functioning of the legal system, as well as at 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 justice process. Reports also serve to inform international and national organizations engaged in supporting reforms, including NGOs and donors. Depending on the purpose of monitoring, the media may also be a secondary target of reporting. Identifying the main recipients of a report plays a significant role in at least three domains:

- *It defines which aspects of a problem will be elaborated in the report.* For instance, when addressing witness-protection issues, if the targeted recipients are the justice actors in the courtroom, then particular attention would be paid to the application of in-court protection measures, rather than measures to protect witnesses outside the courtroom.
- *It determines the level of detail required in the argumentation.* For example, when legal actors believe that their actions are correct, a report aimed at inducing change will need to invoke factual and legal analysis to convince recipients that a problematic practice is not in compliance with domestic law or international standards.
- *It impacts upon the language to be used in the text.* For example, elaborate legal terms and concepts can be used to address an audience with a legal background, but might not be appropriate if the report is targeted at the wider public.

<sup>162</sup> There are a number of writings on negotiation skills that programme managers will find useful. Among others, see William Ury, *Getting Past NO: Negotiating in Difficult Situations* (New York: Bantam Books, 1993).

## ➤ Functions of trial-monitoring public reports

The broad distribution of public reports serves the important function of providing a common foundation of objective information on the functioning of the justice system. Trial-monitoring reports provide a unique resource to support the reform process by:

- documenting practices, problems and abuses within the system, thereby eliminating the need to rely on incomplete or anecdotal information;
- educating stakeholders on domestic and international standards, thereby increasing the accountability of local institutions and actors; and
- providing a solid factual and analytical starting point from which to consider reforms of the system based on international standards of justice.

Trial monitoring will usually provide more information than can ever be fully digested by the reader of a report. In choosing which topics to report on, managers and drafters should select only the most significant issues. Reports should generally focus on the most serious concerns and areas where reforms are most needed or possible. The gravity of the issues selected for reporting will also depend on the phase of the programme's engagement. A newly-founded programme will normally focus on striking shortcomings, whereas a long-established programme may also delve into other, less striking aspects of non-compliance with domestic or international standards.

OSCE trial-monitoring programmes have issued many types of public reports. While not all reports fit easily into a specific category, they 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 cases related to discrete events. The following subchapters provide a brief overview of each, with examples for further reference.

### 12.2.1 Comprehensive reports related to the functioning of the justice system

Since the majority of OSCE trial-monitoring programmes have the express goal of improving the overall functioning of the justice system, many programmes have chosen to issue comprehensive reports, which 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, while including an assessment of compliance with international fair trial standards. Whereas such reports may address the entirety of proceedings, more often they will focus on the public stages of proceedings – criminal, civil or administrative – as access and monitoring permit.

Comprehensive reports should seek not only to point out a problem with the application of laws, but also identify the problem's root cause. This may include providing analysis of the scope and components of a problem, to assess whether the practice at issue is caused by legislative, structural, resource, budgetary or other systemic or specific factors. The analysis may also involve a quantitative or statistical element, to put the issue into perspective. However, for a report to be considered a monitoring report, and not a legal review, the findings and conclusions must be based primarily upon the practices monitored in specific cases. It is important for reports that provide a systemic review to be based on the monitoring of a broad range of case types. 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 justice system as a whole.

Reports providing a broad, systemic overview tend to be the most complex and demanding in terms both of monitoring methodology and report writing. However, they are an excellent place to start for programmes that intend to establish a long-term approach to monitoring. This is because they address the functioning of the entire system and, as such, they broadly engage and support the work of many institutions and actors involved in the justice system. This not only raises the profile of the

programme among the greatest number of actors, but also identifies the programme with a systemic approach to justice monitoring and reform. Such identification is important later as a programme focuses on narrower issues, where legal actors may not have such commonality of interest.

Comprehensive reviews of the justice system, as a whole, may not be frequently repeated, as programmes move on to focus on commonly encountered or sensitive issues. Comprehensive reviews do, however, include recurring problems and can focus on selected issues of importance, such as witness protection or pre-trial detention. Additionally, certain reports have been termed justice-system reviews, even though they focused on thematic issues.<sup>163</sup>

#### Examples of reports providing an overview of the justice system<sup>164</sup>

- “2009 Trial-monitoring Report in Azerbaijan”, OSCE Office in Baku (2010).
- “Preliminary Findings on Monitoring Court Cases in Selected Basic Courts of the host country”, OSCE Mission to Skopje (April 2008).
- “Analytic Report: Observance of Fair Trial Standards and Corresponding Rights of Parties During Court Proceedings”, OSCE Mission to Moldova (2008).
- “Report on the Administrative Justice System in Kosovo”, OSCE Mission in Kosovo (April 2007).
- “Analysis of Criminal Appellate Proceedings in Albania”, OSCE Presence in Albania (2007).
- “Report from the Trial-monitoring Project in Kazakhstan 2005-2006”, ODIHR and OSCE Centre in Almaty (2007).
- “First Review of the Civil Justice System”, OSCE Mission in Kosovo (June 2006).
- “Review of the Criminal Justice System”, OSCE Mission in Kosovo (2006).
- “Ensuring Fair Trials through Monitoring”, OSCE Centre in Dushanbe (2005).
- “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, former Yugoslav Republic of Macedonia (2004).

#### 12.2.2 Thematic reports related to the functioning of specific aspects of the justice system<sup>165</sup>

Thematic reports, like comprehensive reports, are intended to support rule of law reform and enhance the implementation of fair trial standards. In the same way as comprehensive reports, they describe whether and how justice systems apply and implement local laws, including assessing these practices in relation to international fair trial standards. Thematic reports do this, however, by focusing on specific aspects of the judicial system and how these aspects affect the ability of the system to deliver justice fairly and effectively. They are not concerned with a specific case but, more broadly, with the procedures involved in and the functioning of a discrete aspect of the system.

Thematic reports may focus on specific institutions, types of proceedings or components of the criminal, civil or administrative justice process covered by a monitoring programme. In general, thematic reports should be considered for specific elements of the justice system that may be 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 of issuing thematic reports is that they can be completed in less time than comprehensive reports. Despite their limited scope, thematic reports may still include conclusions and recommendations relevant to a wide range of actors. Therefore, wide dissemination is often appropriate for thematic reports.

<sup>163</sup> For instance, see the Review of the Criminal Justice System, “Independence of the Judiciary – The Administration of Justice in Minor Offence Courts – Juveniles in Criminal Proceedings”, OSCE Mission in Kosovo (2006)

<sup>164</sup> A number of these reports are not available on the Internet, but they can be obtained through ODIHR.

<sup>165</sup> See also Part IV, “Thematic trial monitoring”.

### Examples of thematic reports by the OSCE

- “Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005-2010”, OSCE Mission to Bosnia and Herzegovina (2011).
- “The Mitrovicë/Mitrovica Justice System: Status Update and Continuing Human Rights Concerns”, OSCE Mission in Kosovo (February 2010).
- “Reasoning in War Crimes Judgements in Bosnia and Herzegovina: Challenges and Good Practices”, OSCE Mission to Bosnia and Herzegovina (December 2009).
- “Judicial Proceedings Involving Domestic Violence”, OSCE Mission in Kosovo (November 2009).
- “Pre-trial Detention: National Practice and International Standards”, OSCE Spillover Monitor Mission to Skopje (March 2008).
- “The Treatment of Different Communities in the Kosovo Justice System: A Statistical Overview of Punishments and Trial Outcomes in District, Municipal and Minor Offences Courts”, OSCE Mission in Kosovo (December 2008).
- “The Presumption of Innocence: Instances of Violations of Internationally Recognised Human Rights Standards by Courts of Bosnia and Herzegovina”, OSCE Mission to Bosnia and Herzegovina (2007).

#### 12.2.3 Reports on individual cases or sets of cases

Another type of report addresses a particular set of proceedings or, exceptionally, may even centre on a single case. Such reports are usually prompted by a particular domestic context. For example, a set of cases may be important from the perspective of justice in systems in transition or may relate to broader security interests. When many cases of a specific type are examined in a report, this can resemble a thematic report; there is no absolute division between thematic reports and reports covering a specific set of cases.

OSCE reports on individual cases or sets of cases have reviewed the application of criminal law, victims’ rights and witness-protection issues. Another topic of reports has been war crimes prosecutions. Although such reports have a specific focus, they also provide factual information on prosecutions and sentencing for specific crimes; comparative case analyses of differences in the application of standards in charging, trying and sentencing individuals from different ethnic or political groups; or a broad statistical analysis highlighting an imbalance in the number of arrests, prosecutions, dismissals and convictions.

Reporting on individual cases or sets of cases is often prompted by specific concerns regarding the potential for violations of fair trial standards or human rights in general. Such reporting may document abuses within a justice system. In the OSCE context, reports on such cases may also serve as tools to bring fair trial or human rights violations more to the attention of international organizations, which may take action within their mandates in response to the abuses.

Although monitoring specific cases may be carried out for reasons other than justice-sector reform, such reports will often provide conclusions and recommendations geared towards enhancing compliance with international fair trial standards. This is particularly true when numerous cases are monitored or when monitors compare the treatment of the monitored case to the manner in which other cases are adjudicated. In this way, reporting not only provides findings related to specific cases, but may identify thematic issues that impact the justice system more generally.<sup>166</sup>

<sup>166</sup> Such issues have included: witness protection measures; lack of regional law enforcement co-operation; insufficient prosecutorial resources; adequacy of defence counsel; and other problems. Rule 11bis reports of the OSCE Mission to Bosnia and Herzegovina also endeavoured to compare the specific cases monitored to other types of war crimes cases and similar cases.

### Examples reports on specific cases or types of cases<sup>167</sup>

- All regular reports of the Rule 11*bis* Project of the OSCE Mission to Bosnia and Herzegovina that reported publicly on the progress of the indicted cases transferred from the ICTY to the Court of BiH for trial, pursuant to Rule 11*bis* of ICTY Rules of Procedure and Evidence (over 60 reports from 2006).
- “The Response of the Justice System to the March 2004 Riots” (2005) and “Four Years Later, Follow up of March 2004 Riots Cases before the Kosovo Criminal Justice System”, OSCE Mission in Kosovo (2008).
- “Case Report: The Public Prosecutor’s Office vs Latif Gashi, Rustem Mustafa, Naim Kadriu and Nazif Mehmeti: The ‘Llapi Case’”, OSCE Mission in Kosovo (2003).
- “The Successful Suppression of Election Regularities (The Election Cases)”, Coalition All for Fair Trials, the Former Yugoslav Republic of Macedonia (2005).

#### 12.2.4 Other regular and frequent public reports

The three types of general public reports described above aim at providing in-depth treatments of a 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 by issuing short, monthly reports that allow for more regular contact with and feedback to and from local actors.

Regular reports can be issued according to any schedule suitable to the aims and capacity of a programme. Some programmes may issue quarterly reports. 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.<sup>168</sup> Such reports constitute a regular means of providing information and raising awareness of issues that may be different each time or be recurring. Monthly reports may also serve as informal professional newsletters in regions where professional periodicals or other training materials or opportunities are limited. In such a context, 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.

#### 12.2.5 Organizing trial-monitoring public reports

Although reports may differ in content, all aim at presenting monitoring results and conclusions in a manner that both informs and influences policymakers, officials, institutions and legal actors to take specific actions. The following paragraphs provide specific guidance and a selection of good practices that have been used in connection with organizing the basic components of public trial-monitoring reports.

##### ➔ *General structural elements of analysis and advice on uniform writing*

The general structure used by many trial-monitoring programmes in their reports mirrors, to some degree, the legal reasoning found in judicial decisions and other legal writings. This structure includes the following elements:

<sup>167</sup> See also Chapter 20.3 where examples of ad hoc trial monitoring reports are provided.

<sup>168</sup> In 2005, in response to the challenge of communicating more regularly with the local legal community, the LSMS at the Mission in Kosovo began disseminating to courts and judges short monthly (as of 2011 bi-monthly) reports in addition to its yearly reviews. 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 raised the visibility of the programme and have increased positive interaction and information exchange with local judges, prosecutors and lawyers.

- *Opening with a statement of the problem.* Stating the problem and its consequences in a few sentences at the very beginning of the analysis allows readers to grasp quickly the issue in question and the position of the drafters. This statement can be elaborated in the analysis and conclusion.
- *Providing a summary of the applicable law relevant to the problem at issue.* In this part, the drafters outline the relevant domestic law and international human rights or other standards that apply to a situation.
- *Providing a brief description of the relevant facts.* Factual information derived from monitoring observations is used by drafters to convey, in a vivid manner, the nature or magnitude of a problem. One or more examples may be provided. Statistics may be used to make or supplement a point.
- *Applying the law to the facts and reaching a conclusion.* A description of the facts will often, in itself, demonstrate non-compliance with a law or international standard. When this is the case, a conclusion can be set out immediately. If such a conclusion does not flow directly from the facts, drafters can analyze point-by-point how the legal elements apply to the facts, enabling the reader to follow the argument and understand the eventual conclusion. In addition to drawing a conclusion, the drafters can also refer in this section to the possible root causes of the problem, substantiating their position with evidence or corroborating arguments.
- *Issuing recommendations.* In the final section, reports should include specific recommendations to the competent authorities on how the identified problem can be remedied.

The inclusion and order of these elements will depend on the specific circumstances of the report and the guidelines adopted by the particular monitoring programme. Drafters should always keep in mind, however, the objective of their reporting and should gear their writing towards their target audience. Being clear about the problem and the programme's position on it as early as possible in the text can be the most effective way to convey the desired message. Following a predictable structure makes a report easier for a reader to follow.

It is good practice for programmes to develop and disseminate writing-style guidelines to all staff.<sup>169</sup> This will ensure consistency in writing, especially when different parts of internal reports are pieced together into a report for external distribution. Additionally, OSCE programmes should use the guidance provided in the *OSCE Style Manual*. At every stage of reporting, drafters should reference sources, as this ensures the report's accuracy and reliability, as well as its compliance with copyright regulations.

### ➔ *Components of public reports*

In taking the proposed structural elements further, the following are elements generally included in public trial-monitoring reports of all types.

#### ↻ **Title, copyright issues, abbreviations and tables of contents**

In deciding on the title of a report, programme managers should consider how best to convey its content in a succinct, yet accurate manner. For instance, naming a publication “review of the justice system”, if it concentrates only on two distinct aspects of the system will be misleading for the reader. Managers have frequently chosen a primary title for their reports, followed by a more extensive secondary title that mentions the country, courts monitored or other pieces of information that characterize the publication better.<sup>170</sup> It is highly recommended that the publication date, or at least the year, be included on the cover of the report.

<sup>169</sup> These rules can include, for example, whether British or American spelling is used, rules for capitalization; and guidelines using numbers, headings, quotes and footnotes.

<sup>170</sup> See the boxes in Chapter 12.2 for examples of report titles used in OSCE programmes.

Any copyright restrictions that the monitoring programme or the organization deem necessary to impose on the use of its publications should be clearly mentioned at the front of the document.<sup>171</sup> However, considering that most monitoring programmes aim to disseminate their findings as widely as possible, and since reports are not published for profit, it is best not to place heavy restrictions on the usage of materials from a report. Undue copyright restrictions can also complicate matters if permission for reproduction is sought after the close-down of a programme or mission. Although the ideas contained in reports should be freely promoted, anyone who wishes to use entire parts of reports *verbatim* should be expected to quote their source. A note to this effect could be made as part of the copyright notice at the beginning of a report. For instance, certain published reports use the formula:

All rights reserved. The contents of this publication may be freely used and copied for educational purposes and other non-commercial purposes, provided that any such reproduction is accompanied by an acknowledgement of the OSCE Mission as the source.<sup>172</sup>

Because report writing and the publication process are demanding undertakings for monitoring staff, reports have sometimes included the name of the author or authors. However, security considerations should always be taken into account when deciding to acknowledge the drafters of or contributors to reports by name.

A report that uses acronyms or abbreviations in the text should always include at a visible place, preferably at the beginning, a list of all the abbreviations mentioned, with the corresponding terms or names they replace written out in full. The first time an acronym or abbreviation is used in the text it should be in parenthesis following the full name or term to which it refers.

A table of contents should always be included at the beginning of a report. This is especially important for readers in cases where the report comprises several chapters or concepts, or if it is particularly lengthy. Tables of contents should present not only the major chapters, but also subchapters that are clearly distinguished. However, they may not need to go beyond a three-level depth of subtitles.

### ➡ Executive summary

An executive summary sets out briefly the main findings, conclusions and recommendations elaborated in a report. It is a good practice to include one in all reports. Especially if a report is lengthy, an executive summary maximizes the chances that busy actors will become familiar with its most important points. In this sense, an executive summary can be the most important section of a report and deserves the particular attention of drafters and managers. Executive summaries also help ensure that readers have a good understanding of what is addressed in the report prior to reading it in detail, and may serve to attract the reader's interest in reading the full report or attention in parts of it.

### ➡ Introduction

The introduction sets out the background to and the basis for a monitoring report.<sup>173</sup> It may describe the overall monitoring programme and how the particular report fits into the broader programme.

171 A trial monitoring publication is likely to be subject to copyright protection in many countries. This will prohibit anyone from reprinting or redistributing the report. Even websites may be prohibited from including a report without a license from the copyright holder.

172 Other copyright practices used by field operations can also be consulted through accessing their public reports, while one of the Creative Commons licenses could also be considered; see <<http://creativecommons.org/licenses/>>.

173 This can include the legal basis for conducting monitoring, including an OSCE mandate, OSCE commitments and the right to a public trial under domestic and international law.

It can also explain the main purposes of monitoring and of the report. The introductory section might also provide:

- an explanation of the impetus for writing a specific report, including the main problems addressed and the fact that they may run contrary to legal standards and obligations;
- an overview of the report's structure and topics covered;
- the overall domestic legal context, including international commitments, recent reform, and other issues or events that provide the backdrop to the report;
- a brief statement indicating to whom findings are addressed and what the report seeks to achieve in publishing findings and recommendations; and
- acknowledgements, particularly including of any donors of funding, but also mentioning authors (if their names are not on the title page) and other individuals who contributed to drafting or facilitating the production of the report.

### ➡ Methodology

The methodology used in gathering information and compiling the report should be described either in the introduction or in a separate section following the introduction. This is especially important if the programme has not had a high profile. A description of monitoring methodology is important to support the credibility of findings. Trial-monitoring findings and conclusions will often provide the only objective overview of what is occurring in the justice system in places where information is incomplete, anecdotal or politicized. Particularly at the beginning of a programme, a report must establish the validity of the methodology that produced the information it offers and give the reader confidence that such information is reliable and objective. The section on monitoring methodology can include:

- an overview of the scope of monitoring, including numbers and types of cases, courts and hearings monitored;
- a description of how the information was obtained and what proceedings were monitored. It is useful to clarify whether findings resulted from direct observation; document review; secondary sources, such as interviews or court statistics; or from a combination of the above;
- a description of who performed the monitoring, including the qualifications and training of monitors; and
- any “disclaimers” that the programme deems necessary to make, such as that the report does not seek to second-guess the merits of specific judicial decisions but, rather, focuses on procedural issues, or that the report focuses only on problematic issues, rather than good practices.

### ➡ Presentation of findings and legal analysis

Reports will differ in terms of the issues monitored, standards referred to and findings. Within the main body of the report, each distinct part is best presented by including the elements outlined above, which comprise: introducing the issue of concern, outlining the applicable law, describing the facts monitored, drawing a conclusion by applying the law to the facts, and issuing recommendations. Certain programmes add an analysis of select aspects of the domestic legal framework, when they are at odds with international fair trial standards.

Most commonly, the pillar of monitoring reports is the presentation of monitoring results from actual cases as they proceeded through the system. Programmes have developed certain good practices in presenting examples from monitoring in their reports:

- *Illustrations of particular practices or problems.* Using a few sufficiently detailed examples from individual cases is an excellent technique for illustrating a particular problem and persuading readers as to the validity of a programme's concerns. Vivid evidence is provided by the most

striking and recurring examples, as well as by those most representative of a trend or systemic problem. However, if a rare case serves to substantiate a more general trend, quoting it alone may suffice to illustrate a point.<sup>174</sup>

- *Use of case names.* The decision on whether to provide case names ultimately depends on the purpose of reporting. Citing an example by name is rarely necessary in a report seeking to identify general practices and trends. Conversely, when monitoring focuses on specific cases, crimes or events, it may serve the purpose of monitoring to provide the case name for political or documentation purposes. Certain reports have also quoted the names of judges or other justice actors in their public examples of breaches. Nonetheless, most programmes refrain from this practice, as it attaches a stigma to the individuals, can invite negative reactions on their part or by supportive authorities, or might lead to retribution being taken against them. Overall, programmes have attempted to reduce as much as possible the identification of cases and actors in their examples, in order to focus on the problem and not the subjects. Inevitably, though, in many circumstances the actors may be identifiable by peers or by the public, especially if the report focuses on a high-profile case is concerned.
- *Use of 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 supplement qualitative monitoring and reporting of specific types of crimes, helping to demonstrate imbalances in the numbers of arrests, prosecutions, dismissals or verdicts. However, not all statistics are useful for corroborating an assertion, 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 involve minor offences. Statistics regarding the percentage of defendants informed of their right to defence counsel in these same cases would much better illustrate an issue relevant to fair trial standards. Moreover, overburdening reports with statistics can diminish the readers' interest, whereas combining vivid examples and striking statistics can have a profound impact. The use of charts can also provide graphic illustrations.

## ➤ 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 – either under each separate issue, at the end of a chapter, or at the report's end – key conclusions should also be summarized in the executive summary for readers who will not read the entirety of the report. Reports must refrain from setting forth conclusions that are not supported by monitoring.

## ➤ Recommendations

The recommendations section of the report is a key opportunity to promote both specific improvements in practice and broader legal reforms. Recommendations also form the basis of advocacy activities and can jump start the advocacy process. They represent one of the most important parts of any report and should be given careful consideration by the highest levels of monitoring programme management.

A broad range of actors should be brought into the process of formulating recommendations. From the programme side, legal analysts and the heads of programmes should participate, since they have the broadest perspective of the functioning of the justice system. Monitors should also provide input, since they have insights to the particular problems and their root causes. It is also advisable to consult in advance with the targets of recommendations, usually local institutions, as they will be

<sup>174</sup> For instance, in reviewing pre-trial custody when an investigation order or indictment exists, judges may not examine the persistence of a reasonable suspicion, as international standards require. Although a programme may not come across multiple cases of this problem, identifying and reporting on a single egregious case can serve to illustrate the more general problem. For example, one monitoring report cited a case in which the detained suspect's alibi was that he was in prison when the crime was committed, but this was repeatedly not taken into consideration by the competent authorities; see the Review of the Criminal Justice System "Crime, Detention and Punishment", OSCE Mission in Kosovo, p. 19 (2004).

the implementing authorities. The relevant authorities may be hesitant or reluctant to accept and implement recommendations from external sources, especially when surprised by or uninformed about the process. Advance consultation may alleviate this risk, and may also yield ideas for inclusion in the recommendations. What's more, consultations will also be useful for testing how realistic and feasible recommendations are.<sup>175</sup>

Recommendations, like conclusions, should relate to the findings of monitoring, in order to be perceived as relevant and not arbitrary.

Drafters of recommendations should attempt not to be overly prescriptive, unless this is demanded by particularly egregious practices. For example, while a recommendation might use strong language to insist on putting an end to the degrading treatment of persons in detention, recommendations on less grievous issues might ask that authorities “consider” specific procedural steps or specific new language in a law as a means of remedying an identified problem.

Additional suggestions to be considered while drafting recommendations include:

- Recommendations should be specific. The proposed course of action should be clearly identified, both so that there is no misunderstanding with authorities and so that programmes can measure the impact and results of the recommendation over time. If there is a recommendation to amend a rule or law, the provision that is problematic should be identified. Suggested language for the amendment can also be included. Similarly, if recommendations propose training, resource allocation or other actions, they need to clearly articulate what is required and, if possible, they should also prioritize recommended activities for the implementation in the short, medium and long term.
- Recommendations should be addressed to a particular actor, based on the legal competency of the actor and the relevant institution. For example, a proposal to amend a law might be addressed to the parliament or the government, while the need to change a courtroom practice might be addressed to judges.

## ➔ Annexes

If certain information is valuable for illustrating the nature and extent of problems that require documentation, but is too voluminous for the body of the report, this information can be provided in annexes. Annexes may be used, for example, for texts of indictments or verdicts, summaries of specific proceedings or interviews, charts and graphs, applicable legal provisions or international standards and other information, in support of the arguments in the report or for educational purposes.

### 12.2.6 Good practices for getting reports done on time

Writing reports 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, requiring additional data and analysis or other changes to be made. 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, or even more, from the point the drafting process begins.

Certain strategies can be employed to help avoid unnecessary delays and pre-empt problems that complicate the process of report writing. The following recommendations, some of which should be

<sup>175</sup> See also, Chapter 12.2.8 on Consultation prior to issuing reports.

taken into consideration far in advance of the actual drafting, have been found useful among OSCE trial-monitoring programmes for organizing and streamlining the report-writing process:

- It is advisable to engage regularly in secondary internal reporting during the monitoring period, particularly on themes expected to be included in the public report. Secondary internal reporting can also serve as “pilot” analysis revealing any limitations in information or methodology, so that incomplete or missing data can be supplemented in time for drafting the public report. Legal analysts and/or monitors should prepare monthly reports on specific issues or trends, including detailed analysis of individual cases. These reports can then be used to help formulate the core issues or themes in the final report. Thereafter, the drafting process can focus on supplementing these with additional analysis and examples.
- Information should be compiled during the monitoring period with a view to retrieving it as easily as possible for use in the public report. For this purpose, cases should be organized according to thematic issues, with illustrative cases flagged for potential use. Furthermore, statistics should be kept and updated regularly on relevant issues. While a database can be useful in this regard, some programmes maintain a folder system, by which folders are created on specific legal issues and relevant case reports are filed therein.<sup>176</sup>
- If indictments, verdicts or other documents will be analyzed in a report, these should be translated and summarized during the monitoring period, well in advance of drafting.
- Cases used as examples in reports should be as recent as possible, to ensure that a current picture of the justice system is provided. Some programmes refrain from using examples of problems more than a year old, unless it is to demonstrate the developments on an issue over time. Equally, programmes also assign a cut-off date for the input of new information, unless exceptional circumstances apply. A cut-off date prevents the drafter from engaging in a never-ending examination of material and from postponing the draft’s finalization.
- It is advisable to assign to one individual the responsibility of drafting the report and to provide clear, agreed deadlines for the completion of an outline, a first draft and a final draft. When multiple drafters are used to compile a report, a principal drafting co-ordinator should be assigned, to avoid lack of accountability for the final product or lack of coherence in the report.
- It is useful to draw on all resources in connection with report writing. For example, in preparing reports, programmes have used available monitors to help with statistical compilation. Importantly, they have also used local experts – professors or specialized practitioners, for example – to draft and review material on substantive legal issues.
- A chronology and fixed time-frames should be established for the remaining phases. A chronology should include time-frames for review and revisions of the final draft within the monitoring programme; for wider review and clearance by the OSCE mission; for external review and consultation as necessary; and for other steps, such as translation, formatting/printing and distribution. The project manager should consult with working partners and mission authorities to determine what review procedures will be required.
- For efficiency, all actors who will be involved in reviewing the report should be advised well in advance of when they will receive the report. Advance notice allows reviewers to plan accordingly, so that good working relationships are maintained and the report is not delayed. Stressing the importance of a report’s timely publication is critical, as reviewers can substantially prolong the clearance procedure. A delayed publication can weaken or annul the impact of a report and the perception of a programme’s professionalism.
- It is imperative to plan ahead for the logistical aspects of issuing a report. Translation, printing and distribution are time-consuming and must be factored into the publication process. The issuance of a report simultaneously in multiple languages allows all stakeholders to have access to information at the same time and facilitates dialogue that is integral to follow-up. Likewise, reports may have to be formatted and printed by a printing house, with its own procedures and

<sup>176</sup> See, Chapter 5 “Establishment of an information-management system”.

schedules. Distribution must also be considered. Drafting, translation and approval of cover letters for the report should also not be forgotten.

### 12.2.7 Maximizing the acceptance and impact of public reporting

Programmes planning to issue a trial-monitoring report should consider engaging in activities that will maximize the report's impact, as well as its acceptance by the authorities called upon to implement recommendations. The subchapters below address programme activities and strategies used to engage stakeholders in the process of reform and to promote positive responses to monitoring results and recommendations.

At the most basic level, however, the dissemination of a report to the authorities and other interested actors should always be accompanied by a cover letter, possibly signed by an official of the organization at a commensurate position to that of the recipient. The cover letter should always include an invitation to the recipient to provide feedback or express questions to a focal point assigned for this purpose. If any follow-up events are planned for the purpose of presenting and discussing the report, the cover letter may refer to these.

#### ➔ *Strengthening working relationships through the process of reporting*

The ability of a trial-monitoring programme to effect change directly is limited, since the power to make reforms and to take action rests with the relevant governmental authorities. If a trial-monitoring programme has no connection to the government institutions and officials with 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 seek partnership with local authorities and other relevant stakeholders.

Trial-monitoring reports will usually present critical descriptions of legal practice in the host country. This may include shortcomings of a systemic nature, incompetence or even professional misconduct. Although reports do not usually identify legal actors by name, they often question the actions of local authorities or institutions. While the need to point out problems is clear, justice reform will often require commitment and buy-in from some of the same legal actors involved in problematic behaviour. To help develop constructive relationships with local actors and institutions, it is important for them to see reporting and other monitoring activities as useful and inclusive, or even collaborative. An effective 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. Chapters 12.2.7 to 12.2.11 address advocacy strategies to include national actors more directly in the work of monitoring programmes, including in the formulation of recommendations.

#### ➔ *Consultations prior to issuing reports*

Consultations with the relevant authorities over the content of a public report prior to its issuance may take a number of forms. Consultations may involve general discussions of a report's content and conclusions or, better yet, provide an opportunity to comment on a draft. Consultations may also extend to allowing local actors meaningful participation in the formulation of recommendations.<sup>177</sup> In practice, the focus of consultations may be limited to the major conclusions and recommendations or be extended to the entire report, depending on the programme's relationship with the authorities and what is likely to be accomplished in a consultation process.

In deciding what form consultations may take, programme managers should consider what they are seeking to achieve. At a minimum, consultations with authorities to whom recommendations will be addressed are a professional courtesy and can assist in maintaining a good working relationship,

<sup>177</sup> See also, Chapter 12.2.5 sub paragraph on Recommendations.

especially where reports may be critical. Authorities consulted may include representatives of the Ministry of Justice, Supreme Court, legislative bodies or other institutions. Another purpose of consultation is to provide assurance against mistakes by giving local authorities a chance to point out inaccuracies in the report. This process may identify new information or provide new perspectives, enabling a programme to correct errors and adjust conclusions.

As the implementation of recommendations will require the commitment of local officials, consultations also provide opportunities to receive 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 who are indifferent or opposed to change. In this way, consultations provide an additional means of obtaining information regarding stakeholder interests.

Any comments received by local authorities should be carefully examined and incorporated, as appropriate, into the final report, particularly if they point out factual errors or other mistakes. In the final analysis, however, it is the drafters of the report who decide what to include, as they take responsibility for its contents. If no comments are received by a reasonable deadline, the report may well be published even without input from the authorities.

Although consultations cannot ensure that recommendations will be implemented, discussing findings in advance of issuing a public report is always good practice. Even where there seems to be little or no hope of any productive response from institutions or officials, consultations will avoid surprising officials with the publication of criticisms they did not expect. In accordance with OSCE commitments related to trial monitoring, OSCE 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.

#### ➔ *Joint issuance of reports*

A joint public report is a report that is issued in conjunction with one or more other institutions or organizations. Although the organizations need not contribute – or contribute equally – to produce the report, they publicly stand behind the report’s content, conclusions, and recommendations. The issuance of joint reports may raise the visibility and impact of reports, as well as the visibility of the issuing 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 issue joint reports with their implementing partners, including IGOs and NGOs, thereby benefiting from their local perspective as well.

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 applies 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, since official government bodies have sanctioned the findings and expressed a commitment to reform.<sup>178</sup> However, it is very difficult to reach such a level of agreement with local authorities without heavily compromising the nature of

178 Between 2003 and 2006, two of the comprehensive war-crimes reports published by the OSCE Mission to Croatia were issued jointly with the Ministry of Justice of Croatia. The joint reports were prepared in full by the Rule of Law Section of the OSCE Mission, 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. 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. Joint issuance of the reports also benefited the host country in that it was seen to be making reforms necessary for EU membership.

the programme and its findings and recommendations. Programmes also have to choose the actors with whom to issue the report carefully. Joint issuing might be especially problematic when there are tensions between the judiciary and other branches of government.

#### ➔ *Roundtable events*

Roundtable events following the publication of reports have been used extensively as mechanisms to 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 and 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 context, 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 obtain commitments from responsible officials to seeing them documented and followed up.

In addition to being organized after the completion of a report, roundtables can also be organized prior to the completion of the report, to help formulate recommendations. In this way, roundtables can serve more widely as opportunities 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 can also create the necessary buy-in of local officials into the reform process, thereby giving them an important stake in the success of the recommendations.<sup>179</sup>

#### ➔ *Press conferences and press releases after issuing reports*

Press conferences and press releases are methods of raising public awareness about the findings and conclusions of monitoring, as well as about 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;
- avoid technical language;
- explain the implications and significance of findings; and
- lay out what needs to be accomplished next.

Likewise, given that it is unlikely that print and television media will read reports in full, fact sheets should be included with copies of the report to be distributed at press conferences, for later reference and to convey information clearly.

The head of an OSCE field operation or head of department may address the media to present the report and represent the organization's backing of the findings, while the programme manager can delve into the more technical aspects and address any specialized questions from the media. The principal drafters may also be present, to explain any parts of the report or its methodology in response to media inquiries.

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 the press

<sup>179</sup> This is the practice implemented by the OSCE Mission to Skopje and the Coalition All for Fair Trials. Upon completion of monitoring, representatives of government and other involved actors are invited to discuss the findings for the purpose of formulating recommendations. While the drafters retain the right to control the content of the final report, the roundtable provides an important forum for authorities to suggest their own solutions and recommendations to address the issues identified by the monitoring. 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. After the publication of the final report, a follow-up roundtable is usually convened to mark the progress of the commitments undertaken by the parties.

conference. Second, it will help legitimize and confirm the importance of monitoring from the local perspective. Third, such a step, while raising the public profile of reform-minded actors, may also help to secure on-the-record commitments from national authorities to take specific follow-up action. However, when including authorities in press events, it should be kept in mind that such events are not forums for discussion or debate, but public events aimed at providing a clear message regarding the findings of monitoring.

### 12.3 Confidential and semi-public reporting

In addition to public reports, trial-monitoring programmes have also in the past issued confidential reports, as well as reports categorized as “semi-public” because they are of limited distribution. Each type of reporting serves a particular purpose.

Whereas public reports, described in Chapter 12.2, generally seek as wide a distribution as possible, confidential reports contain sensitive or protected information, which for legal, political or strategic reasons should not be shared beyond a limited number of identified recipients. Their texts normally include a specific warning that they should be treated as confidential. Confidential reports have been used to share certain information deriving from closed hearings or which has been disclosed to the programme on the condition that it treats it confidentially. In other instances, programmes have agreed to share only with domestic disciplinary bodies for judges and prosecutors any reports that document egregious misconduct by particular judicial actors.

Semi-public or limited-distribution reports are those addressed to certain types of recipients due to their specialized nature, but that do not include confidential information. Therefore, if for any reason additional actors request them or if they are disseminated as public by any individual, no sensitive interest is compromised. For example, such reports may be shared with other interested international organizations, if they request copies.<sup>180</sup> Confidential or semi-public reports could also be used at the initial stages of a programme, to build the confidence among authorities who appear defensive about public reporting of problems or sceptical of the nature of the programme’s output.

Classification of reports in one way or another may depend on various local factors and perceptions, so rules may vary among different trial-monitoring programmes.<sup>181</sup>

In addition to completed reports, monitoring programmes will possess a wealth of up-to-date information regarding a variety of proceedings, including high-profile cases and statistics on the functioning of the justice system. Understandably, this information is appealing to other organizations, embassies, professionals and scholars who follow justice reforms. As these actors’ activities and writings can contribute to reforms and further the goals of monitoring programmes, it may be useful for monitoring programmes to share this information. Therefore, it is essential for programme managers to have appropriate systems in place to make clear to staff what information can be shared, with whom, and under what conditions. The more regularly public or semi-public reports are issued, the easier it is for programmes to share their findings, as these reports will have gone through clearance procedures and will be available to support advocacy activities.

Nonetheless, publicizing all information interesting to others is not possible in reality. In considering whether to provide non-public reports or to share information more generally, programmes

180 For instance, the monthly reports that the OSCE Mission in Kosovo shared in the past with the UN Mission in Kosovo (UNMIK) were semi-public. From 2005 onwards, the programme then decided to share these reports with all local justice actors and eventually to publish them on the OSCE webpage.

181 The monitoring based on the ICTY 11*bis* rule represents a case in point. Pursuant to Decision No. 673 of the OSCE Permanent Council, OSCE field operations in South-Eastern Europe arranged to share with the ICTY reports on the progression of war crime cases transferred to the national jurisdictions. While the then OSCE Mission to Croatia shared its reports with the ICTY in a confidential manner, the OSCE Mission to Bosnia and Herzegovina treated only a handful of the reports as confidential, sharing most with local and international authorities and eventually with the public.

must take steps to ensure that the use of information does not compromise the programme's ability to deliver on its primary purposes. For this reason, information-sharing controls must be put in place to protect the integrity of the programme in general, as well as, more specifically, the release of confidential information that has been obtained by virtue of monitoring closed hearings and access to non-public documents.<sup>182</sup> The following methods may be considered for non-public information-sharing:

- *Editing and clearance.* To protect confidential information included in reports or legal opinions of monitors that may not be final or directly relevant to other parties, programmes should consider removing such information from case reports to be provided to external parties. 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, once it has been vetted and cleared.
- *Concluding an MoU.* For information sharing that occurs on a regular basis with a specific organization, programmes may consider the signing of an MoU. The MoU can specify the type of information 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 concluding an MoU allows a programme to clarify its methodology and aims to the counterpart and provides valuable assurances regarding how information is to be used. Addressing the timing and method of information sharing further enables a regularized exchange that minimizes ad hoc requests and unanticipated burdens on staff.
- *Formulating an information-sharing protocol.* In general, a programme can adopt an information-sharing protocol – an internal set of rules and guidance – 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, information sharing by the programmes is based on a consistent and well-thought-out approach, and not decided ad hoc as external requests are made.<sup>183</sup>

## 12.4 Supporting other advocacy and capacity-building activities

Apart from issuing reports, trial-monitoring programmes can, and arguably should, undertake a variety of other advocacy activities to ensure their conclusions are widely disseminated and their recommendations are promptly and effectively implemented. The extent to which this is possible may depend on a programme's human and financial capacity, as well as its expertise. Chapters 12.4.1 to 12.4.4 describe advocacy activities OSCE programmes have undertaken to support the implementation of recommendations.

### 12.4.1 Undertaking outreach activities to disseminate monitoring findings and programme views

In addition to issuing and disseminating trial-monitoring reports, programmes have made their findings known through various forums, where they have also presented their views on how to improve domestic justice systems. OSCE trial-monitoring programmes are regularly invited to address specialized conferences and meetings, both in host countries and abroad. These include events

<sup>182</sup> The principle of confidentiality and the corresponding monitor's duty of confidentiality are discussed more generally in Chapter 5.4, Chapter 8.1.4 and Chapter 9.3.8.

<sup>183</sup> In 2005, the Coalition All for Fair Trials 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. The rule book 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.

organized by judicial actors, NGOs, international organizations and journalists. Monitoring staff have, in various capacities, attended these as participants, presenters or moderators.

The media are an excellent means for promoting a programme's views to the wider public and, possibly, to influence the competent authorities. Therefore, programme managers, with the assistance of a field operation's press office, often draft press releases or editorial pieces and give interviews on issues related to judicial reforms. Programmes also increasingly use OSCE field operation websites to convey their opinions and present recommendations or reinforce those already included in reports.

Because the skills required to write extensive and analytical monitoring reports are different from those required to address the media or general public effectively, monitoring programmes should invest in developing the capacity of their managerial staff to give interviews to the media and to draft press releases in a sharp, focused, prompt and easily understood fashion. Similarly, programmes should advance their staff's skills at addressing the public in training and conference-type events; effective public speaking to both specialized and non-specialized audiences is a skill that can raise further support for the goals of the organization.

#### 12.4.2 Providing expert advice and participating in working groups for the implementation of reforms

Trial-monitoring personnel will have useful expertise to share with the national authorities in their efforts to implement reforms. Monitoring personnel, for instance, are often asked to comment on draft laws prior to their adoption or to participate in working groups that make such comments. They have also participated in working groups aiming at developing strategies on particular pressing themes in justice systems.<sup>184</sup>

In the same spirit, certain programmes have set up standing working groups comprising representatives of the monitoring programme, the national authorities and, possibly, other international organizations present in the host country. These working groups engage in an institutionalized dialogue on overcoming identified shortcomings.<sup>185</sup>

#### 12.4.3 Support of training for actors in the justice sector

When a root cause of problems appears to be the lack of knowledge or skills to handle a particular issue, targeted training can sometimes provide a solution, by developing practitioners' capacities. OSCE trial-monitoring programmes have been involved in organizing and delivering training or in supporting such activities by others, in an effort to ensure that their recommendations are implemented effectively. Capacity-building activities have targeted judges, prosecutors, defence counsel, police officers and other personnel. Additionally, ODIHR and OSCE field operations have placed great emphasis on developing the capacity of professionals dealing with critical fields of post-conflict justice through programmes for the transfer of knowledge.<sup>186</sup>

184 Such has been the case, for instance, for the programme in BiH, which is part of a working group contributing to the formulation of the country's strategy to address the prosecution of war crimes.

185 One outcome of the Croatian War Crime Working Group (composed of the OSCE Presence in Zagreb, the Croatian authorities, the EU Delegation and the ICTY Field Office) was the adoption of legislative changes allowing the revision of defective *in absentia* convictions cases from the early 1990s. In Azerbaijan, a working group was formed in 2009, including representatives of the OSCE Office in Baku, the Ministry of Justice, the Judicial Legal Council and senior members of the judiciary. Its purpose is to discuss monitoring findings, to develop recommendations and to facilitate their implementation.

186 Also see Chapter 16.3, "Monitoring war crime proceedings".

OSCE trial-monitoring programmes have also endeavoured to advance domestic training centres responsible for the continuing education of justice-system actors.<sup>187</sup> By lending support to the development and expertise of these permanent institutions, even through “train the trainers” programmes or by channelling training through them, monitoring organizations and other education providers strengthen domestic ownership, sustainability and the efficient co-ordination of training activities. Field operations have further encouraged those responsible for training to employ adult learning and interactive methods, in order to maximize the relevance and effectiveness of the training.<sup>188</sup>

#### 12.4.4 Supporting the development and work of domestic institutions

Through their human rights and rule of law departments, alone or jointly with donors and authorities, OSCE field missions have assisted in the creation and maintenance of institutions that fill in gaps identified in the justice system. Examples of these are the legal clinic established in Baku with the support of the OSCE Mission to Azerbaijan and the support provided by the OSCE to the establishment of the Kosovo Judicial Institute, the Kosovo Law Centre and the Criminal Defence Resource Centre. Although OSCE staff charged with supporting these institutions may not be involved in trial-monitoring activities, the trial-monitoring programmes can channel their findings of systemic weaknesses to these institutions, so that they can play their part in addressing them.<sup>189</sup>

187 For example, the OSCE Mission to Skopje has embarked on a far reaching two-year training programme for legal practitioners and aimed at improving their knowledge and skills on various topics related to international humanitarian law, including war-crimes investigation, witness protection, international fair trial standards, evidentiary issues and amnesties.

188 See also Chapter 8.4, “Training sessions”.

189 For example, findings of the OSCE Mission in Kosovo are regularly used in the training curriculum of the Kosovo Judicial Institute, which is responsible for training judges and prosecutors.

## CHAPTER 13

# Measuring the Impact of Systemic Trial-Monitoring Activities

Measuring the impact of any trial-monitoring programme, especially systemic programmes, can be a daunting task. Because of the nature of the assistance they provide, the effectiveness of their outputs is inherently difficult to assess. However, trial-monitoring programmes should and do perform assessments of their impact. These assessments can indicate whether reports and other advocacy activities have actually been effective; whether monitoring should continue to focus on a specific field or expand or change to different priority cases; whether there is a need to advocate a particular course of action or adopt a different strategy to induce the desired impact; and, ultimately, whether monitoring work has achieved its goals, signifying that the programme can be ended.

Issuing reports can, in itself, be regarded as an achievement, in the sense that reports provide evidence of problems and recommendations for how to remedy the problems. For the purposes of this chapter, however, impact refers to the extent to which monitoring reports and other programme activities actually result in changes of practices or in reforms in the justice system.

Although the development of a model methodology for the assessment of impact is beyond the scope of this manual, the points mentioned below provide some guidance.

### 13.1 Choice of a model for measuring impact

In many contexts – including judicial reform – the evaluation of development activities and of project impact has focused on criteria that meet a donor’s requirements for accountability. This means that the indicators used for measuring the success of a project have concentrated on showing that it completed the specific activities it was supposed to, within the time limits and budget agreed. The measurements used are often quantitative, i.e., whether a programme has monitored a particular number of trials, conducted training for a specified number of people or issued the required reports. This has been described as an “audit model”.<sup>190</sup> In recent years, however, project assessment has shifted toward a “learning model”. This approach focuses on the degree to which project activities have had tangible substantive impacts, for example, whether problematic court practices have been corrected or laws been amended.<sup>191</sup>

In view of the above, programme managers should endeavour to develop concrete indicators, which will enable them to assess the specific and overall impact their activities have on the justice system, both in the short term and in the long term. This requires indicators that measure not only the activities of a programme itself, but also the performance of justice-system actors. Some considerations to take into account regarding performance indicators are described in the next section.

<sup>190</sup> See, for example, Livingston Armytage, “Monitoring Judicial Integrity: Lessons for the Implementation of UNCAC Article 11”, U4 Issue 2009:12, p.14.

<sup>191</sup> *Ibid.*

## 13.2 Choosing indicators to measure impact

In selecting appropriate indicators for measuring impact, it is important to try to identify indicators that are specific, measurable, accurate, reliable and time-bound.<sup>192</sup> These should relate to the achievement of a specific task or objective, or to progress toward resolving an identified issue or problem. The indicators can relate to whether a specific recommendation of a trial-monitoring programme has been implemented in practice. For example, measurable indicators in trial-monitoring programmes might include:

- the number of trials or other judicial proceedings open to the public, compared to the number in the period preceding the monitoring;
- the number and quality of steps that are being taken to make court schedules and dockets more transparent and easily accessible;
- the categories of documents (previously unavailable) to which the public has been given access;
- recommended changes that are made to laws or regulations to bring them into line with international standards;
- quantifiable improvements in specific practices, e.g., defence attorneys are more readily available to indigent defendants;
- increased resources and personnel available to deal with overwhelming court workloads; and
- statistics showing that delays in hearing cases or issuing judgments have been reduced.

This approach typifies a “learning model”, as described above, by testing project impact rather than project output. For instance, it would be short-sighted to assume that a training session on a particular international standard would, in itself, achieve compliance with that standard. Such a conclusion would involve making a number of possibly flawed assumptions, including that the training has been effective in terms of quality; that it has been attended by all those whose practices are problematic; that its messages were understood; that the individuals trained have changed their practices; and that non-compliance with a standard was due to a lack of knowledge, rather than to some other factor. While an “audit model” might record that the project met its goal by providing training, a “learning model” would need to assess whether the training resulted in improved implementation of the standard in question. This could be assessed through further monitoring.

Quantitative measures can also be useful indicators, if the data they measure are carefully selected and if it actually measures impact. Some of the bullet points above, for example, could be measured quantitatively by tracking the prevalence of specific procedures in court cases over a period of time, and using the data to assess whether particular concerns have been resolved or reduced. However, it is important that the indicators be designed to capture the necessary level of detail to ensure their validity. As an illustration, in designing an indicator aimed at measuring the efficiency of processing cases through minor offence courts, it would be misleading merely to compare the statistics reflecting the *overall* caseload over two consecutive years if, during that time, traffic violations were removed from the jurisdiction of these courts.

Even when well designed indicators show progress, it is advisable to urge monitors and analysts to be alert for any signs that a problem may persist, e.g., public surveys or recurring media reports that demonstrate continuing low confidence in the judicial process. These observations could prompt programmes to review the root causes of problems more closely and adapt their activities accordingly, or to review their analytical methodology. Conducting surveys and holding focus groups – either among justice-system actors or the general public – can also be ways to help determine whether projects are having the desired impact.

192 *Ibid*, pp. 7 and 12 ff.

Finally, especially for long-term programmes, it can be useful to arrange for periodic impact-assessment studies by outside experts. Such evaluations can provide a new perspective and are more likely to be free from unintended biases or self-congratulations than internal evaluations.

### 13.3 Practical considerations of monitoring programmes in assessing their impact

The following guidelines may be considered in defining and implementing a methodology to assess project impact:

- Programme managers should select a clear methodology for performing the assessment and interpreting its findings. To this end, they should review writings on impact-assessment methods, as well as studies regarding the efficiency and quality of justice systems. For OSCE monitoring programmes, the experience of the OSCE and the CoE are particularly relevant.<sup>193</sup>
- It is useful for managers to set out objectives to be achieved in the short, medium and long term. This can help to make realistic assessments of progress.
- Programmes should make assessments of their impact in all areas at regular intervals, at least once per year. Yearly and mid-year budget reviews present good opportunities in this regard.
- The method of impact assessment chosen should be manageable within the resources and capacity of the programme.
- Programme managers should encourage discussion and brainstorming on assessment among monitoring programme staff members, as well as seeking advice elsewhere in the organization from colleagues who are responsible for project approval. If feasible, they may consult with outside actors, such as those who work on compiling statistical data on the effectiveness of the host country's justice system. Judicial and prosecutorial centres can be sources of information, as can agencies specialized in system evaluation. Statistics and other indicators gathered from the authorities themselves or from other organizations can also be used.
- Tracking the extent to which programme recommendations have been implemented by authorities assists in providing an informed view about whether implementation has been successful.
- Although some programmes do not have the capacity to gather comprehensive statistics on all issues relevant to their activities, managers can, nonetheless, review whether the authorities have taken positive steps to implement recommendations in general terms.
- Programmes should not miss “the forest for the trees” in relation to judicial reforms, and should prioritize their activities accordingly. At many points during the life of a systemic programme, managers will need to make decisions about whether to continue certain activities, pay greater attention to specific issues, or launch activities in new fields. Managers should be resolute if a change in focus or methods is appropriate. Resistance to change from within an organization can often arise.
- Finally, it is necessary for programmes to be alert to any unintended effects of or impact from their activities, and to take corrective action if necessary. For instance, if governmental actors use monitoring reports as an excuse to retaliate against judges or defence attorneys whose practices may be reported, this would require a careful assessment by and reaction from programme managers.

<sup>193</sup> Also of interest is the website of the European Commission for the Efficiency of Justice, at <[http://www.coe.int/t/dghl/cooperation/cepej/default\\_en.asp](http://www.coe.int/t/dghl/cooperation/cepej/default_en.asp)>.

## CHAPTER 14

# Phasing Out and Sustainability of Systemic Trial-Monitoring Programmes

The closing phase in project management is probably the most neglected on both the theoretical and practical levels. Closing down operations can refer to completing a specific phase of a programme's operations or to closing the programme as a whole. Bringing an entire programme to an end involves intense efforts to ensure that all aspects of its work and its administrative components are completed. Closing a phase of a programme is less demanding, since it is smaller in scale and staff members and structures remain in place to assist with any loose ends that the programme may have left unaddressed.

The point at which a systemic trial-monitoring programme wraps up its operations, or some aspects of its operations, will depend on multiple factors. These can be political, financial or substantive. Political considerations can be complex. In some cases, they can result in an OSCE field operation no longer having a mandate to carry out certain operations, or being closed entirely. Financial considerations pertain to the availability of continued funding for a trial-monitoring programme. Considerations of substance might be that the monitoring programme has successfully completed its overall goal or more specific objectives.

This chapter first outlines sustainability issues to consider when bringing a programme to an end, and then describes other considerations that should be taken into account as a programme is ending.

### 14.1 Activities to support the sustainability of monitoring work

Systemic trial-monitoring programmes often promote judicial reforms by providing a review or oversight function that may be absent in justice systems in transition. Ideally, a country's own institutions and citizens should be able to take on this oversight role independently when an international programme comes to an end. If this is not the case, a sudden closure of operations could have negative effects on the justice system and lead to the unravelling of programme achievements. In order to avoid leaving a vacuum behind, long before a programme shuts down, programme managers should consider how its work can be sustained. Arguably, systemic programmes should aim from the start at developing local reforms and sufficient local capacity so that an international programme will no longer be needed.

Programme managers examining the sustainability of trial-monitoring programmes should identify which domestic institutions or organizations might be in a position to provide adequate review or oversight when the programme closes. In developed democracies, many checks and balances exist to prevent abuses or to right the wrongs in a legal system. Mechanisms within the system include: adversarial proceedings, in which all parties are bound by codes of ethics; effective disciplinary procedures for all judicial actors; higher courts that review the merits and legality of lower court decisions; national human rights institutions, including ombudspersons; and supranational courts or bodies, before which individuals can bring their grievances. Examples of review mechanisms outside the justice system are: media that can expose deficiencies and be watchdogs on behalf of the public; academics or other jurists and think tanks who comment professionally on judicial decisions

and practices; bar associations; and NGOs that monitor proceedings or undertake other capacity-building and support activities. Systemic trial-monitoring programmes have generally turned to such mechanisms outside the justice system as possible successors in continuing a monitoring programme's oversight and review functions when it is closing. OSCE programmes have focused mainly on NGOs as likely successors. However, as outlined below, other options may also be available and should be explored in order to avoid the perception of NGOs as the sole heirs to providing independent reviews of the justice sector. In fact, the benefits of involving several types of local actors in different follow-up activities should also be examined.

#### 14.1.1 Handover to NGOs

In various contexts, OSCE trial-monitoring programmes have supported NGOs and invested in building their capacity. In the case of Montenegro, the OSCE partnered with an NGO at the commencement of monitoring operations. The advantages and possible disadvantages of partnering with NGOs were discussed in Chapter 3.1, "Institutional models".

Selecting an NGO or a coalition of NGOs to which a programme can hand over will generally depend on the extent to which these organizations can commit to monitoring the justice system in accordance with principles that characterize OSCE monitoring programmes. This would entail independence from governmental influence or undue donor influence and a commitment to the duties of non-intervention, impartiality, professionalism and confidentiality, as set out in Chapter 8.1. Any NGO selected should intend to develop its skills and to engage in this field for the long term. Where such NGOs do not exist, another possible option for OSCE programmes to consider is to assist in the creation of an NGO that could take over operations (possibly involving OSCE local programme staff). This would have the extra advantage of building local capacity.

In considering whether to turn over trial-monitoring operations to an NGO, however, it is also important to assess whether the NGO will be independently sustainable, especially in terms of funding. Without sustainable resources, an NGO programme may collapse, even if the NGO has the necessary substantive skills. Past experience shows that many NGOs involved in trial monitoring relied on the OSCE for funding or fundraising on their behalf. When necessary, therefore, NGO staff of a successor operation will need to be trained in such skills as project-writing and fundraising. Describing these skills is beyond the scope of this manual. Nonetheless, it might be important for an OSCE field operation to assist NGOs in these fields through training by competent in-house professionals or by engaging external experts. Furthermore, the OSCE programme can introduce NGO representatives to its network and facilitate direct communication with donors.

Another handover matter that may be contentious is the degree to which monitoring material that has not been published can be shared with NGOs taking up the programme. As a rule of thumb, confidential information gathered during *in camera* hearings or sensitive information obtained through interviews should not be shared outside the organization, as this could lead to code of conduct rules being breached, if not criminal responsibility. Hence, any memos or hearing reports that contain sensitive or confidential information should be carefully screened prior to being shared. In addition, monitoring programmes may consider concluding an agreement on the transfer of monitoring material to and its subsequent use by a successor NGO. If original documents cannot be turned over according to OSCE regulations, then copies may be provided.

#### 14.1.2 Supporting academic review and legal periodicals

The legal nature of monitoring reports often resembles the writings of legal scholars and academics found in law reviews and periodicals. Local legal professionals may have both theoretical background and practical experience. Their books and reviews of substantive law and procedure, as well as of the application of human rights standards in domestic courts, are legal reference sources for

lawyers, prosecutors and judges. In fact, certain writings are so informed and supported by practical examples from courtroom practice that they greatly assist monitors in their analysis and reporting.

A challenge justice systems in transition may face is the shortage of forums in which legal experts and scholars can express themselves regularly. Many host countries have a limited number of legal reviews, and those that do exist may just reprint court decisions – the selection of which may not be transparent – without an appropriate level of analysis or criticism. This handicaps the ability of justice-sector professionals to keep abreast of legal debates and development in jurisprudence.

It would, therefore, be useful for trial-monitoring programmes to examine the possibility of enhancing existing legal reviews and periodicals published by bar associations and other judicial bodies, or to create such a forum for monitoring legal developments. The latter option would require identifying interested and eminent academics, as well as experienced and devoted younger scholars and practitioners who would be willing and able to develop a legal periodical. Such a publication can address fair trial and human rights issues arising in domestic proceedings, comment on domestic jurisprudence and analyze the domestic legal framework.<sup>194</sup> Encouraging legal dialogue through such means is one way of ensuring that the educational role of monitoring reports continues after the closing down of monitoring operations.

#### 14.1.3 Strengthening the capacity of journalists

In established democracies, journalists and the media serve as watchdogs over issues covered by trial-monitoring programmes, such as controversial court cases, questionable practices, corruption or any action that might run counter to the rule of law. Many OSCE participating States benefit from having justice-system news covered by specialized reporters who have a legal background or training that ensures the accuracy of reporting. In many countries where trial monitoring takes place, however, journalists may not be independent or professional. Furthermore, the perception of the media by the public and by justice-sector actors or governmental authorities may be poor, limiting its impact.

A few OSCE monitoring programmes in the past have included ad hoc capacity-building efforts for journalists. More institutionalized co-operation could be developed, with the aim of transferring relevant monitoring skills and knowledge to these recipients. Naturally, any training or other transfer of monitoring know-how would have to be filtered through and adapted to the requirements of professional journalism.

#### 14.1.4 Strengthening the capacity of domestic human rights institutions

Monitoring programmes have also looked into the possibility of national human rights institutions continuing certain monitoring functions. For instance, human rights or judicial-inspection sections in ministries of justice can be charged with responsibilities that are similar to those of systemic monitoring programmes. Ombudspersons and national human rights commissions are also important institutions that further many of these programmes' goals.

Nonetheless, prior to making any decisions relating to handover, programme managers need to consider the mandate of these bodies, as well as their limitations and advantages in the domestic context. For example, ombudspersons in several host countries are limited by law to examining only certain types of cases or to rely on individual complaints when taking note of an issue. Moreover, institutions within ministries of justice, however persuasive their recommendations can be, might not be truly independent from the executive or have the required capacity to monitor cases in the same manner as a monitoring programme does.

<sup>194</sup> Publications can be available in hard copy and/or electronically, depending on the available funds and on how Internet savvy local jurists are.

## 14.2 Other steps in the phasing-out process

Programme managers should ensure that the project they are terminating is complete in all its substantive and administrative aspects and that no loose ends are left pending. Project-management literature describes various steps to be completed during a project's close-down phase.<sup>195</sup> Many of these are administrative steps, such as finalizing payments, shutting down computer systems and disposing of equipment. In the OSCE, such administrative activities are common to the closure of any type of project and, therefore, they are not covered in detail here. In addition to administrative matters, it is important for final project reports to be completed and published before a programme closes. The activities described below reflect other important issues that managers should consider when phasing out a trial-monitoring programme or completing a phase of a project.

### 14.2.1 Handling files and other substantive material

A major concern for trial-monitoring programmes prior to closing down is deciding on the fate of programme material. This includes determining if, where, and how hearing reports, memoranda and copies of case-file documents will be stored. OSCE administration departments have procedures in place for the handling of information, including sensitive information pertaining to personnel and other matters. Likewise, programme managers should ensure that confidential and other sensitive information is properly archived or destroyed, in accordance with the applicable regulations. To the extent possible, managers also need to examine how materials can be accessed after the closing of operations, in case any interested party makes such a request for access. As regards the use of copyright material, Chapter 12.2.5.2 can provide further guidance. In regard to the possible handover of materials to a successor organization, Chapter 14.1 should be reviewed.

### 14.2.2 Compiling lessons learned and good practices

Programme managers charged with ending a programme or a distinct phase of a programme can make an invaluable contribution to future projects by compiling a document describing the good practices and lessons learned from a monitoring operation. It is advisable that such a review cover as many operational elements as possible; the chapters of this manual can serve as an outline for such an exercise. Even if complete information regarding all aspects of a programme is not available to managers at the time a project is closed, they should do their best with the information at their disposal. Impact assessments and other evaluations compiled throughout the life of a programme can be helpful in this regard.

Documenting good practices and lessons learned can be a part of – and contribute to – the drafting of both internal and external final reports. These practices and lessons can also be used in internal debriefing reports, which can assist the organization in setting up future operations to ensure that they are more effective and benefit from previous experience. Lessons learned can also be included in accountability reports to donors; in fact, many donors now include a request for such information in their end-of-project reporting templates. Good practices and lessons learned from a programme's activities, possibly in a more refined form, can also be issued in a public report. In this way, a programme's experience can also benefit justice actors in the host country, future project managers in the same country, and project managers elsewhere in the world dealing with similar challenges.

195 For instance, see H. Maylor, *Project Management* (2005, Third Edition, Prentice Hall, UK).

# **PART IV**

## THEMATIC TRIAL MONITORING

## CHAPTER 15

# Main Aims, Outputs and Methods of Thematic Trial Monitoring

Thematic trial monitoring refers to those programmes or projects that focus on a specific theme, issue or stage of proceeding for a considerable length of time. Unlike systemic trial monitoring, thematic monitoring does not address the entire court or justice system. It may not, therefore, be able to identify systemic problems affecting the judiciary as a whole. On the other hand, it allows for more in-depth review of specific issues or practices than may be possible in a broad, systemic programme. Thematic monitoring may be conducted as a discrete part of a systemic trial-monitoring programme, or it may be an entirely separate programme. Thematic monitoring programmes require their own staff and may need to develop their own specific methodology. However, since many of the methodological procedures of thematic monitoring are the same as those used in systemic monitoring (e.g., with regard to staffing, information gathering, analysis, reporting and advocacy), descriptions of those procedures will not be included here. Readers should refer to Part III for details of these procedures.

The decision to opt for a thematic trial-monitoring programme is usually prompted by the need to follow up on an acute human rights situation or other special challenge faced by a justice system. Two such examples are the processing of war crimes cases in a post-conflict context or cases involving trafficking in human beings. Proceedings for juveniles and other vulnerable groups can also be the focus of thematic programmes, particularly if the domestic justice system does not have specialized institutions in place to deal with these cases or there are fears of discriminatory conduct. Thematic projects may also be developed when a systemic programme expands to monitor new areas, such as civil and administrative proceedings, and this monitoring is organized as a discrete project.

The OSCE trial-monitoring programme in Serbia is an example of an entirely thematic programme, as it has always been limited to the monitoring of war crimes trials. The programme in Croatia was also limited to war crimes after 2008. In other countries, systemic trial-monitoring programmes have encompassed several thematic projects. In Bosnia and Herzegovina, for instance, the systemic programme follows the monitoring of cases dealing with each of war crimes, organized crime, trafficking in human beings, juvenile justice and other selected issues almost as distinct projects. In Kosovo, the programme included a separate thematic focus on domestic-violence cases. In Montenegro, there was a thematic focus on the right to a trial within a reasonable time in civil proceedings.

The following sections address certain common overarching features of thematic monitoring, such as programme aims, staffing considerations and outputs. Thereafter, Chapter 16 describes succinctly each of the areas most commonly encountered in thematic monitoring projects of OSCE field operations and a few of their particularities. Annex VII at the end of this manual includes examples of public reports issued by OSCE field operations in thematic areas.

### 15.1 Aims of thematic trial monitoring

Thematic monitoring generally aims at assessing the way in which certain proceedings, phases or issues are handled by the authorities, rather than the way in which the judiciary as a whole operates.

Nevertheless, while thematic projects may centre on specific topics, they may also look more broadly at all factors influencing the issues that concern them. As an illustration, war crimes monitoring programmes look well beyond courtroom proceedings. They endeavour to identify institutional obstacles to securing criminal accountability, track the progress of regional co-operation efforts in the collection of evidence, and/or assess outreach efforts by the courts. When thematic projects are part of a systemic programme, their aims may coincide with the more general objectives of the programme, supporting justice reforms compliant with fair trial standards.

## 15.2 Staffing, capacity-building and field support for thematic monitoring

When hiring or selecting monitoring staff to work on thematic topics, programmes should endeavour to engage professionals who have academic knowledge, experience or training in the corresponding fields. It is also important to assess the individuals' commitment to remaining engaged in the field for a considerable length of time, given that thematic projects have a long duration, so developing institutional memory is a consideration.

Sufficient training of monitoring staff is also crucial for the effectiveness of thematic monitoring, since a general legal background will rarely suffice. Therefore, depending on the level of legal complexity of the monitored cases or issues and the particularities of monitoring methodology, further education or specialized training for monitors may be needed, either in-house, in the host country or abroad.

When thematic monitoring is part of a systemic programme, it is imperative that programme managers adapt internal reporting templates to reflect the specific information collection and analytical needs of the thematic project. For instance, the trial-monitoring manual and the daily hearing reports developed by the OSCE Mission to Bosnia and Herzegovina were subsequently adapted to include a special focus on war crimes and trafficking in human beings. Any differences in monitoring methodology should also be clearly spelled out to monitors in written guidelines.

As in systemic monitoring, organizing regular meetings among thematic monitoring staff to discuss cases and issues can enhance the effectiveness of the programme. Such meetings enable staff to keep up-to-date with developments, share experiences and discuss possible improvements in the methodology of monitoring and advocacy activities. Meetings can occur both at the domestic and the regional levels, if relevant. For instance, ODIHR brought together individuals responsible for monitoring war crimes in different field operations, which enabled monitors and programme managers to improve their operations by comparing methodologies and drawing good practices from other programmes.

## 15.3 Thematic monitoring mode of operations

Certain features of systemic monitoring methodology will often have special relevance to, or need to be modified for, thematic trial-monitoring programmes. Most of these features have already been outlined in Part III of this manual, pertaining to systemic monitoring. Thematic programmes, however, may seek to supplement or place special emphasis on some of these. For instance, since cases involving vulnerable defendants may take place behind closed doors, access to in camera proceedings may be particularly important to a thematic programme focusing on such defendants. In such cases, access should be agreed upon with the host country through an MoU.<sup>196</sup> Additionally, depending on the theme examined, monitors will need to place special emphasis on particular information-gathering techniques from among those described in Chapter 9.

<sup>196</sup> See Chapter, "Access to closed hearings".

Thematic monitoring may also cover points or issues outside the courtroom that are relevant to the theme or type of case being monitored. For example, in monitoring justice issues concerning vulnerable individuals, a thematic programme may look into the activities of other agencies that assist individuals in such proceedings, such as the role of social welfare centres in proceedings involving juveniles or that of experts responsible for establishing the mental state of vulnerable persons. In thematic monitoring of domestic violence or hate crimes cases, monitors may examine whether the police have complied with established standards. Programmes have also sought to gather information or gain first-hand experience of whether institutions that host mentally ill or juvenile offenders meet international standards.

In many contexts, thematic monitoring requires a closer look into the merits of cases, such as in war crimes proceedings, in order to assess procedural guarantees. Doing so can allow a more thorough evaluation of the independence and impartiality of judicial actors, as well as a better understanding of the selection of cases for trial or sentencing practices. For instance, the Mission to Croatia's main impetus to monitor war crimes proceedings was the concern that the Croatian judicial authorities were biased in the selection of cases for investigation and trial, targeting ethnic Serbs, as opposed to ethnic Croats.<sup>197</sup>

#### 15.4 Outputs of thematic trial monitoring

The specialized nature of the themes monitored often results in different outputs from those of systemic trial monitoring. While reporting remains a principal output, thematic programmes are often more proactively engaged in advocacy activities, since they are focused on particular problems or issues rather than broad trends in reform. For example, programmes monitoring war crimes trials have not only reported publicly on the progress of cases, but have also focused on capacity-building, strengthening co-operation with neighbouring countries, outreach efforts and witness-support schemes. They have also encouraged and provided advice and technical assistance to the authorities on the adoption and implementation of strategies to address the prosecution of war crimes. Since thematic programmes have not always had the specialized in-house expertise required to achieve all of their objectives, they have also turned to external experts for this purpose.

Thematic programmes have also been involved in other types of advocacy activities, including supporting discussions among legal professionals, co-operating with training centres and contributing to legislative amendments necessary to ensure that the shortcomings identified through monitoring are addressed. The advocacy activities carried out by thematic programmes need to be tailored to the scale and complexity of the thematic area being covered, as well as to the resources of the programme. For instance, some advocacy activities on organized crime, terrorism or war crimes cases might be better suited to regional initiatives, which may be more sustainable than domestic ones. In subject areas where public perceptions matter greatly, as in war crimes, terrorism and organized crime proceedings, commissioning public opinion surveys may provide the information needed for further outreach and advocacy activities.<sup>198</sup>

197 For a discussion of monitoring the merits of cases see Chapter 11.4.2, "Simplifying the reporting of facts" particularly the point titled "Analysis of impartiality and fairness through a comparative or statistical approach", as well as Chapter 20.2, "Identification of issues and analysis in ad hoc monitoring".

198 See as an example the Survey on "Views on war crimes, the ICTY, and the national war crimes judiciary", April 2009, by Strategic Marketing Research and OSCE.

## CHAPTER 16

# Main Themes Encountered in Trial-Monitoring Programmes

This chapter discusses and provides examples of a number of issues that have been the subject of thematic trial-monitoring programmes within the OSCE. It describes some of the salient features of each, including why the topics were chosen and variations in the methodology of different programmes. The list of examples offered here is not exhaustive, and other issues could be chosen by future programmes.

### 16.1 Monitoring the implementation of new codes

Thematic monitoring of the implementation of new legal codes can be valuable if justice systems have undergone a complete change in their criminal or criminal procedure codes. Bosnia and Herzegovina is one jurisdiction in which the system was transformed from inquisitory to hybrid, with robust adversarial features. Another jurisdiction in which this was the case is Kosovo. Considering that, in both cases, the introduction of these codes occurred rapidly, domestic legal professionals had little time to adapt to the radical changes in the laws. Therefore, the manner in which the new codes were implemented was of great interest for monitoring programmes.<sup>199</sup>

To make valid assessments on how a new legal framework is implemented throughout a jurisdiction, programmes should ensure a sufficiently large and long-term presence on the ground, covering multiple courts and as many hearings as possible. While monitoring personnel for such programmes should have a general legal background, previous experience practicing law may not be necessary, since monitors will be observing entirely new procedures and practices. The international presence in such programmes may be limited to senior positions, while nationals can be employed as monitors, as this type of monitoring does not pose any particular concerns in terms of the security of monitors.

In terms of methodology, managers of thematic programmes observing the implementation of new codes may decide that it is sufficient to follow only selected hearings in different cases. For instance, if new amendments to the law affect pre-trial detention, then detention hearings may be selected as particularly relevant, together with a review of any subsequent detention orders and motions obtained from the case file. However, unless carefully structured, monitoring the implementation of new provisions may not always identify non-compliance with fair trial rights or bring to light the root causes or the consequences of certain practices. This can especially be the case for programmes that use statistics extensively, which can make a report difficult to read and lessen the impact of an argument. For example, finding that only two per cent of courts use audio recording for their hearings may not stun the authorities into taking action, unless a report also explains how this adversely impacts upon the parties' right to a fair hearing.

<sup>199</sup> In Bosnia and Herzegovina, the imposition of new codes by the Office of the High Representative happened almost overnight in 2003. In 2004, the newly established trial-monitoring programme of the OSCE Mission engaged in monitoring the implementation of the new criminal procedure code by deploying 24 national monitors to cover 38 trial and appellate courts throughout the country.

In terms of advocacy activities, by way of example, the OSCE Mission to Bosnia and Herzegovina initiated the practice of regular meetings of “Local Implementation Groups”, convened by court presidents to discuss challenges faced in the implementation of the new Criminal Procedure Code. These meetings including OSCE staff, judges, prosecutors, defence counsel and law-enforcement officials, proved to be useful forums in the first few years following the introduction of dramatic changes to the criminal procedure framework. The OSCE Mission also shared trial-monitoring findings with ad hoc bodies within the ministries of justice tasked with monitoring the implementation of the criminal code and criminal procedure and developing necessary amendments. Conclusions from the Local Implementation Group meetings nationwide were compiled and shared with legislative-reform bodies.

## 16.2 Monitoring investigation and pre-trial proceedings

There are many significant issues that thematic programmes can monitor in investigative proceedings, shown on the chart in Annex II.A. Gaining access to the pre-trial phase of proceedings was addressed in Chapter 4.6, hence those considerations are not repeated here. OSCE field operations have engaged in direct pre-trial monitoring either from the beginning of their operations, as did the Mission in Kosovo, or as a result of the expansion of their systemic monitoring programme, as with the Mission to Bosnia and Herzegovina.

Thematic programmes on pre-trial proceedings need to pay special attention to reassuring local authorities about the programme’s controls over confidential information and the monitors’ non-interference with investigations. It is imperative for managers to address how information gathered from closed proceedings will be handled, given its confidential nature. This might have implications also for other elements of the programme, such as, for instance, whether NGOs will be accepted as monitors by the authorities.

To assist monitoring staff in their work, programme guidelines should make specific reference to standards observed in pre-trial proceedings.<sup>200</sup> Guidelines or programme instructions should also clarify which hearings or investigative actions may be followed. In addition, programme designers will need to consider how much attention should be paid to the merits of cases.

## 16.3 Monitoring war crimes proceedings

War crimes proceedings are a priority for all OSCE trial-monitoring programmes in host countries that process such cases, as well as for ODIHR, which provides additional assistance in this sector to OSCE field operations.

The OSCE trial-monitoring programmes in South-Eastern Europe have developed a variety of thematic structures for focusing on these proceedings. Two of the OSCE trial-monitoring programmes, in Croatia and Serbia, were representative of long-term thematic projects that follow almost exclusively war crimes trials.<sup>201</sup> The Mission in Kosovo has always observed war crimes trials through its monitoring of criminal proceedings. The Missions to Skopje and to Montenegro also monitor war crimes proceedings alongside other high-profile cases. The Mission to Bosnia and Herzegovina has always had within its systemic trial-monitoring programme a team dedicated to following war crimes proceedings.<sup>202</sup>

200 Monitors should also be well acquainted with the most recent legal developments, such as those from the jurisprudence of the European Court of Human Rights. The latter has found in its case law that an investigation should be effective, independent, prompt and open to an element of public scrutiny. See, for instance, <[http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614-2.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614-2.pdf)>.

201 Other components of these field operations assist local authorities in other justice-related reforms. In Croatia, the programme began to limit its monitoring exclusively to war crimes trials in 2008.

202 This unit also included the “Rule 11*bis* project”, which was created for the purpose of monitoring six cases indicted by the ICTY that were transferred to the Court of Bosnia and Herzegovina for trial (see the example in Chapter 3.11).

In terms of staffing and field-support practices, both nationals and internationals have held monitor and legal analyst positions in war crimes proceedings monitoring. Certain programmes have also invested in supporting their staff psychologically against re-traumatization,<sup>203</sup> while all managers have taken precautions against possible threats to the security of monitors.<sup>204</sup>

War crimes monitoring projects have engaged energetically in advocacy. Annex VII includes various examples of public monitoring reports on war crimes trials. Beyond reporting, staff monitoring war crimes proceedings have also engaged in promoting knowledge transfer, dialogue, transparency, outreach and other confidence-building measures. Some notable advocacy activities have included:

- the promotion of technical and political interstate co-operation in war crimes matters;<sup>205</sup>
- capacity-building initiatives throughout the former Yugoslavia. Of particular note is the effort driven by ODIHR and supported by the ICTY, the United Nations Interregional Crime and Justice Research Institute and the regional OSCE field operations, which ran from 2008 through 2011. This aimed at promoting knowledge-transfer in war crimes processing and led to the publication of a report.<sup>206</sup> In turn, these findings were implemented by the “War Crimes Justice Project” with EU funding,<sup>207</sup> and
- contributions to the development of other truth-seeking and reconciliation mechanisms promoted by civil society in post-conflict areas.

#### 16.4 Monitoring trafficking in human beings and other organized crime

Organized crime, with its transnational character, is considered by the OSCE to be one of the main threats to the safety and stability of all participating States.<sup>208</sup> It has many facets, including trafficking in human beings for the purpose of sexual or labour exploitation, drug trafficking, money laundering, corruption and terrorism. Trial monitoring of organized crime cases has been a priority for a number of monitoring programmes, with the heaviest focus having been on anti-trafficking activities.

Monitoring programmes have developed diverse structures for handling the portfolio of organized crime. For instance, NGOs involved in trial monitoring have often been eager to make organized crime a priority, as is the case with the Coalition All for Fair Trials, supported by the OSCE Mission to Skopje. Certain systemic monitoring programmes have assigned legal analysts as focal points for anti-trafficking activities. Moreover, the portfolio of trafficking in human beings may be separated from that of other organized crime, allowing different legal analysts to look into the distinct issues in more depth, as was the case with the OSCE Missions to Bosnia and Herzegovina and the OSCE Mission in Kosovo.<sup>209</sup> In some field operations, advocacy and outreach activities to combat organized crime – i.e., capacity-building of judicial actors, interstate co-operation or legislative reforms – are dealt with by units separate from the trial-monitoring programme.

Combating trafficking in human beings is seen as a threefold process, targeting prevention, protection and prosecution. Thematic trial monitoring can yield significant information on the third element, but also on the effectiveness of the second. While trial monitoring has traditionally

203 See Chapter 8.5.6.

204 See Chapter 8.5.7.

205 An example is the Palic Process, a process to stimulate co-operation in the judicial area among four countries that began in the Serbian city of Palic in 2004, under the auspices of the OSCE. See, for instance, <<http://www.osce.org/zagreb/32648>>.

206 See the report “Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer - Final Report” (2009); available at <<http://www.osce.org/odihr/38689>>.

207 For more information see <<http://www.osce.org/odihr/74803>> and <<http://www.icty.org/sid/240>>.

208 See the Report on OSCE Activities in the Fight against Organized Crime in 2010 by the Office of the Secretary General, Strategic Police Matters Unit.

209 It is of interest that the OSCE National Anti-Trafficking Officer in the OSCE Mission to Bosnia and Herzegovina was also seconded to the newly formed Office of the State Co-ordinator for Combating Trafficking in Human Beings and Illegal Immigration, as a form of concrete support following advocacy with authorities to establish such a role within the government.

concentrated on the defendant's rights against possible abuse by the authorities, the monitoring of trials concerning trafficking in human beings is one area where particular focus is placed on protection of victims and witnesses. This entails many measures, including early identification, in order to avoid the prosecution of victims for offences such as prostitution or illegal immigration, and to ensure that they receive assistance and protection. Trial-monitoring programmes may need to develop additional mechanisms – e.g., questionnaires, interviews – to identify cases where protection is not afforded to the injured parties.

Monitoring findings from organized crime cases are often used in reports analyzing other thematic areas, such as witness protection. In addition to monitoring reports on trafficking proceedings,<sup>210</sup> monitoring programmes and ODIHR have undertaken a number of other activities to combat trafficking. These range from establishing help-lines to reviewing legislation, and include providing technical and financial assistance for the creation of websites for the competent national authorities.<sup>211</sup>

### 16.5 Monitoring cases with vulnerable persons

Among the priority areas where trial-monitoring programmes focus their activities is monitoring proceedings in which members of vulnerable groups are involved as defendants or injured parties.<sup>212</sup> Therefore, trial monitors will follow cases involving members of minority ethnic groups or cases of inter-ethnic crime and hate crimes, domestic violence, rape and crimes committed by or against mentally-ill persons, as well as proceedings involving juveniles.

The extent to which the OSCE will operate a separate thematic project to monitor proceedings involving vulnerable groups will depend on various factors. The protection of vulnerable groups may stem directly from the mandate of the field operation,<sup>213</sup> or result from the deterioration of a given situation in the host country.<sup>214</sup> A lack of institutions to deal with vulnerable groups, such as mentally-ill persons or juveniles, may also ground the decision to establish a focal point or unit within a programme to follow such proceedings and conduct specifically tailored advocacy activities.<sup>215</sup>

In terms of advocacy and outreach, apart from issuing relevant reports, some monitoring programmes have contributed to raising public awareness regarding victims' rights where monitoring findings pointed to a lack thereof. The programme in Bosnia and Herzegovina, for example, developed a "Template for Property Claims" for victims claiming compensation through criminal proceedings, and the leaflet "Know Your Rights and Duties", addressed to victims testifying in criminal proceedings.<sup>216</sup>

### 16.6 Monitoring civil and administrative proceedings

Although most trial-monitoring programmes globally focus on criminal proceedings, there is a growing tendency to expand activities to cover civil and administrative proceedings. Among the first programmes to do so was the LSMS of the OSCE Mission in Kosovo; this programme has been monitoring criminal cases since 1999, but expanded its focus to civil cases in 2004, and to

210 See Annex VI.

211 See for instance <<http://www.osce.org/odihr/23708>>.

212 Vulnerable groups or persons can be understood as those who are more likely to have additional needs when dealing with the justice system and who may face discrimination or experience poorer outcomes if these needs are not met. Vulnerable persons may include, for example, persons belonging to minorities or juveniles.

213 For example, the protection of ethnic communities in Kosovo.

214 The monitoring of domestic violence, juvenile or trafficking cases is often the result of a peak in the occurrence of these crimes.

215 In practice, it has been most common to create a group of monitors to follow domestic violence, cases involving ethnic communities and juvenile offenders, as in the field operation in Bosnia and Herzegovina from 2006. See <<http://www.osce.org/bih/48001>>.

216 See <[http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010122712570728eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010122712570728eng.pdf)>.

administrative cases in 2006. The OSCE trial-monitoring programmes in Albania, Azerbaijan, Croatia and Montenegro have also included components of civil and administrative monitoring in their work.

Although the monitoring of civil and administrative proceedings is developed in this manual under the heading of thematic trial-monitoring programmes, some systemic monitoring programmes could also centre around civil and administrative proceedings. However, in line with the general descriptions set out in Chapter 1.4.1, this type of monitoring would most often be considered either a thematic monitoring programme or a discrete thematic element within a systemic programme, in that it has its own focus, methodology and staff. The LSMS of the OSCE Mission in Kosovo, for example, divides its monitoring activities into those observing the criminal justice sector and those monitoring civil and administrative cases. As noted above, the LSMS is an instance in which a monitoring programme began by concentrating on the criminal system and only subsequently expanded into monitoring civil and administrative processes.

When expanding operations into these fields, monitoring programmes will need to review any agreements or MoUs with the national authorities and confirm that they also provide access to civil and administrative proceedings.<sup>217</sup> If, while setting up a programme, managers consider it likely that they will eventually be looking into civil and administrative proceedings, they may negotiate access agreements with the authorities that cover all these fields from the beginning.

The differences in monitoring the various fields of criminal law is arguably not as great as the differences between criminal, civil and administrative proceedings, since each is regulated by an entirely different legal framework. If a monitoring programme wishes to cover all these aspects of the justice system, this may result in different teams being created to cover the distinct areas of law. In general, managers should try to hire staff with experience or specialized background in the particular type of legal proceedings they will be following.<sup>218</sup>

One of the greatest challenges in post-conflict countries and states in transition is that the legal framework for civil and administrative proceedings is often obsolete, discriminatory, inconsistent, scattered and suffering from legal vacuums. Therefore, monitoring programmes may need to make painstaking efforts to ensure that the most common and relevant substantive and procedural laws and legal material are obtained and made accessible to monitoring staff, including through translation, if necessary. Local academics and eminent practitioners have proven to be reliable trainers on civil and administrative law in host countries and are in a good position to identify the main problems in their systems.

An initial challenge for new civil and administrative programmes is the identification and prioritization of cases. Existing programmes have focused on cases where vulnerable groups are involved. These have included cases related to the property rights of ethnic minorities, as well as cases on family law, conflict-related property claims and the adjudication of interim measures.

It is possible that the programme will be required to identify parts of the legal framework that are obsolete, contradictory, biased or run contrary to human rights principles. This can be especially challenging when jurisprudence on particular matters is not straightforward. This was the case, for instance, with regard to property adjudication proceedings in Kosovo, which presented many legal dilemmas. Monitoring staff may need to compare how certain institutions function in other justice systems, in order to propose more effective and human rights-compliant ways of dealing with certain disputes or legal actions. Programmes will also need to be vigilant in addressing issues that may

<sup>217</sup> See Chapter 4, “Access to court proceedings”.

<sup>218</sup> When the OSCE Mission in Kosovo started to expand its programme, it shifted international monitors to civil and administrative proceedings and handed over criminal cases to newly hired national monitors, in order to use the experience of international professionals at the outset of monitoring new areas of the justice system.

not be regulated by domestic laws, possibly due to their novelty, but which can lead to the exploitation of persons in vulnerable positions.<sup>219</sup>

Monitors of civil and administrative proceedings need to develop co-operative relationships with different stakeholders than those in criminal proceedings. Given that these civil and administrative proceedings frequently involve the services of numerous governmental agencies, monitors may also need to assess the effectiveness and professionalism of those bodies if they impact upon the functioning of the courts or the broader justice system.

Thematic programmes monitoring civil and administrative proceedings may also face special challenges of sustainability when the time comes to close the programme. Civil society may not always be as developed or energetic in following civil and administrative law cases as in criminal ones. Managers of thematic programmes in these fields must, therefore, pay extra attention to advocacy and to raising public awareness of their programmes and the substantive problems they confront, in order to encourage civil society and the media to become more involved.<sup>220</sup>

219 Examples of these can be civil and same-sex unions in family law or for hereditary rights, adoption or fostering of minors, movement of persons in and out of the country, the exploitation of human stem cells for financial profit, and practices relating to artificial insemination.

220 Chapter 14 provides further information and strategies on sustainability when closing a programme.

# PART V

## *AD HOC TRIAL MONITORING*

## CHAPTER 17

# Mandate, Principles and Aims of *Ad Hoc* Trial Monitoring

International and domestic organizations sometimes engage in trial monitoring in order to observe directly and form an opinion about how particular high-profile cases are handled by the courts. In the OSCE experience, these projects have come under the heading “ad hoc” trial monitoring. OSCE ad hoc monitoring has been organized in response to specific events that gave rise to criminal proceedings, such as post-election violence or the prosecution of human rights defenders and journalists. The presence of observers at such trials can be especially important as a confidence building measure, in line with OSCE commitments on trial monitoring.<sup>221</sup> ODIHR has carried out a number of such projects in recent years, sometimes jointly with OSCE field operations.

Ad hoc monitoring is based on the same principles as other kinds of trial monitoring described in this manual: non-intervention in the judicial process, objectivity and agreement. Application of these principles in an ad hoc monitoring context should be guided by the specific aims of the activity. For example, non-intervention is based on respect for the independence of the judiciary and generally proscribes engagement with the court regarding the merits of individual cases. In ad hoc monitoring, however, this does not amount to a blanket prohibition of contacts with courts and does not preclude interviews with judges for information-gathering purposes or subsequent advocacy activities. Since ad hoc monitoring often centres on sensitive political cases, the principle of objectivity acquires additional importance, and care must be taken to ensure that it is not compromised – or perceived to have been compromised. The principle of agreement emphasizes the need for engagement with the authorities from the outset of the monitoring activity, including transparent communication of the planned methodology and envisaged outputs. Ultimately, this also facilitates greater acceptance by the authorities of the resulting findings and recommendations.

Similarly, principles of conduct for trial-monitoring staff apply equally to ad hoc monitoring projects. This includes the duties of non-intervention, impartiality, professionalism and confidentiality.<sup>222</sup> The sample code of conduct for monitors in Annex I. A. applies to ad hoc programmes, as well as to other types of trial monitoring. Monitors in ad hoc projects should be held to the highest standards of professional conduct, and this should be taken into consideration by managers when hiring and training decisions are made.

The main difference between the aims of ad hoc monitoring and those of systemic monitoring is that ad hoc monitoring focuses on specific human rights concerns, rather than a broader justice-reform agenda. However, this does not preclude ad hoc monitoring projects from issuing conclusions and recommendations of a general nature and engaging in follow-up dialogue with the authorities. While the specific cases targeted by ad hoc monitoring are unlikely to be representative of the routine caseload handled by the courts, such high-profile cases can be seen as “stress-tests” exposing the key strengths and weaknesses of a criminal justice system.

<sup>221</sup> See the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990), paragraph 12.

<sup>222</sup> See Chapter 8.1, “Standard of conduct for trial-monitoring staff”.

The context in which ad hoc monitoring activities take place is often politically sensitive, and the prospect of additional scrutiny may be even less appealing to the authorities than in other types of trial-monitoring projects. Acceptance of the monitoring will be facilitated by clear communication of the activity's aims, methodology and envisioned outputs to all stakeholders. Such communication will help all actors – from the government and judiciary to civil society – to understand the monitoring activity and form appropriate expectations with regard to its results. In OSCE experience, relevant information is often conveyed to the authorities in official correspondence before the start of monitoring. Project managers should strive to supplement this with meetings and briefings with all stakeholders, to minimize the risk of misinterpretation and miscommunication.

#### **Aims and background of ad hoc monitoring projects:**

##### ODIHR Trial Monitoring in Belarus (2011)

Pursuant to an exchange of letters between the Director of ODIHR and the Permanent Representative of Belarus to the OSCE, an ad hoc trial-monitoring activity was deployed to monitor the criminal proceedings against persons charged with offences related to the violence that followed the presidential elections of 19 December 2010. The monitoring pursued three aims:

- to assess the compliance of the monitored trials with relevant domestic and international fair trial standards;
- to identify concerns and areas for improvement in the criminal justice system; and
- To present the Belarusian authorities with recommendations aimed at improving the administration of criminal justice in line with their OSCE commitments.

##### ODIHR and OSCE Centre in Tashkent Trial Monitoring in Uzbekistan (2005)

Following the violence on 13 and 14 May 2005 in Andijan, an ad hoc trial-monitoring activity was organized by ODIHR in co-operation with the OSCE Centre in Tashkent, upon agreement with the Ministry of Foreign Affairs of Uzbekistan. Between September and November 2005, the project it observed the criminal proceedings of 15 individuals charged with violent crimes and other serious offences against the state. The monitoring aimed to:

- assess the proceedings for compliance with international fair trial standards and OSCE commitments; and
- establish and maintain a dialogue with the Government of Uzbekistan on issues related to fair trial standards.

Ad hoc monitoring activities have certain distinct features that set them apart from systemic and thematic monitoring described in Part III and Part IV, respectively. As their name suggests, ad hoc monitoring activities do not constitute a part of a planned reform assistance programme but, rather, are triggered by specific proceedings the monitoring organization regards as warranting such a response. The monitored trials are often highly publicized and may be perceived as controversial and/or politically sensitive.

Operationally, most ad hoc activities have a limited duration, are organized in a short period of time and, therefore, face special logistical and administrative challenges. By their nature, ad hoc projects have a limited scope, focusing on the specific cases related to the events that served as the catalyst for monitoring. They seek to gain access primarily to the particular proceedings resulting from those events. Like other types of trial monitoring, however, they are aimed at assessing compliance with fair trial and human rights standards, and they issue public reports to make their findings and analysis available to the public and the authorities.

The following chapters provide some details and guidance on the operation of ad hoc projects. It should be emphasized that many aspects of systemic and thematic monitoring operations described in earlier chapters are also applicable to ad hoc monitoring, taking into account the differences dictated by the special circumstances of ad hoc activities.

## CHAPTER 18

# First Steps and Initial Considerations in Establishing an *Ad Hoc* Trial-Monitoring Programme

The steps outlined in Chapter 2, “Conducting a Preliminary Assessment”, provide general guidance applicable in setting up an ad hoc project. However, because ad hoc projects are usually established in different circumstances and for different purposes than systemic or thematic monitoring, this chapter provides additional methodological guidelines for organizations and project managers to consider when establishing an ad hoc monitoring programme.

### 18.1 Identifying situations for ad hoc monitoring

Organizations with a security and human rights mandate such as the OSCE are guided by a number of considerations when they identify situations that merit ad hoc trial monitoring. These may include international concern about the events that triggered the criminal proceedings, insufficient confidence in justice administration in the country, the appearance that prosecutions of prominent opposition figures or human rights defenders might be based on political considerations, and similar concerns. In assessing these factors, an overall review of the in-country conditions, as described in Chapter 2.2.1, will be beneficial, even if its scope and depth will be affected by time constraints. A decision to conduct trial monitoring may also be taken on the basis of prior assessment or monitoring of the situation – such as an election observation mission or a human rights assessment mission.

### 18.2 Reviewing operational capacity

Once it has been decided that identified proceedings should and can be monitored, the organization’s capacity for carrying out the operation should be examined. In this regard, suggestions outlined above in Chapters 2.2.2 through 2.3 should be taken into account. Review of operational capacity should match available resources with the anticipated needs of the monitoring activity, propose a plan to allocate resources efficiently and/or seek additional resources. In ODIHR’s experience, this has included discussions with OSCE field operations, where applicable, on co-operation and pooling of resources. An assessment of staffing needs at an early stage will facilitate timely recruitment, especially of the necessary external staff.<sup>223</sup> A preliminary budget for the activity should assess its financial implications in the short, medium and long term if the monitoring may potentially continue for some time.

Even when there are time constraints, the organization should prepare at least a brief programme paper setting out the purpose, methodology and anticipated time-frame for the programme.<sup>224</sup> This is important to ensure that the overall concept for monitoring is well thought through and that all actors have a common understanding of the basis of the programme. A programme paper, as in systemic monitoring, may also be useful in building support for the programme and for conduct-

<sup>223</sup> See, Chapter 19.2 “Staffing issues”.

<sup>224</sup> See, Chapter 2.3 “Drafting a programme paper”.

ing discussions with possible partners, the host government and donors, as well as in any eventual evaluation of the project.

### 18.3 Ensuring access

Negotiations regarding an ad hoc project's access and operations should take place at the earliest possible time, in order to reach an agreement with the authorities on its scope and practical issues.<sup>225</sup> Although all OSCE participating States have committed themselves to accept the presence of monitors, in practice host governments have often sought to limit the parameters of such monitoring. In those instances, project managers may have to decide whether and how to strike a balance between the call to ensure the monitoring is conducted at any costs and the need to do so based on a sound methodology that includes full access and a relative degree of confidence and trust with the host country.

Access agreements may be concluded in the form of MoUs or exchanges of letters. They should include, at least, the minimal arrangements necessary to carry out the planned monitoring activities. These include the presence of sufficient numbers of staff in the country, access to the court proceedings and access to documents and interviews with relevant actors. International organizations such as the OSCE may be in a position to negotiate greater access than that normally granted to domestic civil society activists.

For ad hoc projects, the term “proceedings” normally refers to the public trial in the first-instance and appellate courts. Access to closed hearings is desirable, wherever it can be negotiated with the authorities. Ad hoc projects may face challenges in obtaining access to the investigative stage; nevertheless, project managers should strive to obtain access to detention facilities and, where relevant, pre-trial detention hearings. One of the arguments for such access is the need to monitor properly any allegations of ill-treatment in custody.

After the formal arrangements are completed, it is advisable for the monitoring organization to seek a meeting with judicial authorities at an appropriately high level to introduce the monitoring activity and its key personnel. The introduction should include a general overview of the methodology and explain what outputs may be expected and how they will be used. This meeting may also present a suitable opportunity to request access to documents and interviews and to agree on the details of observation, such as the use of technical means in the courtroom, the facilitation of interpretation for the monitors and similar issues.

### 18.4 Making logistical and administrative arrangements

Logistical and administrative issues should be foreseen and tackled as early as possible in the preparatory stage. These issues include, among others:

- *Travel, transport and visa requirements.* Obtaining visas, in particular, can be time-consuming. In addition, consideration must be given to whether any special status is to be conferred on the staff. Special letters or identification may need to be issued to all monitoring staff to facilitate their arrival and movement in the country, as well as access to court premises.
- *Lodging.* Lodging monitors in proximity to the court and to each other will facilitate their transportation and communication.
- *Communication with the team during deployment.* Access to the Internet for the monitoring team should be ensured where possible. Project managers should establish policies on the use of e-mail or other electronic communication, such as Skype and mobile phones. The necessary

<sup>225</sup> See Chapter 4, “Access to court proceedings”.

equipment and accessories (local SIM cards, mobile Internet modems, etc.) should be budgeted for and procured.

- *Making records of proceedings.* It is necessary to establish whether monitors will be taking handwritten notes of proceedings or whether laptops and audio-recorders may be used. If laptops and audio recorders are available to the monitors and allowed in the courtroom, the files produced can be more easily shared with the team leader and colleagues for the purposes of verifying information, analysis and drafting.
- *Information technology for storing and managing monitoring data.*<sup>226</sup> An elaborate information-management system in the form of a database may be unnecessary for an ad hoc project of limited scope and duration. However, if the monitoring of a large number of cases is foreseen, prompt establishment of such a system can facilitate the organization and processing of monitoring findings, efficient division of work and effective management of all tasks.
- *Payment methods.* Bank transfers are widely used to complete payments internationally, while a field operation may also assist in making payments locally. However, challenges may arise where monitoring takes place in a location where no field operation exists and, for whatever reason, bank transfers are not possible. Security concerns involved in cash handling should be considered in the planning process.

The preparatory phase in ad hoc trial monitoring may need to be completed quickly. Experience shows that there is often a short interval between the events occurring and the corresponding criminal proceedings taking place. This accentuates the need for standby systems to be in place and for good practices and lessons learned from previous programmes to be at the disposal of project managers.

226 See Chapter 5, “Establishment of an Information-management System.”

## CHAPTER 19

# Operational Aspects of *Ad Hoc* Trial-Monitoring Projects

Ad hoc monitoring projects have special operational features that distinguish them from other types of monitoring. In particular, the monitoring team is usually assembled quickly, includes internationally experienced individuals and operates for a relatively short period of time. These and other special requirements pose various challenges. This chapter describes salient features of ad hoc monitoring operations, including project structure, staffing issues and training.

### 19.1 Project structure

In terms of structure, an ad hoc monitoring project is usually run by a project manager, co-ordinator or senior monitor, who bears overall responsibility for implementation of the project. This includes both substantive and administrative issues, as well as providing general guidance and oversight to the team.

The team itself may not have the hierarchical structure of systemic programmes, since all team members may carry out monitoring functions. However, it is advisable for ad hoc teams to be led by a more senior professional with experience in this field of work, as well as in management and operational issues. The responsibilities of a team leader may include some or all of the following tasks:

- conducting monitoring;
- managing and co-ordinating the team's work;
- liaising between the team and headquarters, preparing periodic reports and updates;
- representing the team externally with national and international actors;
- drafting the final report; and
- Carrying out administrative duties, as necessary.

Sample terms of reference for a team leader can be found in the Annex V. A.

The role of the team leader in representing the ad hoc project before international and national interlocutors, as well as before the media, should be considered and agreed upon. This role is important in programme management and resolving any contentious issues with the authorities, as well as establishing working relationships with other relevant actors. The monitoring organization may prefer to channel media enquiries and contacts through its own public relations staff, in which case the team leader would not always be the “public face” of the ad hoc project. The division and scope of responsibilities should be made clear to the team leader and reflected in the terms of reference.

As with other types of programmes, ad hoc monitoring also requires legal analysis of the findings. It is advisable for larger operations to include legal analysts who devote a substantial amount of time to this role. If the project team is small, some or all of the monitors may perform analytical functions. In practice, however, while the monitors may have the qualifications and credentials to perform analysis, their workload and monitoring responsibilities may prevent them from fulfilling this role. The team leader should assess existing capacities early in the operation and request additional resources as necessary. Team leaders may be in the position to direct or even carry out research

and analysis themselves, but this does not detract from the need to staff the analytical function adequately. In OSCE experience, having one legal analyst for each three monitors or monitoring teams should ensure that proper attention is paid to all monitoring inputs, that the requisite feedback and direction is provided to monitors, and that the final report is drafted quickly and efficiently.

As in systemic and thematic trial monitoring, higher-level staff of ad hoc teams whose regular functions do not include direct observation of proceedings should, nonetheless, strive to attend at least some hearings, in order to gain first-hand experience of the justice system and the challenges the monitors may face.

Ad hoc monitoring activities may be organized according to either staff or project models, or use a combination of both.<sup>227</sup> The decision made should take into account the availability of internal and external resources, as well as the context and sensitivities of the monitoring activity. In ODIHR's experience, ad hoc monitoring had been carried out entirely by ODIHR and OSCE field-operation, personnel (Uzbekistan, 2005), or with the involvement of external international experts (Belarus, 2011) or national monitors (Armenia, 2008-2009).

## 19.2 Staffing issues

### 19.2.1 Nationality and experience

When monitoring is carried out in sensitive contexts by international organizations, proper attention must be given to the programme's image of independence and impartiality, as well as to the security of personnel. For these reasons OSCE ad hoc monitoring teams have usually been staffed by non-nationals of the host country. The inclusion of national monitors may be appropriate when these considerations do not weigh strongly and may be balanced by efficiency and financial considerations. For example, the ODIHR ad hoc project in Armenia (2008-2009) initially paired international and national monitors, but as the monitoring progressed and gained acceptance, teams composed of national monitors gradually replaced the mixed pairs.

If time pressure precludes formal training of monitors before the start of the project, it is advisable for project managers to hire experienced individuals with backgrounds in legal practice and trial or human rights monitoring. While a legal background is an advantage, ad hoc projects have also had some positive experiences with non-lawyers as monitors, e.g., persons with a background in journalism. On occasion, non-lawyers with a sound knowledge of the local context have provided valuable perspectives and made a more thorough record of the proceedings.

As the time-frame for identifying monitors may be short, organizations likely to engage in ad hoc trial monitoring can greatly benefit from a regularly updated roster of interested and qualified candidates, who can be contacted to staff a new operation on short notice. If national monitors are recruited, proper competitive recruitment processes will add credibility to the operation. If circumstances exclude this option, professional networks of reliable international and domestic actors may be utilized to attract qualified candidates.

### 19.2.2 Project-scale issues

The scale of an ad hoc project will depend on the number of cases and hearings to be monitored, on whether they are processed in geographical and temporal proximity, and on the available budget. Ad hoc projects carried out by ODIHR have varied from more than 20 monitors following approximately 100 trials over one year (Armenia, 2008-2009), to three monitors tasked with observing a single trial spanning several weeks (Uzbekistan, 2005). The decision whether to pair monitors will

227 See Chapter 3, "Choosing and institutional model".

also impact the number of monitors engaged.<sup>228</sup> Since ad hoc monitoring generally deals with a relatively small number of highly sensitive trials, pairing may be particularly appropriate to help ensure that monitoring is accurate and comprehensive, and to help protect against any misperceptions by a single monitor. In some instances, a host country has limited the number of monitors it agreed to accept at one time. In such circumstances, a decision must be made whether the limitations are too severe to allow for a professional monitoring operation and, if so, whether to enter into further negotiations with the host government or to call the monitoring operation off altogether.

In general, the larger and longer the project is, the more applicable are field support mechanisms outlined earlier in this manual, such as providing a forum for continuous training and exchange of information and experiences.<sup>229</sup>

### 19.2.3 Contract issues

Depending on the available budget and the expected number and duration of the trials to be observed, ad hoc project monitors may be hired on a daily or monthly contract. Short duration contracts, coupled with a requirement that monitors be available on “stand-by” to deploy for the next hearing, have the disadvantage of being unattractive to many professionals who have competing offers and parallel engagements. Therefore, project managers should find ways to make the compensation package sufficiently competitive to attract qualified personnel, or be prepared to engage staff with less experience.

If contracts cover only the days when a monitor is present at hearings, this may be a disincentive for monitors to devote any additional time to report writing or carrying out research on legal or factual issues to substantiate their findings. Project managers should, therefore, consider including a reasonable number of extra days in contracts for such activities. To ensure that monitors complete their final reports, contracts can include provisions stipulating a final payment only upon satisfactory completion of all tasks.

### 19.2.4 Support staff

Like other types of trial-monitoring programmes, ad hoc projects require the assistance of support staff. Especially when the monitoring is carried out in a country where the monitoring organization does not have offices, local assistants and interpreters may be indispensable. Duties of a local assistant may include consulting court schedules, making local travel arrangements and other administrative duties.

Engaging reliable interpreters is essential to carrying out monitoring activities effectively. In particularly sensitive contexts, where security, capacity and objectivity-related concerns exist, project managers may choose to hire international interpreters. However, this will entail significant additional costs and logistics. In ordinary circumstances, project managers may rely on professional recommendations or address translation agencies that provide interpreters specialized in legal terminology.

## 19.3 Training and briefing issues

Since ad hoc projects are often organized on short notice, there may not be sufficient time to conduct formal training prior to the monitoring activity. Time constraints may also limit the time monitors – especially internationally-recruited monitors – have to “read in” before their deployment. In some instances, monitors may first meet each other only after their arrival in a host country.

<sup>228</sup> See Chapter 8.5.4, “Monitor pairing.”

<sup>229</sup> See, for instance, Chapter 8 and Chapter 5.

Regardless of how experienced the monitors are, it is imperative for programme managers to ensure that at least a minimum of guidance and instructions are provided in advance of and during operations.<sup>230</sup> All team members should undergo a briefing prior to deployment. The briefing should provide information about the context of the monitoring operation, its scope and methodology; introduce the tools (such as reporting templates and interview questionnaires) and the code of conduct; and cover the logistics of deployment. If the team is recruited internationally, a briefing may take place via conference call or Skype to save travel costs. If no briefing for the monitors is carried out prior to deployment, the team leader must brief all team members on the ground.

In addition to the briefing, it is advisable to prepare a package of materials for the team members. This package may include background materials on the cases to be monitored, salient features of the national criminal procedure law, the substantive law relating to cases that will be monitored, the structure of the national court system, and references to international fair trial standards. It is also helpful to include practical information, such as the location of hotels and courts. A sample table of contents of such a package is supplied in Annex VI. C. Existing trial-monitoring manuals, earlier trial-monitoring reports and other resources, such as ODIHR's *Legal Digest of International Fair Trial Standards*<sup>231</sup> should be considered for inclusion in the package.

Opportunities for continuing training may vary depending on the duration and scope of the monitors' assignments, the amount of time spent by the monitoring team in the country, and available resources. At a minimum, project managers and team leaders should organize regular meetings of the monitoring team to exchange experiences and discuss challenges. Continuing training may be organized to address identified needs, such as certain aspects of domestic law or report-writing skills.

230 See also Chapter 8 to Chapter 12.

231 ODIHR, *Legal Digest of International Fair Trial Rights*, *op. cit.*, note 2. A list of other sources for substantive standards is included in Annex VII.

## CHAPTER 20

# *Ad Hoc* Project Monitoring Cycle

Ad hoc trial monitoring, like systemic and thematic monitoring, follows the “trial-monitoring cycle” described in Chapter 1, beginning with information gathering, then moving to analysis, advocacy and follow-up. Due to the nature of ad hoc monitoring, however, programmes usually close following the conclusion of the specific cases being monitored, leaving less opportunity for advocacy and follow-up. The sections below set out some of the specificities of the trial-monitoring cycle as it applies to ad hoc monitoring programmes.

### 20.1 Information-gathering techniques in ad hoc monitoring

By and large, the guidelines provided in Chapter 9 – “Information gathering and verification in systemic trial monitoring” – are also applicable in ad hoc monitoring. However, adjustments should be made to take into account the specifics of an ad hoc programme.

#### 20.1.1 Identification of cases and scheduling issues

Ad hoc monitoring projects generally expend little effort identifying cases for monitoring, as these usually will have been pre-determined by particular events and access agreements at the outset of the project. However, it is possible that additional sensitive cases connected to the events or otherwise of relevance for the aims of the project will arise later. If monitors become aware of such cases through the media or other sources, and the access agreement does not cover them already, project managers should seek the consent of authorities to expand their activities to these proceedings as well.<sup>232</sup>

Experience shows that scheduling monitors to cover hearings may present a challenge. Some trials have lengthy gaps between hearings, or multiple hearings in different trials may take place on the same day, in the same court or in different courts. As a result, monitors may have to stay in the country for extended periods of time without monitoring, or they may need to travel back and forth and be on “stand-by” for the next hearing. In order to limit inconvenience and save resources, project managers should seek commitments from the authorities to provide due notice of scheduled hearings. Local project staff should also be actively involved in verifying dates of upcoming hearings through court registrars and other contacts.

#### 20.1.2 Scope of ad hoc monitoring

Ad hoc monitoring involves a broad review of fair trial and human rights standards, much as is the case for systemic monitoring, but based on far fewer cases. Consequently, no procedural or substantive matter should be eliminated from ad hoc monitoring. However, while ad hoc monitoring may reveal the need for wider justice-system reforms, there may not be an opportunity for comprehensive research and analysis of systemic problems within the justice system. The ad hoc project should be mindful of its limitations and formulate its conclusions and recommendations accordingly.

<sup>232</sup> For example, when the ODIHR monitoring team in Belarus learned about disbarment of some of the lawyers involved in defending the accused in the monitored proceedings, a request was made to the authorities to monitor appeals lodged by these lawyers.

At the same time, managers of ad hoc projects should not ignore the context of the monitored trials. For example, if the monitored cases involve post-electoral events, then freedom of assembly and other related human rights may need to be analyzed. If the events that gave rise to the trials are widely perceived as controversial, or if the charges appear to be politically-motivated, the monitoring team may need to examine issues related to the merits of the case, such as the consistency of key witness testimonies and the extent to which the prosecution met the required burden of proof. The advice of national legal experts may be considered for particularly complex legal issues.

It is highly advisable for ad hoc projects to monitor proceedings until the judgements become final and binding. Doing so enables them to have a complete picture of how the justice system handled these cases, as appellate courts may reverse any problematic verdicts on the basis of the concerns also noted by the monitors. Appellate-level monitoring can further reveal shortcomings in appellate proceedings that are, by law, intended to correct first-instance judicial errors. Appellate-level monitoring also dispels possible subsequent criticism by the authorities of the impartiality of the findings.

### 20.1.3 Note taking

While observing trials, it is highly advisable that monitors take extensive notes. In OSCE ad hoc projects, the record of the trial has frequently not been provided to monitors and, even when it was, there were limited opportunities to verify its accuracy and completeness, or to translate it. In certain appellate proceedings the monitors observed that no record was created. Maintaining an independent record of what is said in court by all participants, making summaries of visual evidence presented and documentary evidence read aloud, as well as noting accompanying behaviour or conduct, enables monitors to search for and retrieve relevant information and examples from their notes for their reports. It also allows monitors to corroborate the points made in the reports with detailed references to the monitored proceeding.

Although detailed note taking on hours of proceedings can be strenuous for monitors, it has proven to be worth the effort. Indeed, it is far better to record information that may not be used than to lack the notes to substantiate a finding. As mentioned previously,<sup>233</sup> note taking can also be greatly facilitated by means of laptops or audio recorders, when their use is permitted.

### 20.1.4 Access to case files

Ad hoc projects may face obstacles in gaining access to the court-case files. In certain countries, even the written verdict is not shared beyond the trial participants, while the legal requirement of a public verdict is interpreted to pertain only to its partial oral pronouncement. Project managers should strive to ensure access to all documents relevant to the understanding and analysis of the observed trials. Where constraints are placed on access to court dossiers, monitors may seek to obtain at least some of the critical court documents – such as indictments and verdicts – from the parties, if there are no legal restrictions placed on the latter sharing such documents. The prosecution and the defence may also be approached to provide monitors with copies of relevant documents.

### 20.1.5 Meetings and interviews

Ad hoc monitoring teams should pursue meeting with the main trial participants and other persons who can provide information on the proceedings, the treatment of the defendants and witnesses, and background to the events. To this end, Chapter 9.3 to Chapter 9.5 should be consulted for guidance. It should be reiterated that, if meetings with defendants and their families are arranged, monitors should be explicit about their mandate, in order to avoid raising expectations, which could be

233 See Chapter 18, “First steps and initial considerations in establishing an ad hoc trial monitoring programme”.

especially high in political contexts or where the OSCE is one of the few or the only organization monitoring the trials.

Interviews with trial participants should be structured and based on lists of questions prepared in advance. Care should be taken to avoid any appearance of bias, so parties should be asked similar questions. Reports of all interviews should be written for internal use and, where necessary, to verify specific points. Questionnaires should be able to be shared externally, should such a need arise, e.g., at the request of the national authorities.

In addition to meetings for gathering information, project managers or team leaders should seek meetings with judicial authorities at suitably high levels at the outset of the monitoring programme, to explain the monitoring activities and develop co-operative relationships. It may also be beneficial to seek meetings with trial judges to introduce the monitoring operation and explain the methodology, as well as to obtain information. Such meetings, however, should not create any appearance of interfering with judicial independence and the administration of justice; in politically sensitive contexts, therefore, project managers may decide not to pursue them.

Ad hoc trial monitors may additionally consider the use of written questionnaires for all trial participants, when feasible and appropriate, particularly in cases where communication cannot take place in person.

## 20.2 Identification of issues and analysis in ad hoc monitoring

Ad hoc project managers and team leaders need to consider in advance whether the scope of the monitoring will cover only procedural matters or also look into any issues related to the merits of the observed cases. If it is decided to examine the merits of cases, project managers should recall the principle of non-intervention and refrain in the course of proceedings from public comments that might be construed as violating this principle. Care should also be taken in making comments or reaching conclusions if monitors may not be privy to all evidence in a case.

Judicial discretion however, should not amount to arbitrariness. Therefore, the examination of the merit of cases may be considered when deciding upon the methodology of ad hoc monitoring. This includes the examination of evidentiary matters and of the decisions of the court, as these can reveal whether compliance with fair trial standards is met. In most ad hoc monitoring, it is not sufficient to limit observations and analysis strictly to procedural matters. However, the monitoring of procedural fairness should always be the starting point of monitoring, not least because it protects the programme from accusations of bias.

Chapter 10, “Analysis of Trial-monitoring Findings”, should be consulted for other aspects of analysis that ad hoc monitors should conduct to reach their conclusions. As with other types of monitoring, staff of ad hoc projects should identify and verify any problems noted in the proceedings and, to the extent possible, assess their root causes. Due to the nature of ad hoc monitoring and its inherent limitations, monitors may not be able to gather sufficient data for the comparison of findings or for identifying trends. The monitoring report should explain these limitations and make appropriate reservations regarding the scope of findings and recommendations.

## 20.3 Advocacy and follow-up in ad hoc monitoring

Ad hoc monitoring operations rarely issue public statements or interim reports until the end of the monitoring process. The advisability of such statements should be considered by project managers in light of the circumstances, including agreements with the authorities, the political context, the level of concern and other relevant factors. Project managers and team leaders may also take up specific problems with the authorities, such as allegations of torture.

In OSCE experience, ad hoc monitoring activities have most often resulted in the publication of findings in one final report. Project managers should inform the authorities at the outset whether the final report will be made public. The advantages of confidential reporting have been explained in earlier chapters.<sup>234</sup> However, most ad hoc operations are expected to make their findings and recommendations public, especially since greater transparency, oversight and public confidence in the administration of justice usually justify the monitoring activity in the first place. Without a public report the ad hoc monitoring activity may be deprived of its most powerful advocacy tool, or may even be seen as complicit in covering up violations of fair trial standards.

The drafters of the final report should choose balanced language that may be used as a basis for dialogue and co-operation in follow-up activities. Recommendations should be formulated to enable follow-up, ideally addressed to specific responsible bodies. While the monitoring organization may be able to carry out some of the follow-up activities, the monitoring team itself will probably complete its work with the issuance of the report.

In OSCE experience there is a practice of sharing an advance draft of the final report with the authorities and requesting written comments. While the authorities may respond by refuting critical conclusions, providing them with the opportunity to comment, and possibly to make commitments to examine identified challenges, may be an important step towards engaging the authorities in a dialogue or reform process.<sup>235</sup>

Even in the absence of a mandate to encourage reforms, a public report by an ad hoc monitoring programme will alert the authorities about the challenges identified in proceedings, which may point to wider and deeper problems in the justice system. Furthermore, a report has the potential to form a basis for reform efforts and to feed into the institution-building projects of international organizations or of domestic actors engaged in these efforts.

Since the report constitutes the project's principal advocacy activity, it should be structured, drafted and delivered in such a way as to maximize its impact. An executive summary should be succinct and emphasize the key messages of the report. It should also be carefully worded to avoid possible misinterpretation by the authorities or the media. A press release issued with the report could highlight the main conclusions and recommendations, and propose future engagement. If the report is issued in several languages, care should be taken to ensure quality translation of the legal terminology through, for example, review by bilingual national legal experts. It can be a useful precaution to state within the report that, while translations are provided for the convenience of readers, the English-language version should be considered the official text. The box below provides some examples of past reports by ad hoc monitoring programmes that might be useful to prospective drafters.

234 See Chapter 12.3 on "Confidential and semi-public reporting".

235 See Chapter 12.2.8 on "Consultation prior to issuing reports".

### Examples of reports of previous ad hoc monitoring programmes

- “Trial Monitoring in Belarus (March 2011 – July 2011)”, ODIHR (10 November 2011);<sup>236</sup>
- “Final Report: Trial-monitoring Project in Armenia (April 2008 – July 2009)”, ODIHR (8 March 2010);<sup>237</sup>
- “Report from the OSCE/ODIHR Trial Monitoring in Uzbekistan – September/October 2005”, ODIHR (21 April 2006);<sup>238</sup> and
- “Report from the Trial-monitoring Project in Azerbaijan 2003-2004”, ODIHR and OSCE Office in Baku (2003-2004).<sup>239</sup>

It is advisable for organizations engaged in ad hoc monitoring projects to create mechanisms for preserving institutional memory. This should include relevant information pertaining to the set-up of an ad hoc project, its operations, outputs and possible follow-up activities. Recording good practices and lessons learned, through debriefing sessions immediately after the completion of the project, as well as interviewing the monitors and project managers and co-ordinators of past projects, could also enhance the effectiveness and efficiency of future undertakings.

<sup>236</sup> Available at <[www.osce.org/odihr/84873](http://www.osce.org/odihr/84873)>.

<sup>237</sup> Available at <[www.osce.org/odihr/41695](http://www.osce.org/odihr/41695)>.

<sup>238</sup> Available at <[www.osce.org/odihr/18840](http://www.osce.org/odihr/18840)>.

<sup>239</sup> Available at <[www.osce.org/odihr/40973](http://www.osce.org/odihr/40973)>.



# ANNEXES

# ANNEX I

## CODE OF CONDUCT AND OTHER GUIDELINES FOR MONITORS

### A. SAMPLE CODE OF CONDUCT

#### CODE OF CONDUCT FOR TRIAL MONITORS

##### **Professionalism**

Monitors shall:

- Familiarize themselves in advance of the trial with all available information related to the case, including the date and time of the hearing to be observed, the location of the court building, identities of the defendants, their legal representatives, prosecutors and judges, and the legal charges;
- Arrive at court early enough to have sufficient time to gain access to it;
- If an interpreter is needed, sit so that interpretation can be made during the trial without disturbing the proceedings;
- Pay full attention to the proceedings and take notes diligently;
- Strictly obey the court rules;
- Show respect for official representatives of the host state at all times; and
- Carry identification documents.

##### **Non-interference (non-intervention)**

Monitors shall:

- Not influence a proceeding in any way, even in the interests of a fairer outcome;
- When engaging with third parties, explain the purpose of trial observation, including the principle of non-intervention; and
- When asked questions about or invited to actively engage in the judicial process, explain their role as observers and the principle of non-intervention, and decline to comment or act.

##### **Objectivity and impartiality**

Monitors shall:

At no time in observing or reporting express bias;

Not make any statement to court officials, parties to a case or any other third party, including the media, on the proceedings;

When in the courtroom, to the extent possible, sit apart from the prosecution, defence, other participants to proceedings and apparent supporters of a party, and take notes visibly and contemporaneously to the observed proceedings;

When collecting additional information through meetings, attempt to contact opposing parties and collect a variety of views;

Not engage in conversations in a manner that might give the impression of taking sides and, in particular, avoid protracted conversations with parties to the proceedings; and

In reporting, indicate clearly where a piece of information is hearsay, allegation, opinion and the like.

**Confidentiality**

Monitors shall:

- Not disclose to court officials, parties to a case or any other third party, including the media, observations or their findings; and
- Ensure safety and confidentiality of hand-written notes, data handled electronically and of other monitoring information, especially when they contain personal data or private or confidential sources.

**Access to court**

If access is denied or performance of their duties is hindered by the host state's officials, monitors should identify themselves and explain the OSCE commitment to allow observers at trials. A monitor should never demand access or threaten court officials, and should remain respectful and courteous at all times. Any obstacles with court access should be reported to the team leader.

**Security**

Monitors shall:

- Choose a safe place for appointments and secure means of communication, particularly with private sources;
- Report security-related incidents or serious concerns immediately to the team leader, and discontinue observation immediately if they feel unsafe at any point, for whatever reason; and
- Not contact any third parties if there is a possibility that this could affect the security of the monitors.

I, \_\_\_\_\_, born on \_\_\_\_\_, national of \_\_\_\_\_, selected as a monitor for \_\_\_\_\_ [observation activity] in \_\_\_\_\_, acknowledge having received a copy of the Code of Conduct, understand and accept all the provisions thereof, and undertake to perform my duties in accordance with them.

Should I have any doubts or questions with regard to the Code, I will report them immediately to the team leader or the designated contact point at [the Organization].

I declare having been informed that I am not an OSCE staff/mission member; I am not subject to the Staff Regulations and Rules of the OSCE and, consequently, I am not entitled to any rights or benefits provided by these texts, nor to any privileges and immunities granted to OSCE staff/mission members. Nevertheless, I undertake to abide by the substance of the OSCE Code of Conduct, a copy of which I have received.

Signature \_\_\_\_\_ Date \_\_\_\_\_

## **B. SAMPLE GUIDELINES FOR MONITORS**

### **Drafted by the OSCE Mission to Moldova**

#### **I. Basic Principles for Trial Monitors**

##### **The Right to Observe/Monitor**

All OSCE participating States have committed themselves to allow the presence of observers at trials in order to increase transparency and build public confidence in the judiciary. The right to observe trials stems from the right to a fair and public trial, which is enshrined in the International Covenant for Civil and Political Rights, the European Convention on Human Rights and domestic law of the OSCE participating States.

##### **Preliminary Notification of State Bodies**

The OSCE/ODIHR and the OSCE Mission to Moldova shall inform the President of the Superior Council of Magistrates of the Republic of Moldova of the beginning of the Trial-monitoring Programme.

Under the Memorandum of Understanding which was concluded with the Superior Council of Magistrates, the latter will support the programme observers in their monitoring efforts. In particular, the President of the Superior Council of Magistrates shall inform all court presidents about the launched programme and ask them to assist the monitors with getting access to trials, files on criminal cases, minutes from the trials and sentences.

By the beginning of the monitoring in February 2006, the OSCE/ODIHR will distribute copies of the Memorandum of Understanding with the Superior Council of Magistrates to all monitors.

##### **Procedural Focus**

The focus of the Trial-monitoring Programme is on procedural issues and not on substantive justice or the merits of the cases monitored. Accordingly, programme monitors should remain particularly attentive to violations of procedural rights.

It is not the monitor's task to evaluate the evidence or otherwise engage in balancing the various considerations that arise in the course of the trial.

The monitor should focus on compliance with legal procedures.

##### **The Role of OSCE/ODIHR Programme Monitors**

In line with the objectives of the Trial-monitoring Programme and the Trial-monitoring Guidelines referred to herein, the role of the monitors under the OSCE/ODIHR programme is to provide accurate and concise reports on the trials they monitor. The monitors do not have the status of OSCE/ODIHR staff members.

##### **Access to the Court Building and Courtrooms**

If the hearing is public, according to the national legislation free access to the court building and courtroom is a constitutionally guaranteed right. Observation of this legal norm in practice is part of the monitoring exercise.

Accordingly, the observers, first of all, should try to get into the court building and the courtroom while not drawing attention and not standing out from the main public. The only visual differential sign of the monitor at this stage will be a badge with the name of the programme and emblems of the programme organizers (see Identification section on page 7).

In case of problems with free access, the monitor should undertake the following actions:

In the event that access is denied by court officials (policeman at the entry to the court building, court clerk at the entry to the courtroom, judicial officer and other), the programme monitor should request a meeting with the presiding judge so as to explain the purpose of his/her presence.

In the event that, after the conversation, during which the monitor should briefly list the programme objectives and tasks and explain his/her role, access is still denied, the programme monitor should request a meeting with the Court President or his/her representative.

If a meeting with the Court President is allowed, the monitor shall present the Identification Badge issued by the programme organizers and the copy of the MoU signed with the Superior Council of Magistrates and the programme organizers. The Identification Badge shall indicate that the respective person is a monitor in the OSCE /ODIHR Trial-monitoring Programme.

If the Court President denies access to hearings, the monitor shall record the reasons given in the reporting template and inform the national co-ordinator thereof.

The monitor should never demand access to the trial and should remain respectful and courteous at all times.

In general, when writing a descriptive report, the monitor should detail all the aspects of his/her entry to the court and events taking place in the courtroom.

### **Non-Intervention**

It is a matter of courtesy that the monitor introduces himself or herself to the president of the court and the presiding judge, and explains that he or she plans to attend the trial. If meeting with the presiding judge is difficult, the monitor may consider notifying the judge or other court officials in advance that he or she will be attending.

The observer should wear formal attire and sit where she or he can see and hear clearly, if possible. If an interpreter is needed, the observer should sit so that interpretation can be made during the trial without disturbing the proceedings. Detailed notes should be taken, particularly on the nature of the proceedings. **Remember that the role of a trial monitor is to assess the fairness of the trial, not the guilt or innocence of the accused.** Note the presence and behaviour of judicial officers and the treatment of the accused and victim during the trial.

**Do not interrupt the procedure, intervene or talk to court officials, the accused, witnesses or the defense lawyer during the trial. The observer should be careful not to be identified with either the defence or the prosecution.**

Special comments focusing, in particular, on whether the court proceedings appeared to comply with OSCE and other fair-trial commitments should be written down. Such comments should make clear any issues of concern in this regard. The comments should take into account that the trial is part of a judicial process, not a single event, and should, therefore, be written to include the broader legal context and circumstances. For example, if the court proceedings appear technically correct, but the defendant was forced to confess while in detention, this would still be a violation of the

defendant's right to a fair trial. Or, while a trial may be fair, the comments might include indications that a person has been the victim of human rights violations. Any such circumstances should be noted. The comments should include official court references (case numbers, charges, names of witnesses, etc.). This can be especially important if further follow-up is contemplated. It should be made clear how much of the trial the monitor has actually attended. It may not be possible to draw fair conclusions about a trial if the monitor has only attended one session. On the other hand, in some instances, one session may be sufficient for it to be clear that there are valid concerns about the fairness of a trial.

One of the fundamental principles underlying trial monitoring is respect for the independence of the judicial process. Accordingly, **OSCE/ODIHR monitors must never intervene in or attempt to influence trial proceedings in any way whatsoever.**

In accordance with the principle of non-intervention, monitors should:

- Never interrupt proceedings. In the event that a monitor is asked by any of the parties to respond to a question, the monitor must stress her/his non-interventionist role and decline to comment. Otherwise, s/he would violate the principle of non-intervention into the proceedings.
- Never tell or indicate to the judge or any of the other parties what course of action they should take. If monitors have concerns over the work of individual judges or any other party, the relevant information is to be sent to the national co-ordinator. Under no circumstances should monitors confront the individual or request an explanation for the conduct in question.
- Never express their opinion on the case they are following, either inside or outside the courtroom.
- Under no circumstances engage in conversation with the mass media or give comments on behalf of the OSCE/ODIHR or the OSCE in general.
- If mass media try to ascertain the monitor's opinion on a certain case being monitored, the monitor may only inform of her/his intention to observe and of the programme objectives. Furthermore, the monitor should refer the journalist to the programme co-ordinator. The co-ordinator, after consultations with the OSCE/ODIHR, will make relevant comments in exceptional cases.

### **Confidentiality**

The OSCE/ODIHR monitors can provide general information on the nature and objectives of the trial-monitoring programme to court officials and parties to the case.

However, OSCE/ODIHR monitors should never comment on the procedural or substantive nature of the case, or the criminal justice system in general, to court officials, parties to the case or any other third party.

### **Security of the Observer**

It is particularly important that monitors do not take any action that might be detrimental to their security. In this regard, OSCE/ODIHR monitors should:

- Report all security related incidents, no matter how unimportant they may appear, to the National Co-ordinator;
- Discontinue their monitoring immediately and inform the National Co-ordinator if any threat is made against a monitor;
- Discontinue their monitoring immediately and inform the National Co-ordinator if they feel intimidated at any point, for whatever reason; and

- Not contact any of the parties to the case if there is a possibility that this could impact negatively on the security of the observer.

### **Code of Conduct**

The trial monitors should:

- As far as possible, know well in advance the date, time and location of the trial. It is necessary to describe in the special comments whether it was easy to get such information in advance, and whether such information was accurate. When possible, they should attach the most interesting procedural documents to the report.
- Arrive early enough to ensure that they have sufficient time to gain access to the court, locate the courtroom and identify where they will sit. It is necessary to clearly describe this preparation for monitoring in the special comments.

### **Identification**

- Monitors should have their OSCE/ODIHR Identification Badge with them at all times. Monitors should not misuse their OSCE/ODIHR Identification Badges. The primary use of the badge is to facilitate access to the trial, and it should not be worn outside the courtroom or at any other time.

### **Conduct in the court**

Monitors should at all times:

- Maintain polite, civil and respectful relations with all court officials and parties to the case.
- Be appropriately dressed and behave in a dignified manner. It is important that monitors under the OSCE project treat all parties and court officials with respect and courtesy.
- Be seen to be taking extensive notes, as this indicates that close attention is being paid to the proceedings.
- Take care to ensure not to leave trial notes lying around, as they may contain sensitive information.

### **Appearance of independence and impartiality**

Monitors should:

- Find seating that will enable them to observe, hear and follow all aspects of the proceedings. In order to maintain the appearance of independence and impartiality, the monitors should sit in a neutral position. It is important that monitors do not sit next to either the defence or prosecution.
- Not express any views on the trial, either inside or outside the courtroom.
- Not discuss the case with any of the witnesses.

### **Reporting**

All monitors should carry out monitoring in pairs. A report prepared only by one monitor and not supported with the paired report will not be considered.

Each of the monitors should develop her/his own report, consisting of descriptive and formal parts (checklists and special comments).

When preparing a report, monitors should:

- Make detailed notes of everything happening in the court building from the moment of entering, and particularly in the courtroom.
- Copy the materials of the case, minutes from the trial, and sentences (only if it is possible to make copies of such documents).
- Fill in the Checklist provided.
- Also submit a descriptive part of the report (special comments), where there should be a free narration of the witnessed events and actions on the day of monitoring or during hearings on the monitored case.
- Promptly produce reports based on their notes and own findings, with attached copies of the documents (if available).
- Ensure that the information contained in the trial reports is accurate and consistent.
- The majority of information included in the trial report should be based upon what the monitor has directly observed. Where information from other sources is included, it is important to clearly reference these sources (conversation with the defence counsel, conversation with the prosecutor, etc.). In addition, **facts should be clearly distinguished from third-person allegations and assessments.**
- Include in the report their recommendations on how to eliminate systematic violations that monitors face during the monitoring process.
- Include in the report the citations from conversations with the judges, prosecutors, defence lawyers and others that illustrate regular problems or provide examples of positive phenomena and initiatives (the name and position of the interviewee should be indicated precisely and double-checked)
- Once a month, choose one obvious case of typical violations and formulate it as a narration, which then should be submitted to the National Co-ordinator.
- As far as possible, mention in their reports information related to the material conditions and technical equipment of the courts.
- Submit the report by e-mail **no later than two days** after the monitoring by e-mail.

The National Co-ordinator, after receiving the reports, will contact the monitors for any necessary clarification of details. These actions should not be interpreted as doubting the information provided by the monitors. Additional clarifications and verifications will guarantee reliability of the information that will form the basis of the comprehensive report to be prepared.

## ANNEX II

# MONITORING COURT PROCEEDINGS – ISSUES AND SAMPLE FORMS

### A. COMMON ISSUES MONITORED IN PROCEEDINGS

#### Common issues monitored at various stages of the legal process<sup>240</sup>

##### (A) Issues monitored at trial stage

- Right to a public hearing.
- Right to a competent, independent and impartial court.
- Right to be present at trial and to defend oneself (including having adequate time and facilities to review the evidence and prepare a defence).
- Right to legal counsel at trial (including instruction on this right, right to free legal assistance in certain circumstances, and effectiveness of defence counsel).
- Equality of arms (including right to present evidence, call and examine witnesses, and to have adequate time for preparation of defence).
- Application of the presumption of innocence and burden of proof.
- Right not to be compelled to confess guilt, and right to silence at trial.
- Right to be tried without undue delay (reasons for delays and other problems related to postponing and adjourning hearings).
- Right to an interpreter.
- Right to security and liberty (also connected to the right to be tried without undue delay while in detention).
- Right to a public and reasoned judgement on guilt and punishment.
- Victim's rights issues, including right to a lawyer, compensation, and protection and support mechanisms.
- Application of other domestic procedures and rules related to the conduct of effective and fair trials.
- Professionalism and performance issues related to legal practitioners.
- 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).

##### (B) Issues monitored at pre-trial proceedings<sup>241</sup>

- Right to a competent, independent and impartial judicial authority.
- Right to prompt judicial review upon arrest, and related issues (legal basis of custody, opportunity of detainee to be heard by a judicial officer, and regularity of custody review).
- Right of the suspect to be informed of her/his rights upon questioning.
- Right of the suspect to information at the time of judicial review of custody (including right to be informed of charges).
- Right to be free from torture and other inhuman and degrading treatment.
- Right to legal counsel at the pre-trial stage, including at the custody hearing.
- Right to trial within a reasonable time after detention.
- Right to an interpreter.
- Rights of witnesses/victims to security (protection) and support (i.e. psychological and other).
- Other specific issues for vulnerable victims, witnesses and suspects (including respect for their situation and existence of relevant institutions and mechanisms in this regard).

<sup>240</sup> This chart 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. A more comprehensive list can be found in the companion volume to this manual, ODIHR's Legal Digest of International Fair Trial Rights, *op. cit.* note 2.

<sup>241</sup> 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 is not the case in many former socialist systems, where the review of custody may still be undertaken by the State Prosecutor's Office.

(C) Other issues that may be monitored through additional sources of information

- 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).<sup>242</sup>
- Right of detainees to have access to the outside world.
- Right to humane conditions and to be free from torture.
- Right to challenge lawfulness of detention.
- Right to appeal judicial orders, decisions and verdicts.
- Rights of witnesses/victims to security (protection) and support (psychological and other).
- Perception of the justice system by the public.
- Right to a competent, independent and impartial court (including indications of threats to justice actors, corruption, etc).
- Effectiveness of court administration (availability of courtrooms, case-management systems and facilities, accessibility of criminal records, etc.).

<sup>242</sup> 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 during the arrest or investigative procedures.

## B. POSSIBLE ISSUES TO EXAMINE WHEN MONITORING TRIAL PROCEEDINGS

The sequence adopted below follows the list in Annex II.A.

### ➡ Right to a public hearing. Check whether:

- A trial schedule is compiled and, if it is, whether it accurately depicts all hearings and is placed in public view (e.g., on an announcement board) or is easily accessible to the public;
- There is a culture among judges of accepting in the courtroom members of the public with no direct interest in the proceedings, and whether attendance at proceedings is allowed without bias as to the affinity of the public with one party or another;
- The courtroom assigned to a specific hearing is too small relative to the expected public interest and despite the fact that a larger courtroom could have been allocated;
- The hearing takes place in the office of the judge, without due reason;
- There are unreasonable restrictions placed on the public entering the courtroom after the proceedings are in session;
- Media are permitted to enter a courtroom and whether any permission required is denied without explanation;
- The court strikes a case-by-case balance of interests in declaring a trial or hearing closed, and whether it considers other less stringent measures to protect the concerned interests; and
- Other such measures, less stringent than declaring the hearing closed, are available in the legal system (e.g., the assignment of pseudonyms or testimony provided by video-link as alternative protective measures for vulnerable witnesses).

### ➡ Right to a competent, independent and impartial court. Check whether:

- There are any objective or perception-based indicators that judges assigned to a case do not have the legal qualifications to try them (e.g., a minor-offence court judge being assigned to a panel on a war crimes case);
- A diversity of competent judges is promoted, thus avoiding perceptions that qualified persons of different genders, ethnic or religious backgrounds are deliberately excluded from administering justice in specific cases;
- The judges assigned to a specific case are appointed on the basis of an objective system – such as a lottery – and, if random assignment is overridden, that this is done on the basis of a reasoned decision ;
- Judges are enabled by the system to decide independently on a matter, or whether they consider themselves bound by external factors, (e.g., a judge refusing to review an administrative instruction or considering her/himself bound by a detention order imposed by a foreign court or considering her/himself unable to review well-grounded suspicion for the continuation of pre-trial detention);
- Judges treat favourably or more cordially one party in relation to another in their communication, or whether trial judges or higher level judges publicly express an opinion that jeopardizes the presumption of innocence in a case;
- Judges adjudicating a case are continuously present during the trial and the bench is properly composed;
- There have been threatening statements made against the judiciary by political actors or parties to the proceedings in relation to the outcome of a case;
- Allegations of corruption or undue influence on the judges of a case are made by parties or there is such a perception of lack of integrity among the public;
- The court appears not to take due notice of the arguments or proposals made by the defence or prosecution, or rejects them without due justification;
- The decisions and judgements of the court contain justifications as to the evidence or law they have considered in reaching them;
- Evidence not presented in court is taken into consideration in reaching a verdict (also connected to the right to oral proceedings and the right to a public trial);

- The system provides judges with security of tenure and decent compensation; and
  - The evaluation of judges takes into account factors that limit their independence and has an impact on their conduct (e.g., giving negative evaluations of judges who express minority opinions).
- ➔ **Right to be present at trial and right to defend oneself. Check whether:**
- The court has duly summoned a defendant for proceedings, and whether defendants tried *in absentia* have a real opportunity to challenge verdicts reached in their absence;
  - A defendant removed temporarily from proceedings is represented by counsel and informed about what took place in her/his absence;
  - The accused is given a real opportunity to present evidence in her/his favour, and whether s/he has access to evidentiary material, especially if s/he so requests;
  - There are claims or indicators suggesting that the prosecution has suppressed exonerating evidence;
  - A defendant's testimony has allegedly been extracted under pressure, the defendant claims to have received threats aimed at preventing her/him from presenting a defence, or the defendant is alleged to have been pressured into covering up other co-perpetrators, and whether such allegations are properly investigated;
  - The defendant has a real opportunity to review the record of any testimony s/he provides and signs;
  - The defendant has adequate time to prepare a defence against evidence presented by the prosecution or gathered by the court; and
  - Witnesses called by the defence are pressured not to testify.
- ➔ **Right to legal counsel at trial (including instruction on this right, right to free legal assistance in certain circumstances, and effectiveness of defence counsel). Check whether:**
- The defendant has the opportunity to engage counsel of her/his own choice, who is willing, competent and independent;
  - The court or prosecution clearly and understandably instruct the defendant as to these rights at the appropriate time;
  - The defendant has the opportunity to consult confidentially with counsel and is given reasonable time for this prior to the proceedings;
  - There are any restrictions placed on defence counsel accessing their client in detention (e.g., detention centres asking defence counsel to obtain the written permission of the court in order to visit the defendant in detention);
  - The defendant is content with the counsel assigned, and whether the court takes action to protect the rights of the accused and assign different counsel in the event the appointed counsel is blatantly indifferent or not competent to represent the accused; and
  - Defence counsel is present during trial in the event the defendant refuses to attend.
- ➔ **Equality of arms (including the right to present evidence, to call and examine witnesses, and to adequate time for preparation of defence). Check whether:**
- Defence or prosecution motions are rejected without due justification;
  - The court openly or blatantly favours the prosecution over the defence, or vice versa, and whether both parties are given adequate time and opportunity to gather evidence and present it; and
  - The accused appears to have an opportunity equal to that of the prosecution to request that expert evidence be provided.
- ➔ **Application of the presumption of innocence and burden of proof. Check whether:**
- The court makes statements during trial that demonstrate bias against the accused prior to rendering the verdict;
  - Judges give great value in their verdicts to circumstantial or contradictory evidence without due reasoning, and whether this points to arbitrariness rather than judicial discretion;
  - The court asks the accused to prove her/his innocence, in contravention to the law;

- The court takes into account investigative statements by the accused that were made in her/his capacity as a witness without being provided information as to her/his rights as a suspect;
  - The court and prosecution disregard a defendant's claim of having been tortured or mistreated during investigation without duly investigating it;
  - Testimony by a co-defendant or convicted co-perpetrator is the only evidence leading to the conviction of a co-accused;
  - Justice officials or other governmental officials make public statements treating the accused as already guilty of the crimes; and
  - Documents showing that a failed negotiation had taken place in the context of a plea or immunity agreement are taken into account in establishing guilt.
- ➡ **Right not to be compelled to confess guilt and right to silence at trial. Check whether:**
- The silence of the accused is, *ipso facto*, considered by the court as a sign of guilt;
  - There are any indications that the accused has been bribed, threatened or lured into confessing guilt;
  - Ethical rules of conduct in reaching plea agreements are respected; and
  - The defendant is duly informed of her/his rights, and whether s/he is reminded of these during proceedings, if and when appropriate.
- ➡ **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). Check whether:**
- Postponements are granted by the court without due cause;
  - The defence purposefully protracts proceedings;
  - The presentation of expert or other evidence takes an unreasonably long time and the court does not seek to expedite this;
  - It is obvious that the court does not manage proceedings effectively (e.g., case management or other support staff consistently fail to send out summons and case documents within the legal deadlines, or the court repeatedly calls too many witnesses to testify on a given day);
  - The panel takes due measures to ensure the presence of critical witnesses who are unwilling or unable to come to court (e.g., reviewing the service of summoning, fining and/or protecting them; or the court does not even attempt to summon key witnesses that may be abroad); and
  - The court disciplines unruly parties, defendants or members of the public according to the law.
- ➡ **Right to an interpreter. Check whether:**
- The defendant is provided with a professional and independent interpreter to follow the proceedings if s/he does not understand the language of proceedings; and
  - Court documents are provided to the accused translated into a language s/he or the defence counsel understands; whether the defendant speaks the language of the proceedings, but does not wish to use it for ideological reasons (the failure to provide an interpreter then may not constitute a violation depending on the circumstances).
- ➡ **Right to security and liberty (also connected to the right to be tried without undue delay while in detention). Check whether:**
- Proceedings for a defendant in detention are prioritized over others; and whether there are undue delays attributed to justice and governmental officials;
  - Sentences imposed are repeatedly commensurate to the time defendants are kept in detention;
  - The panels reviewing pre-trial custody properly review the continued existence of all grounds for detention, which inevitably may subside over time, and whether they properly justify their detention decisions with due reference to the insufficiency of measures alternative to detention; whether certain exceptional grounds for detention are used repeatedly and signify, instead, other reasons for depriving the defendant of liberty (e.g., punitive reasons, rather than preventing escape); and

- The domestic legal framework is elaborate enough compared to international pre-trial detention standards, and whether statistics demonstrate an overuse of pre-trial custody (e.g., for a certain category of defendants).
- ➔ **Right to a public and reasoned judgement on guilt and punishment. Check whether:**
    - The judgement is pronounced publicly;
    - The judgement contains sufficient arguments to support its conclusions on the basis of law and presented facts, duly considering all submissions significant enough to have an impact on the verdict;
    - The sentence pronounced is within the range provided by law and any extraordinary aggravating or mitigating circumstances are duly reasoned;
    - Evidentiary standards for mitigating and aggravating circumstances are applied (i.e., aggravating circumstances may need to be proven beyond reasonable doubt and mitigating ones on the basis of probability).
- ➔ **Victim's rights issues (including the rights to representation, compensation, protection and support mechanisms): Check whether:**
    - Vulnerable witnesses have access to and actually benefit from the application of protective measures (physical protection and psychological support) by court mechanisms or other civil society assistance;
    - The law and legal practice allow victims to pursue clear compensation claims in criminal proceedings, or whether there is an accessible system to grant them compensation in civil proceedings;
    - A party asks impermissible questions (e.g., questions on prior sexual conduct in rape cases when law or international standards do not permit); and
    - The law and practice allows for vulnerable victims to be assisted by free legal counsel during proceedings.
- ➔ **Application of other domestic procedures and rules related to the conduct of effective and fair trials. Check whether:**
    - Deadlines that are prescribed by domestic law are compliant with international standards, and whether they are duly abided by (e.g., deadlines for commencing proceedings after the indictment is issued, maximum number of days between hearings in a single case); and
    - Other indicators of performance required by domestic standards and which bring international standards into effect are complied with (e.g., the number of postponements a judge is allowed to grant in a case).
- ➔ **Professionalism and performance issues related to legal practitioners. Check whether:**
    - Judges, prosecutors and defence counsel have the necessary legal background and skills to handle specific categories of cases (e.g., knowledge of international humanitarian law to deal with war crimes cases or relevant computer knowledge when dealing with organized crime committed through the use of computers, training in questioning rape victims or juveniles when such are the injured parties in cases), as demonstrated through their conduct in proceedings and additional information gathered.
- ➔ **Specific victim and/or witness rights, juvenile justice or the implementation of other laws in open or non-public hearings (if closed trial hearings are monitored). Check whether:**
    - The law and legal practice afford protection, through judicial means or extra-judicial protection, to vulnerable witnesses or witnesses under threat;
    - Juvenile victims are treated in accordance with international standards in judicial proceedings, or whether juvenile defendants are tried by courts or judges for adults; and
    - The media can gain access to public court records according to any freedom-of-information legislation and the right to a public trial.

## C. SAMPLE QUESTIONNAIRE FOR CLOSED REPORTING SYSTEM

### QUESTIONNAIRE FOR TRIAL OBSERVATION

TRIAL OBSERVATION REPORTING FORM	
<input type="checkbox"/> REPORT <input type="checkbox"/> Date <input type="checkbox"/> Place <input type="checkbox"/> Number (ID) of observer	
Name of the OSCE observer/s:	
Observation date and hours:	
Report submission date:	
Time spent in court:	
Date for next hearing:	
Is there any change in relation to the basic data of the case since the previous observation?	
Have any other observers attended whole or part of the hearing – please specify.	
<b>General information</b>	
Full name of the defendant/s:	
Gender of the defendant/s:	
Date of birth of the defendant/s:	
Factual description and legal qualification of the alleged conduct of the defendant/s under the Criminal Code, according to the prosecution:	
Type of proceedings (general, accelerated, other - indicate)	
Name of the court where the case is tried:	
Full name of the judge(s) hearing the case:	
Full name of the prosecutor:	

Full name and contact details (if available) of the defence counsel:	1. 2.	
Time of opening and closing of the hearing:		
How did you learn where the hearing would take place:		
Preventive measure of restraint applied toward the defendant:		
• A written undertaking not to leave and to maintain proper behavior	Yes	
• Detention	Yes	
• Bail	Yes	
• Leaving a military person under supervision of military-unit management	Yes	
• Leaving a minor under supervision	Yes	
• Personal guarantee	Yes	
• House arrest	Yes	
Additional information about the defendant (Place of work, marital status, political affiliation, membership of organization(s), juvenile at time of crime and sentencing, etc.)		
Is mental capacity an issue with regard to defendant(s)?	Yes	No
What action(s)/decision(s) did the court undertake in this regard?		

**COMPLIANCE WITH FAIR TRIAL STANDARDS**

**THE RIGHT TO TRIAL BY A COMPETENT, INDEPENDENT AND IMPARTIAL COURT ESTABLISHED BY LAW**  
*note: please leave the correct answer and/or write your additional remarks in the answer boxes; mark N/A in the box if a given question is not applicable to the hearing*

Was the right to challenge the court's composition explained by the judge?	Yes	No
Were any challenges made in the case?	Yes	No
	By whom?	
	On which grounds?	
	Satisfied?	Yes

Did the judge take into consideration the age, general level of capacity, physical and mental condition of the defendant when elucidating her/his procedural rights?	Yes	No
Did the judge maintain impartiality while trying the case?	Yes	No, please explain
Did the judge speak or act tactlessly or allow unethical statements or actions in respect of any of the participants of the process?	Yes	No
Did the court retire to the deliberation chambers at the conclusion of the hearing?	Yes	No
	How long did the deliberations take?	
	Did the panel leave alone to make its deliberations?	Yes

<b>THE RIGHT TO A PUBLIC HEARING</b>		
Describe how you entered the court building (was any ID presented, were you registered as visitors)		
and entered the courtroom (agreement with secretary, permission of the judge)		
Was anyone denied access to the courtroom?	Yes. What were the reasons?	No.
Where did the court session take place?	Courtroom	Office of judge, because there was no free courtroom available
		Office of judge, although there were available courtrooms
In the event it was decided to try the case in a closed hearing, what were the legal grounds for the decision?		

<b>THE RIGHT TO BE PRESUMED INNOCENT; THE RIGHT NOT TO BE COMPELLED TO TESTIFY OR CONFESS GUILT</b>
note: for the questions pertaining to information on defendant's rights, specify whether the responses were provided orally and in writing, whether explanation was given in a full, simple and understandable manner, and whether the defendant's age, maturity level, mental and physical conditions were taken into account.

Were there any signs or attributes borne by the defendant that created perception of her/his guilt? (For example, wearing handcuffs, shackles or a prison uniform, or being kept in a cage)	Yes	No
Did any participants in the trial put moral or other pressure on the defendant during the examination?	Yes	No
Was the defendant's right not to testify against her/himself or close relatives explained to her/him?	Yes	No
Did the defendant exercise this right?	Yes	No
Was it explained to the defendant that s/he is not bound by any confession or denial of guilt made during pre-trial stages of the case?	Yes	No
Was it explained to the defendant that s/he is not bound to answer questions, and that the refusal to answer can not be held against her/him?	Yes	No
Did the prosecution or court seek to draw any adverse inferences from the exercise by the defendant of her/his right to silence?	Yes	No
Did the judge pressure the defendant to plead guilty?	Yes	No
Quote irrelevant or leading questions and indicate their authors.		
Was it suggested that the defendant reach an agreement on admission of guilt with the prosecution (or was the defendant encouraged to do so) in order to finish the case in a faster manner, or to receive a milder punishment?	Yes	No
Was the defendant required to testify under oath?	Yes	No
Were any judgments issued by the court or by public officials suggesting explicitly or implicitly the guilt of the defendant either before trial or after an acquittal or a finding of innocence?		

Was the defendant interrupted while testifying and, if yes, how and by whom?	
--	--

### THE RIGHT TO OBJECTIVE AND COMPREHENSIVE EVALUATION OF EVIDENCE

Please provide a brief summary of the testimony of all defendants.		
Was the defendant interrupted while testifying and, if yes, how and by whom?	Yes	No
Was the testimony given by the defendant during the pre-trial proceedings or at the current hearing, as well as audio, video or film recording of this testimony, made public?	Yes	No
Did this testimony contradict evidence given in court and, if yes, how?	yes	No
Was the defence put at disadvantage vis-à-vis the prosecutor? (For example, were petitions and evidence adduced by the defence groundlessly excluded)	Yes	No
Did the defendant make any complaint concerning a disadvantage?	Yes	No
Did the court order/conduct the performance of any examination?	Yes	No
Did the court fail to introduce or to consider (ex officio)/admit any relevant evidence?	Yes	No
Were any questions dismissed by the court?	Yes	No

Did the court take all reasonable steps to exclude irrelevant and/or inadmissible evidence from being heard?	Yes	No		
Have the defendant and/or her/his defence lawyer had fair opportunity to:				
• rebut the findings of the prosecution?	Yes	No		
• comment on written and oral examinations, question and cross-examine witnesses and experts?	Yes	No		
• suggest the presentation of new evidence?	Yes	No		
• present evidence	Yes	No		
• present the defence case?	Yes	No		
Were any witnesses present in the courtroom before they testified?	Yes	No		
Were the witnesses examined in the absence of other witnesses not previously examined?	Yes	No		
How was the order of presentation of evidence determined? Was the opinion of parties taken into consideration?	Parties were questioned, their opinions were taken into consideration	Parties were not questioned	The order wasn't determined	
	Parties were questioned, their opinions were not taken into consideration			
Who was the first to examine the defendant/s?	Defence	Prosecution	Judge/s	N/A
Who conducted the main part of examination of the defendant/s?	Defence	Prosecution	Judge/s	N/A
Were the rights of the witness in connection with her/his testimony explained?	Yes	No		
Was the witness warned of criminal responsibility for giving false evidence?	Yes	No		
		No, there were no witnesses		
		N/A		

Provide a brief description of the testimony of witnesses.			
Was any psychological or other pressure exerted on witnesses during examination by any trial participants?	Yes	No	
Did any witness testimony at trial contradict their statements given during the investigation? How did the parties comment on such contradictions?	Yes	No	
Was any expert examination made during the trial?	Yes, at the initiative of:	No	
Was the procedure of commissioning and conducting the expert examination in line with the established procedure?	Yes	No	
Did the expert testify?	Yes. In particular:	No	
Did the judge explain to the expert(s) or specialist(s) their rights and duties?	Yes	No	Partially
Did the judge explain to the defendant(s) their rights to challenge the experts or specialists involved?	Yes	No	Partially
Did the parties to the proceedings petition for conducting a revised or additional expertise after examining the expert's opinion?	Yes	No	
Were the records of the investigation contained in the case file pronounced in full?	Yes	No	

Was evidence presented as to whether the crime scene examination, identification of persons, investigatory expertise and acquisition of samples for examination were performed according to the established procedures?	Yes	No	
Did the prosecutor exercise her/his function without apparent personal bias or undue influence?	Yes	No	
Did the judge ask the parties whether they had any additional motions to supplement the evidence? Were any such motions made?	Yes	No	

**EXCLUSION OF EVIDENCE ELICITED AS A RESULT OF TORTURE OR OTHER COMPULSION**

Did the defendant retract any previously given evidence, citing psychological (mental) or physical pressure (coercion), torture, ill-treatment, duress, threats, deceit or other unlawful treatment applied to her/him during investigation?	Yes	No
	What was the reaction of the judge?	
	What was the reaction of the prosecutor?	
Were any statements admitted as evidence that were alleged to have been elicited under psychological or physical coercion, torture, ill-treatment, duress, threats, deceit or other unlawful treatment?	Yes	No
Were there any motions to exclude evidence on the basis that it had been illegally obtained?	Yes	No

**EQUALITY OF ARMS**

Was the prosecutor present at the trial?	Yes	No
Was the prosecutor replaced during the trial?	Yes	No
Describe the demeanor of the prosecutor and her/his reactions to courtroom events?		

Were any motions submitted in the case?	By the Defence	By the Prosecution		No
Please provide a short summary of these motions.				
Were the motions granted by the judge?	Yes	No		
Were the grounds for denial sufficient? Briefly describe those grounds.	Yes	No		
What party of the trial was nearer to the judge in the courtroom: the defence or the prosecution?	Defence	Prosecution	Both Parties were an equal distance from the judge/s	
Did the judge assist any of the parties in collecting evidence? If yes, describe the way the assistance was displayed.	Yes		No	
	Defence		Prosecution	
Were all witnesses called?	For the Defence		For the Prosecution	There were no witnesses
	Yes	No	Yes	No
Who spoke first during the pleadings?	Defence		Prosecution	There were no pleadings
Was any participant of the hearing restricted in her/his opportunity to speak in pleadings?	Yes		No	There were no pleadings
Did the prosecutor make proposals on how to apply the criminal law and with regard to the punishment during the pleadings?	Yes, namely:		No	There were no pleadings

Did the defence counsel make proposals on how to apply the criminal law and with regard to the punishment during the pleadings?	Yes, namely:	No	There were no pleadings
Were the participants of the hearing allowed to make final remarks?	Yes	No	There were no pleadings
Was defendant's last plea disturbed or restrained in any way?	Yes	No	

### THE RIGHT TO DEFEND ONESELF IN PERSON OR THROUGH COUNSEL

Did you observe any obstacles that prejudiced the defendant's opportunity to fully present her/his defence?	Yes	No
Did the judge determine whether a copy of the indictment was handed over in time?	Yes	No
Was the suspect represented by defence counsel throughout entire course of pre-trial stages and all investigative proceedings?	Yes	No (indicate from which moment/with what gaps in the timeline)
Was defence counsel present? Was s/he appointed or contracted?	Appointed	No
	Contracted by the defendant	
If defence counsel was appointed, when was s/he introduced to the defendant?	Yes	No
In the case of contracted counsel, was the defendant able to choose her/him independently?	Yes	No
Was the defence counsel replaced during the trial? If yes, how many times?	Yes	No

Was the table of the defence counsel located close to the defendant?	Yes	No
Please describe the defence counsel's style of communication with the defendant during the trial. Were communications between the defendant and her/his lawyer restricted by the court in any way?		
Was the defendant provided with the time and facilities to confer with her/his lawyer in private, one-on-one, without limitations on time or the number of meetings?	Yes	No
Was the defence/defendant given adequate advance notification of the witnesses or experts that the prosecution intended to call at trial?	Yes	No
Were the defendant and her/his lawyer granted access to appropriate information, including documents and other evidence that might help the defendant prepare her/his case, to exonerate her/him, or to mitigate the sentence?	Yes	No
Did the defence have the opportunity to obtain and comment on the observations filed or evidence adduced by the other party?	Yes	No
Describe any other obstacles to effective exercise of the right to qualified, competent and effective defence.		

#### THE RIGHT TO BE PRESENT AT TRIAL

Was the defendant present?	Yes	No	
Was the identity of the defendant established?	Yes	No	
Was the defendant explained her/his rights?	Yes	No	Partly
Was pre-trial testimony by the defendant presented at the trial?	Yes	No	

Did this testimony contradict testimony given during the hearing? How did the defendant explain the contradictions?	Yes, in particular:	No
Was the defendant allowed to make a final statement?	Yes	No
Was the defendant removed from the courtroom during the hearing?	Yes	No
	If yes, state the reasons. Did the defendant return to the courtroom? Did the defence attorney have the opportunity to consult with the defendant before the witness was released? Was the testimony of other defendants questioned in her/his absence read out upon her/his return to the courtroom? Was the defendant given the opportunity to give evidence and to put questions to the persons questioned in her/his absence?	
Did anyone interrupt the defendant when s/he was making her/his final statement?	Yes	No
Did anyone ask her/him any questions?	Who?	

### THE RIGHT TO AN INTERPRETER AND TO TRANSLATION

Was a translator/interpreter involved in the trial?	Yes	No
Did the judge explain to the translator/interpreter her/his rights?	Yes	No
Was the translator/interpreter warned about the criminal responsibility for providing knowingly false translation?	Yes	No
Was the right to challenge the translator/interpreter explained to the parties?	Yes	No
Was the defendant given the written translations during the trial of judicial documents required by law to be handed over to the defence?	Yes	No
In your view, was the translation of good quality?	Yes	No



Was the conviction, if any, based solely or to a decisive extent on evidence provided in anonymous testimony at the witness-protection hearing or on evidence exempted from direct presentation (i.e., voice/image distortion)?	Yes	No	
		What weight did the court attribute to such testimony/evidence?	
Did the final judgment (announced and written) include:			
• Description of the criminal act and the means of its commission?	Yes	No	
• Analysis of acts of the defendant in relation to the <i>corpus delicti</i> ?	Yes	No	
• The motive and consequences of the crime?	Yes	No	
• A decision regarding protection and/or other special measures?	Yes	No	
Was the alleged offence re-qualified?	Yes	No	
Was the verdict read out clearly?	Yes	No	
Was the verdict well reasoned?	Yes	No	
After having announced the judgment, did the judge explain to the defendant (and other trial parties) its substance?	Yes	No	
Did the judge explain the procedure and terms of appeal of the verdict and the right to request clemency?	Yes	No	
Were any interim court resolutions passed during the case?	Yes	No	

## PRE-TRIAL RIGHTS

### THE RIGHT TO LIBERTY

When and where was the defendant arrested?	
What police station was s/he taken to after arrest? How long was s/he held under arrest?	
When was the defendant first interrogated?	

Was the defendant allowed to read the protocol of arrest before signing it?	Yes	No
Did the defendant have the opportunity to include her/his statements and motions in the protocol?	Yes	No
Was the protocol of arrest prepared and given to the suspect for signature within [time-frame] after her/his custody by the body conducting the investigation?	Yes	No. For the following reasons:
		When was it prepared?
After being taken into custody, was the suspect immediately, but no later than [time-frame] from the moment of detention, allowed to inform his relatives on the place and reasons of her/his custody?	Yes	No. For the following reasons:

**THE RIGHT OF ARRESTED PERSONS TO INFORMATION**

Was the arrestee immediately given a written notice and explanation of her/his rights?	Yes	No
Was the arrestee informed of the reasons for arrest in a language s/he understands?	Yes	No
	When?	
Were the charges brought within [time-frame] from the moment of arrest?		
Was a translator/interpreter involved, when necessary?	Yes	No

**THE RIGHT TO LEGAL COUNSEL BEFORE TRIAL AND THE RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENCE**

When was the legal counsel allowed on the case?	
Did the suspect talk to anyone or was her/his right to silence observed before the arrival of the legal counsel?	

Before the interrogation, did the suspect have a confidential meeting without any obstacles with her/his legal counsel, the length of the meeting being no less than [time-frame]?	Yes	No
Was the legal counsel present during all interrogations of the accused?	Yes	No
Indicate the full name of the legal counsel, as well as the grounds of her/his involvement in the case (appointed or contracted).		
Did the criminal investigator recommend her/his legal counsel?	Yes	No
Did the defence counsel experience any difficulties in obtaining permission from the criminal investigator to meet her/his client?	Yes	No
Did the accused have meetings with her/his defence counsel confidentially and alone, without limitation on their duration and number?	Yes	No
Was the defence counsel allowed an opportunity to read and/or make notes from the case files?	Yes	No
Was the defence counsel provided with a copy of the case files or with any opportunities to make transcripts from any kind of documents without limitations in volume?	Yes	No
Were the defendant and her/his legal counsel allowed adequate time to prepare a defence, considering the complexity of the case, the seriousness of the criminal charges faced and the volume of the documentary material to be reviewed?	Yes	No

#### THE RIGHT TO HAVE ACCESS TO THE OUTSIDE WORLD

Were the detainee's relatives informed about the place and reasons of the detention?	Yes	No
--	-----	----

Did the detainee request any medical aid? Was it provided?	Yes		No
	Request is met	Request is not met	
Did a foreign detainee have an opportunity to contact her/his consulate?	Yes		No, although the detainee is foreigner

**THE RIGHT TO BE BROUGHT PROMPTLY BEFORE A JUDGE OR OTHER JUDICIAL OFFICER AND THE RIGHT TO CHALLENGE THE LAWFULNESS OF DETENTION**

Was the accused heard by the judge when selecting the preventive restraint measure?	Yes	No
Was the defence lawyer present? Was the lawyer allowed to present any evidence?	Yes	No
Was the defendant remanded in pre-trial detention?	Yes, what reasons were given?	No
Did the accused or her/his defence counsel challenge the lawfulness of detention?	Yes	No
	When, to whom, and what was the result?	

**RIGHTS DURING INTERROGATION**

Were the rights of the suspect/accused explained to her/him before interrogation?	Yes	No
Did the accused exercise her/his right to refuse to testify?	Yes	No
Was legal counsel present during the interrogation of a minor?	Yes	No
At what time of day was the interrogation conducted?		
How long did the interrogation last?		
Was the protocol of interrogation presented to the defendant for reading?	Yes	No
Did the defendant have the opportunity to make corrections and include additional information in the protocol?	Yes	No

**THE RIGHT TO HUMANE CONDITIONS OF DETENTION AND FREEDOM FROM TORTURE**

Were any complaints submitted on the use of torture or other cruel treatment during any pre-trial custody?	Yes			No
Who filed these complaints?	Defence counsel	Suspect/the accused	Relatives	

Describe the nature of the complaints	
What actions were taken by the public prosecutor to examine such complaints?	

<b>INDEPENDENCE &amp; IMPARTIALITY OF THE COURT</b>	
Was there any indication of bias on the part of a judge?	
Were there inappropriate contacts between parties (e.g., between the prosecution or the defence and the judge)?	
Do members of the bench have any relationship with the executive branch, police or prosecution?	

## ANNEX III

# CONDUCTING INTERVIEWS – ISSUES AND SAMPLE FORMS

### A. INDICATIVE ISSUES TO EXPLORE IN INFORMATION-GATHERING INTERVIEWS

#### ↻ Court presidents and individual judges

Monitors may wish to inquire directly with court presidents and individual judges about the following issues, among others:

- How are cases allocated to individual judges within a given court;
- How judges handle statements by political actors attempting to undermine their independence, especially when such statements are made in the public arena;
- Whether judges have material and human resources at their disposal to complete the procedural actions that are required of them;
- Whether the court president or judge ever received threats to her/his, or is aware of threats made to colleagues by parties to the proceedings or outside actors;
- Whether systems for the imposition of disciplinary measures against judges are deemed inadequate or biased;
- Whether there are any problems with judges' remuneration, and what implications this might have on their work;
- Whether judges have had sufficient training in the handling of particular types of cases, to which special laws and procedures apply, or would appreciate training in a specific field, such as war crimes, or organized or economic crimes;
- Whether judges have easy access to a defendant's past criminal record;
- Whether judges have access to computers, knowledge of how to operate them, and whether they believe electronic databases would be of use in their work;
- Whether judges have any problems in requesting or obtaining evidence from other parts of the country or from abroad;
- Whether judges are aware of and use the services of witness-support personnel or NGOs that carry out such activities;
- How do judges organize the drafting of their verdicts in complex cases;
- Whether judges believe there are any efficient ways of managing their work better, such as establishing quotas or moving certain types of offences to lower courts or to the administrative justice system; and
- How do judges deal with cases involving vulnerable offenders, such as juveniles, drug abusers and the mentally ill in the event that appropriate institutions do not exist in the host state?

#### ↻ Chief prosecutors and individual prosecutors

In interviews with chief prosecutors and individual prosecutors, monitors may pose the same questions as listed above, but may also explore the following issues:

- Whether the communication between prosecutors and police investigators is effective;
- Whether prosecutors have any difficulties in physically reaching courts within their jurisdiction;

- In cases where witnesses change their testimony between investigations and trials, what reasons do they believe contribute to this;
- Whether there have been cases where they or their colleagues have investigated alleged threats to witnesses or defendants, and what obstacles may exist in this regard; and
- Whether prosecutors have adequate information at their disposal regarding sentencing practices, enabling them to negotiate effectively possible plea agreements or immunity agreements with the defence, if these are allowed in the justice system.

#### ➔ Defence counsel

In addition to questions described above for judges and prosecutors, interviews with defence counsel may reveal interesting information about the following matters:

- Obstacles to carrying out the function of legal representation independently and in accordance with internationally and domestically recognized standards;
- Impediments to free, timely and unsupervised communication with their clients in detention centres, courts or police facilities;
- Obstacles to obtaining full and timely access to court or prosecution files for the preparation of an effective defence;
- Withholding by the prosecution of exonerating evidence;
- Lack of material resources or other obstacles to gathering evidence in support of the defence that breaches the equality of arms;
- Unjustified rejection of defence motions by the court;
- Problems with receiving compensation for defence services provided *ex officio*;
- Avenues to addressing the ill-treatment of or forced confessions by their clients, or similar issues; and
- Background information to a case that may not feature in the case file.

#### ➔ Bar Associations

Facts of interest that can be obtained from bar associations would include:

- The process of gaining admission to the bar and whether this is fair, transparent and un-bureaucratic;
- Attempts to infringe upon the independence of the bar;
- The funds and capacity available to bar associations to carry out targeted training for lawyers;
- Challenges that lawyers face in their work; and
- Their independence, capacity and willingness in imposing disciplinary measures to lawyers violating the code of ethics.

#### ➔ Defendants, especially in detention

The following questions may be posed to defendants, particularly when they are deprived of their liberty:

- Whether detainees are visited by their defence counsel in order to prepare an effective defence;
- Whether they have the opportunity to communicate with their lawyers in person, by phone or otherwise, without supervision or undue interference;
- Whether court documents and summons are served to the defendants, especially when in detention, in a timely manner, and whether the defendants' submissions are duly forwarded to the court or other judicial authorities;
- Whether they are given the necessary facilities to prepare their defence, particularly if they are in detention and not represented by a lawyer;

- Whether they are released from detention immediately in the event no valid detention order exists; and
- In the event information about ill-treatment in detention is provided, monitors may inquire whether the individuals are aware of existing mechanisms for the reporting of such instances, or whether they have conveyed this information to their lawyer, the director of the detention centre, the court or prosecution, any ombudsperson, or any other organization responsible for these matters.

#### ➤ Injured parties, witnesses and organizations involved in supporting vulnerable individuals

These individual and groups may be asked about such issues as:

- Delays in the processing of cases where they have filed a complaint, and instances in which they have not received information regarding their progress;
- Perceptions that the authorities are not genuinely investigating a complaint or a claim;
- Concerns regarding their security;
- Instances in which the court or the investigative authorities have not treated vulnerable witnesses with sensitivity;
- Scepticism as to whether they can be compensated for damages suffered; and
- Inability to engage legal representation, the non-existence of legal aid mechanisms for injured parties, and other similar problems.

In addition to the aforementioned issues, monitors may inquire with representatives of organizations supporting vulnerable persons:

- Whether they have sufficient resources to provide services to all those in need;
- Whether their personnel are adequately qualified and trained, and if continuing education is possible;
- Whether they face any difficulties accessing individuals in need; and
- Whether their opinions are taken into consideration by the authorities when submitted.

#### ➤ The police

In meeting with the police, trial monitors may inquire about such issues as:

- The manner in which police officers handle domestic violence cases, and the type of training they may have received;
- The training and challenges investigators may face in gathering evidence for war crimes or organized crime cases;
- The diversity of police officers in a given unit that deals with interethnic or gender crimes, and the efficiency of co-operation among them;
- What kinds of physical-protection measures exist for witness or judges;
- What organizational systems are in place to record cases following riots; and
- What types of supervisory structures exist, especially with regard to prosecutors or senior police officers, and whether there are any problems in the co-operation between police and prosecutors?

#### ➤ Governmental officials, judicial and prosecutorial councils, and training and disciplinary bodies

Depending on the competencies of these actors, information of interest to corroborate monitoring findings may include:

- The materials and human resources allocated to the judicial branch and the manner in which these are disbursed to guarantee the judiciary's independence from the other branches of government;
- Efforts taken to ensure the implementation of judicial decisions;
- Systems in place for recording statistical data, and general use of information and communication technologies in judicial reform;<sup>243</sup>
- The authorities' efficiency in drafting new laws or amending existing ones, submitting these for public discussion, and promoting their prompt review by the legislative body;
- Co-operation with international courts and compliance with decisions or recommendations of international human rights bodies and courts;
- International co-operation and mutual legal assistance with judicial and prosecutorial authorities in other countries;
- Councils' roles in the process of selecting or vetting judges and prosecutors;
- Attempts to infringe upon the independence of judicial and prosecutorial councils;
- The process of examining complaints against judges and prosecutors, the criteria used in applying disciplinary measures, and the sufficiency of the resources allocated to reviewing complaints; and
- The effectiveness of training organized for judges and prosecutors, including whether continuing education is compulsory, and the subject matter, frequency and duration of training sessions.

243 See, for example, Waleed H. Malik, "E-Justice: Towards a Strategic Use of ICT in Judicial Reform", available at <<http://www.undp-pogar.org/publications/judiciary/wmalik/ejustice.pdf>>.

## B. SAMPLE INTERVIEW QUESTIONNAIRE FOR DEFENCE ATTORNEY

1. Your name and a summary of your professional qualifications and experience.
2. The full name of defendant that you represent.
3. In relation to the manner and circumstances in which your client was detained, please give details of the following matters:
  - a. The date and time that your client was detained.
  - b. The circumstances and manner by which your client was detained.
  - c. The date and time that you were informed of the fact that your client had been detained.
  - d. The manner by which you were informed that your client had been detained.
4. Please provide details of any complaints made to you (or to the prosecution authorities or the court) by your client (directly or through you) regarding the manner and circumstances in which your client was detained.  
*[Please note: In view of the principle of confidentiality of communications between lawyer and client, this question should only be answered where a defendant has given permission for this to be disclosed.]*
5. Has your client been examined by a doctor regarding visual traces of torture?
6. In relation to each of the charges (or amended, substituted or additional charges) brought against your client, please give details of the following matters:
  - a. Details of the charges brought against your client.
  - b. The date upon which your client was informed of the nature of the charges brought against her/him.
  - c. The date and time that you were informed of the fact that your client had been charged.
  - d. The manner by which you were informed that your client had been charged.
7. In relation to the questioning of your client, please provide details of the following matters:
  - a. The date, place and time that your client was first questioned.
  - b. The date and time that you were informed that your client was to be questioned (or had been questioned).
  - c. Whether you were given any opportunity to consult with your client and advise her/him before s/he was questioned.
  - d. Any complaints made to you (or to the prosecution authorities or the court) by your client (either directly by your client or through you) regarding the manner and circumstances in which your client was questioned.
  - e. Please give the same details in respect of any subsequent questioning of your client.  
*[Please note: In view of the principle of confidentiality of communications between lawyer and client, this question should only be answered where a defendant has given permission for this to be disclosed.]*
8. In relation to access to your client, please give details of the following matters:
  - a. The date, time and place that you were first allowed to see your client and to give her/him legal advice.
  - b. The circumstances and conditions in which you were allowed to see your client and to give her/him legal advice. In particular, please state whether or not you were allowed to see your client in private and in conditions of confidentiality. Please give details of any refusal of access

to your client or any other matter which impeded the ability to consult with your client and to give her/him legal advice.

- c. Please give the same details in respect of any subsequent occasion when you were allowed or refused access to your client.

9. In relation to the detention of your client, please give details of the following further matters:

- a. The date and place that your client was first brought before a court to review her/his detention and consider whether her/his detention should continue.
- b. Where a court hearing did take place to review the question of the detention of your client, please state:
  - i. Whether you were informed of such a court hearing and, if so, when.
  - ii. Whether your client was allowed to be present at the court hearing.
  - iii. Whether your client was allowed to make representations to the court as to the question of whether her/his detention should continue.
  - iv. Whether you were allowed to be present at the court hearing.
  - v. Whether you were allowed to make representations to the court as to question of whether your client should continue to be in detention.
  - vi. The grounds relied upon by prosecution and the court to refuse bail and to continue detention of your client.

10. In relation to the materials made available to the defence, please give details of the following matters:

- a. A description of the materials, either from the prosecutor or from the court file, that were made available to the defence.
- b. Have procedural documents been made available for you? Were they made available at your request or automatically (without your request) upon completion of the investigation?
- c. The date upon which defendants and/or their legal advisers received those materials.
- d. Please give a summary of any instances of a failure by the prosecution or the court to disclose material to the defence that might have assisted you in presenting submissions to the court with a view to diminishing the extent or seriousness of the alleged involvement of any of the defendants in the events that were the subject of the charges.

11. What motions have you submitted? Have they been granted? Did you have an opportunity to independently collect evidence and present it to the court? To call defence witnesses?

12. Please give a summary of any other relevant complaints that you or your client have in relation to violations of human rights or fair trial rights during the course of the investigation of this case or during the trial.

13. Please give a summary of any other matters that wish to draw to our attention in connection with the investigation or trying of this case.

## C. SAMPLE QUESTIONNAIRE FOR INTERVIEWS WITH THE POLICE

### Pre-indictment programme Procedures and the conditions of the deprivation of liberty

**Name and the position of OSCE staff conducting the interview:**

**Name of the Interviewee (Police Station/Police Administration Commander):**

**Date of the interview:**

**Time of the interview:**

**Location of the Interview:**

#### I. Procedural aspects of deprivation of liberty

*Following are the questions the OSCE will pose to the interviewee in order to clarify the procedures which the police apply on the occasion of deprivation of liberty*

##### *1. Instructions on rights to persons deprived of liberty (police detention)*

Does the Police regularly inform a person on the following rights on the occasion of deprivation of liberty? (Article 5. and 9. CPC FBaH, Article 5. ECHR, Article 5(2) ICCPR)

**1.1.** On the reasons of the arrest?

**1.2.** On the right to remain silent and advise that s/he is not obliged to make a statement nor respond to the questions asked?

**1.3.** On the right to a counsel of his/her choice (private) or the right to a defence attorney at no cost (ex-officio)?

- a. Does the police have the official list of defence attorneys and do they present the list to a person deprived of liberty?
- b. Describe the manner and the procedure which the police apply if a person requests access to a private defence attorney?
- c. Describe the manner and the procedure which the police apply if a person requests access to ex-officio defence attorney?
- d. Whom do you contact when a person requests appointment of ex-officio defence attorney? (judge, prosecutor or other person)
- e. Do the police have a relevant rulebook to apply in relation to appointment of a defence attorney? Please give the details (title, adoption date, authority)?
- f. Describe how do you ensure a free communication with a defence attorney in the police premises? (Art. 62 and 158 (5) FBiH CPC)
  - Is there a separate room?
    - Is there a glass window?
    - Are there police officers present during the communication? How close? Out of sight? Out of hearing?
    - What type of supervision do you apply during the defence attorney's visits?

**1.4.** On the right to notify a family member or another person of his/her own choice (Article 5 CPC FBaH)

- a) Describe the manner and the procedure which you apply if a person requests notification of a person of his/her choice?
  - What are the means of communication?

- Who bears the expenses?

b) Do the police, immediately, inform parents/guardians of a juvenile in the police detention on his/her arrest? (CPT principle 16.)

**1.5.** On the right to notify a consular officer of his/her country if a person deprived of liberty is a foreigner? (Article 5, Article 92 (2) (e) FBiH CPC,)

a) Do you have the list and contact details of the embassies/consular offices in BaH? Provided by whom?

b) How is this applied in the police practice?

**1.6.** On the right to a free interpretation? (Article 9, Article 92.2. CPC FBaH)

a) Does the Police have the list and contact details of the certified court interpreters?

b) How is this ensured/provided?

### ***Medical examination and treatment***

**2.1.** Do the Police offer medical examination free of charge and as promptly as possible after admission to a place of deprivation of liberty? (CPT, Principle 24)

**2.2.** Do the Police provide medical care and treatment whenever necessary during the police detention? (CPT, Principle 24)

**2.3.** Do the Police provide immediate medical care to juveniles deprived of liberty? (UN RoPJDL)

**2.4.** Is there a female officer to deal with female detainees?

**2.5.** In case of juvenile detainees, are the parents/guardian and the Centre of Social Welfare informed about the arrest?

**2.6.** Are juveniles allowed to keep their personal belongings?

**2.7.** Who bears the expenses of the medical examination/treatment?

**2.8.** Describe how does this function in practice in your area (co-operation with Health Care institution)?

**3.** *How long, in average, a person stays in the police detention?*

**4.** *Explain the manner and the procedure of transfer of a person deprived of liberty from the police detention to the prosecutor (hand-over within 24 hours)?*

**5.** *Did you have cases of persons deprived of liberty for up to 72 hours? (cases of suspicion for terrorist acts)? Is there any specific procedure in this regard?*

### ***6. Allegations on ill-treatment***

**6.1.** Do you ensure a remedy if a person complains on ill-treatment?

**6.2.** Is there any internal Police regulation on this issue?

**6.3.** Who decides on this complaint?

**6.4.** Do you inform the prosecutor, at which moment?

**6.5.** Are you aware of the Obligatory instructions of the FBaH Chief Prosecutor on the procedures in cases of the police ill-treatment?

## **II. Police questioning of a person deprived of liberty**

*Following set of questions will be posed to the police commander/officer about instructions and procedures which they applied before the first questioning*

### *1. Instructions on rights before the police questioning of suspects*

Do the Police regularly inform a suspect on the following rights on the occasion of the first police questioning:

**1.1.** On the right to be informed on the criminal offence that s/he is suspected of and of the grounds of suspicion (Article 92.2. CPC FBaH)?

**1.2.** On the right not to give evidence or answer questions? (Article 92.2.a. CPC FBaH)

**1.3.** On the right to engage a defence attorney of his/her choice who may be present at the questioning? (Article 92.2.b. CPC FBaH)

**1.4.** On the right to a defence attorney at no cost (mandatory defence, Article 59 CPC FBaH):

- if s/he is mute, deaf, or suspected of a criminal offence punishable with long-term imprisonment, (Article 59.1. CPC FBaH); or

- if it is in the interest of justice due to complexity of the case, mental condition of a suspect or the other circumstances require? (Article 59.5.CPC FBaH)

**1.5.** If s/he comments or presents the facts, in presence of an attorney that this statement can be used as evidence at the main trial without his/her consent (Article 92.2.c. CPC FBaH)

**2.** *If the suspect waives some of her/his rights how do you record it?*

**3.** *Record from the questioning of the suspect?*

**3.1.** How the Police keep the record from the questioning of a suspect (audio/video or taking the minutes)?

**3.2.** Do the Police record the entire statement, as given by the suspect, or summarize the statement of the suspect?

**3.3.** Do the Police read the record to a suspect before signing?

## **III. Technical conditions of police detention premises**

The OSCE staff shall perform the inspection of the facilities for deprivation of liberty

**1.** *OSCE observation of overall conditions of the detention premise/s in the police station*

**1.1. Accommodation**

- a) Size per cell? Height and width? Furniture?
- b) Light? (natural or electric) Ventilation? Heating?
- c) Presence of dangerous object convenient for inflicting injuries?
- d) Access to drinking water?
- e) Capacities to separate male/female, adults/juveniles or more suspects?
- f) Clean mattress and clean blankets (if a person has to stay overnight)?

**1.2. Personal hygiene**

- a) Access to and hygienic conditions of toilets?
- b) Available washing facilities and necessary toilet articles?
- c) Are there separate males and females toilets?

*Following questions shall be posed to a police commander/officer in an interview:*

**1. Which internal document regulates the standards in the police detention facilities?**

**2. Is there a detention premise in the police station?**

**3. If there is no designated police detention premise in the respective police station, where do the Police keep persons deprived of liberty?**

**4. Has the issue of deprivation facility been addressed to a cantonal level (MoI)? Please provide details?**

**5. How is the food provided to a suspect in the police custody?**

**5.1. Do the police provide food for a suspect during the police custody?**

**5.2. Who bears the costs for the food?**

**5.3. Is the issue regulated by the internal police rulebook?**

**5.4. Constraints the Police face in this regard?**

## **IV. Police custody registers**

*The following questions should be provided by a police commander in the interview*

**1. How do the Police keep a record of persons deprived of liberty?**

**2. Does the register contain the following:**

- a. Ordinal number
- b. Name of a person deprived of liberty?
- c. Date of birth of a person deprived of liberty?
- d. Address of a person deprived of liberty?
- e. Personal identification number of a person deprived of liberty?
- f. Date and time of deprivation of liberty?
- g. Time when the person arrived to the police station?
- h. Reasons of deprivation of liberty?
- i. Time when the person was informed of his/her rights?
- j. When was a person interrogated?

- k. Record of signs of injury and health problems?
- l. The fact that a person deprived of liberty underwent a medical examination (the name of a physician and the result of the examination)
- m. Record of signs of drug or alcohol use?
- n. Time when food was offered to a person?
- o. If and when s/he had contacts with and/or visits by next of kin, lawyer, or other persons?
- p. Time when transferred to a court or another institution?
- q. Time when released from police detention – transferred to another institution?

**3. How do you keep the register of complaint of persons deprived of liberty?**

**3.1.** Who enters a complaint?

**3.2.** Who has the access?

**V. Comments/recommendations of the police commander/officer?**

*The OSCE will inquire with the police commander the following questions:*

**1. Has any international organization conducted a similar survey? Which and when?**

**2. Have you raised the issue of conditions and procedures for deprivation of liberty to any international organization (EUPM, EUFOR, CoE, etc) or to national institutions? What was the outcome?**

**3. In your view, what is needed to improve the overall conditions?**

**VI. Team's assessment on the overall situation in the respective police station**

*After the interview with a police commander and inspection of the facilities the team provide the following assessment.*

**1. Summary of the main concerns during the visit?**

**2. Action proposed?**

# ANNEX IV

## REPORTING – SAMPLE FORMS

### A. SAMPLE FINAL REPORT (TABLE OF CONTENTS)

#### **Trial-monitoring Final Report Table of Contents**

#### EXECUTIVE SUMMARY

#### **Acronyms and abbreviations used in the text**

#### **INTRODUCTION**

Background to the report .....	
Scope, focus and methodology.....	
Structure of the report.....	
Background to the trials .....	

#### **Acknowledgements**

#### **CHAPTER 1: THE RIGHT TO LIBERTY AND SECURITY OF THE PERSON**

A. International standards .....	
B. National legislation .....	
C. Findings and analysis .....	
<i>Pre-trial detention</i> .....	
<i>Prohibition of arbitrary detention</i> .....	
D. Conclusions and recommendations.....	

#### **CHAPTER 2: RIGHT TO A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL**

A. International standards .....	
B. National legislation .....	
C. Findings and analysis .....	
<i>Structural judicial independence</i> .....	
<i>Improper interference with judicial independence</i> .....	
<i>Sentencing</i> .....	
<i>Appellate proceedings</i> .....	
D. Conclusions and recommendations.....	

#### **CHAPTER 3: EQUALITY OF ARMS**

A. International standards .....	
B. National legislation .....	
C. Findings and analysis .....	
<i>Evidence submitted by the parties</i> .....	
<i>Video materials</i> .....	
D. Conclusions and recommendations.....	

#### **CHAPTER 4: THE PRESUMPTION OF INNOCENCE**

A. International standards .....	
B. National legislation .....	
C. Findings and analysis .....	
<i>Statements by public officials and state media</i> .....	
<i>Security measures and the use of the cage</i> .....	
<i>Trial judge exposed to case file prior to trial</i> .....	

*Statements of certain accused leaked to media*.....  
*Evidence of prior convictions*.....  
*The burden of proof*.....  
D. Conclusions and recommendations.....

**CHAPTER 5: THE RIGHT TO A PUBLIC HEARING**

A. International standards .....  
B. National legislation .....  
C. Findings and analysis .....  
    *Audio recording of the trial* .....  
    *Security in the courthouse and courtrooms* .....  
    *Defendants' presence at appeal hearings* .....  
    *Public attendance*.....  
D. Conclusions and recommendations.....

**CHAPTER 6: THE RIGHT TO DEFEND ONESELF OR THROUGH LEGAL COUNSEL OF CHOICE**

A. International standards .....  
B. National legislation .....  
C. Findings and analysis .....  
    *The counsel of one's choosing*.....  
    *Adequate opportunity to mount a defence*.....  
    *Access to counsel during pre-trial investigation*.....  
    *Effectiveness of the legal representation*.....  
D. Conclusions and recommendations.....

**CHAPTER 7: THE RIGHT TO SILENCE AND THE EXCLUSION OF UNLAWFULLY OBTAINED EVIDENCE**

A. International standards .....  
B. National legislation .....  
C. Findings and analysis .....  
    *Improper response to allegations of torture, maltreatment and excessive force* .....  
D. Conclusions and recommendations.....

**CHAPTER 8: THE RIGHT TO EXAMINE OPPOSING WITNESSES AND EVIDENCE**

A. International standards .....  
B. National legislation .....  
C. Findings and analysis .....  
    *Unavailable witnesses*.....  
    *Victims present during testimony of others*.....  
D. Conclusions and recommendations.....

- Annex 1: Table of Accused and Sentences**
- Annex 2: Comparative Conviction Rates**
- Annex 3: Summaries of Articles Impacting on the Presumption of Innocence**
- Annex 4: Relevant Universal Periodic Review Recommendations**
- Annex 5: Relevant OSCE Commitments**

## B. TEMPLATE FOR ANALYST INTERNAL REPORTING



**Organization for Security and Co-operation in Europe  
Mission in Kosovo  
Department of Human Rights and Rule of Law  
Legal Systems Monitoring Section**

**WEEKLY REPORT**

**OO ?**

**To:** Chief of LSMS  
LSMS Legal Analyst

**Cc:** ARC  
OO LSM  
HRO/RoL professionals

**From:** LSM

**Date:**

**Re:**

### General situation

This can be a brief description of the general situation for the week that has affected your work. You can mention the trials monitored during the week and any eventual final decision pronounced by the Court. No confidential information (including investigations and police phase) should be mentioned here.

This part should be the one addressed to the Head of Office.

### Human Rights Violations

Please report information here to be included in the HRRoL weekly report. The violations reported can be related to the police, the investigative and trial/re-trial stages. This part shall provide an analysis of the case reported in regards to the domestic law and the international Human Rights standards. No name should be mentioned.

### Human Rights Concerns and Other Information

Include here issues that are not intended for the HRRoL weekly.

### Trials

Trials attended, case's information, summary of the sessions and eventual concerns. Since the trials are public, indicate names (except of course for the trials/sessions in camera and juvenile's cases)

### Police/Pre-trial Investigations:

Report on investigations monitored and/or on police practice if there are concerns that do not fit in II - Human Rights Violations. Never mention names (investigations are confidential) and never report here on very sensitive cases.

**Access to Justice and other issues**

Any issues covered during the week (like visit to detention centre, access to justice...) and raised concerns that do not fit in II – Human Rights Violations.

**Forthcoming Events:****Upcoming trials for the next weeks**

Defendant(s)	Criminal acts	Articles	Presiding judge (Court, 64 or 6 panel?)	Date	Time

**Others**

Any important event you will be involved in.

# ANNEX V

## ADMINISTRATIVE MATTERS

### A. TERMS OF REFERENCE, TEAM LEADER

#### Background

In the OSCE Copenhagen Document, participating States decided “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...”.

Against this background, [the Organization] will deploy a trial observation activity in \_\_\_\_\_, where the recent presidential elections were followed by demonstrations, which, in turn, resulted in arrests of and bringing of criminal charges against some of the participants.

#### Objective

The purpose of the deployment is to observe trials of the protesters and to assess their compliance with domestic law, international human rights standards and OSCE commitments.

[The Organization], therefore, requires the services of an experienced expert to lead the trial observation activity on the ground.

#### Tasks and responsibilities

Under the supervision of Project Manager, the Team Leader will:

- Supervise the Local Co-ordinator, Trial Monitors and Legal Analyst(s);
- Represent the activity externally;
- Liaise with the relevant actors, including the authorities and other domestic and international observers, to ensure efficient and effective implementation of the activity;
- Identify court hearings to be observed and assign monitors;
- Collect and manage the information produced by the monitors;
- Oversee the observation progress and methodology, including the quality of the monitors’ reports, identify and suggest remedies for any shortcomings in the implementation of the activity;
- Consult and co-ordinate on a regular basis with [the Organization] regarding the implementation of the activity;
- Draft progress and final activity reports; and
- Perform any other related duties that may be necessary for the implementation of the activity.

#### Location

The Team Leader will be based in \_\_\_\_\_. Travel within the country may be expected.

#### Deliverables

- Progress reports, on a weekly basis, and on an ad hoc basis when requested by [the Organization];
- Materials collected in the course of the activity, including the monitors’ reports, interview forms and any other supporting materials;

Financial reports, if necessary; and

Final report, including quantitative and qualitative information on compliance of the observed trials with domestic and international human rights standards.

### **Qualifications**

- Advanced university degree in law, human rights, rule of law or another related field;
- Minimum ten years of working experience in the area of human rights, rule of law or a related field, including at least six years in a management position, as well as in positions requiring extensive legal drafting;
- Excellent knowledge of the relevant international human rights standards and OSCE commitments, including fair trial standards, case law and doctrine;
- Knowledge of comparative criminal law and procedure;
- Excellent drafting and editing skills, including documented ability to analyze complex legal matters;
- Excellent interpersonal and managerial skills;
- Excellent organizational, communication and problem-solving skills;
- Demonstrated ability and willingness to work as a member of a team, with people of different genders and diverse political views, while maintaining impartiality and objectivity;
- Fluency in written and spoken English;
- Flexibility and ability to work under minimum supervision, under pressure and tight deadlines; and
- Ability to operate word processing software, spreadsheet, slideshow and e-mail.

### **Assets**

- Experience with trial monitoring, including leading trial-monitoring programmes;
- Experience with the OSCE, particularly in the field of project management;
- Knowledge of [local language].

## B. TERMS OF REFERENCE, TRIAL MONITOR

### Background

In the OSCE Copenhagen Document, participating States decided “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...”.

Against this background, [the Organization] will deploy a trial observation activity in \_\_\_\_\_, where the recent presidential elections were followed by demonstrations, which in turn resulted in arrests of and bringing of criminal charges against some of the participants.

### Objective

The purpose of the deployment is to observe trials of the protesters and to assess their compliance with domestic law, international human rights standards and OSCE commitments.

[The Organization], therefore, requires the services of an experienced expert to serve as a trial monitor on the ground.

### Tasks and responsibilities

Under the direct supervision of the Team Leader, the Trial Monitor will perform the following tasks:

- Observe court proceedings;
- Collect relevant information from available sources, including prosecutors, lawyers, family members of the defendants and NGOs;
- Report on the course and outcome of the hearings; and
- Perform other duties related to the mandate and overall goal of the activity.

While performing his/her duties, the Trial Monitor will be bound by the Activity’s Code of Conduct.

### Location

The selected candidate will be based in \_\_\_\_\_. S/he will travel within the country as necessary.

### Deliverables

- Notes and reports from court hearings;
- Trial reports in accordance with [the Organization’s] requirements;
- Any additional relevant information, including documents and notes from interviews.

### Qualifications, experience and skills

- University degree in law;
- Minimum four years of experience working as a legal professional or otherwise in the field of human rights or rule of law;
- Good knowledge of international human rights standards related to criminal law, criminal procedure and fair trial;
- Excellent writing skills and the ability to analyze legal matters, as well as to present them in a clear manner;
- Excellent organizational, problem-solving and communication skills;

- Fluency in written and spoken English;
- Flexibility and ability to work under pressure and tight deadlines;
- Demonstrated ability and willingness to work as a member of a team, with people of different genders and diverse political views, while maintaining impartiality and objectivity; and
- Ability to operate word processing, spreadsheet and e-mail programmes.

**Assets**

- Prior experience in trial monitoring;
- Knowledge of [local language];
- Knowledge of the [local] legal system.

### **C. BRIEFING PACKAGE FOR THE MONITORING TEAM (TABLE OF CONTENTS)**

- Sources of information, useful websites
- Correspondence between the Organization and the authorities, agreements
- Terms of reference
- Code of conduct
- List of the known criminal cases
- Statements by NGOs and IOs
- Selected press reports
- Relevant legislation (extracts): Criminal Code charges; Criminal Procedure Code
- List of courts
- Background reports on human rights situation
- Trial-monitoring questionnaire
- Sample interview checklist

## ANNEX VI

### EXAMPLES OF OSCE THEMATIC AREA REPORTS

#### Implementation of new codes

- “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).

#### War crimes proceedings

There are innumerable reports on war crimes proceedings available on the websites of OSCE field operations. Their subject matter is reported in diverse ways, i.e., there are:

- Reviews that cover entire periods, such as “*Delivering Justice in BiH: An Overview of War Crimes Processing from 2005 to 2010*” and “*Kosovo’s War Crimes Trials: An Assessment Ten Years On: 1999-2009*”;
- Reviews issued about cases on a yearly basis or more frequently, such as the reports by the OSCE Mission to Croatia “*Background Report: Domestic War Crimes Proceedings 2007*” and “*Background Report: Developments in war crimes proceedings, January – May 2007*”;
- Reports on individual on-going cases on a quarterly basis, namely the “*Rule 11bis*” reports by the OSCE Mission to BiH;
- Reports on specific human rights issues or themes arising in war crimes proceedings, such as “*Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and Recommendations a Year after the Adoption of the National Strategy for War Crimes Processing*” or “*Reasoning in War Crimes Judgements in Bosnia and Herzegovina: Challenges and Good Practices*”; and
- Spot reports on specific issues of public interest, such as the “*Spot Report: Reactions in Croatia to the ICTY verdict on the ‘Vukovar Three’*” or “*Reaction in Croatia to the Arrest of Ante Gotovina*”.

Some other examples of specific war crimes reports include:

- “*Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010*”, OSCE Mission to Bosnia and Herzegovina (2011);
- “*Kosovo’s War Crimes Trials: An Assessment Ten Years On: 1999-2009*”, OSCE Mission in Kosovo (2010);
- All regular reports of the *Rule 11bis* Project of the OSCE Mission to Bosnia and Herzegovina that reported publicly on the progress of the indicted cases transferred from the ICTY to the Court of BiH for trial, pursuant to *Rule 11bis* of ICTY Rules of Procedure and Evidence (over 60 reports from 2006);
- “*Investigation of War Crimes cases: Obstacles and Challenges from a Monitoring Perspective*”, OSCE Mission to Skopje (2008);
- “*Summary Report on the ICTY Files*”, OSCE Mission to Skopje (2008);
- “*Return of Cases from ICTY: A Legal Perspective*”, OSCE Mission to Skopje (2007);
- “*Case Report: The Public Prosecutor’s Office vs Latif Gashi, Rustem Mustafa, Naim Kadriu and Nazif Mehmeti: The ‘Llapi Case’*”, OSCE Mission in Kosovo (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);
- “War Crimes Before the Domestic Courts”, OSCE Mission to Serbia (2003).

#### ➔ Trafficking in Human Beings

- “Trafficking in Human Beings for the Purpose of Labour Exploitation: A reference paper for Bosnia and Herzegovina”, OSCE Mission to Bosnia and Herzegovina (2011);
- “Monitoring of Court Cases for Crimes Related to Trafficking and Illegal Migration”, Coalition All for Fair Trials, the former Yugoslav Republic of Macedonia (2010);
- “Trafficking in Human Beings and Responses of the Domestic Criminal Justice System: A Critical Review of Law and Emerging Practice in Bosnia and Herzegovina in Light of Core International Standards”, OSCE Mission To Bosnia and Herzegovina (June 2009);
- “Combating Trafficking in Human Beings through the Practice of the Domestic Courts”, Coalition All for Fair Trials, the former Yugoslav Republic of Macedonia (2005);
- “Court Efficiency in Human Rights Protection in Corruption Related Cases” (January 2011); “Judicial Efficiency in Fighting Corruption” (January 2011); “The Need for Monitoring Court Cases in the Area of Corruption” (December 2007) by the Coalition All for Fair Trials, the former Yugoslav Republic of Macedonia.

#### ➔ Vulnerable persons

- “Ensuring Accountability for Domestic Violence: An Analysis of Sentencing in Domestic Violence Criminal Proceedings in BiH, with recommendations”, OSCE Mission to Bosnia and Herzegovina (2011);
- “Juvenile Correctional Institutions in Republika Srpska: Spot Report on the Opening of Tunjice Educational Reformatory Home”, OSCE Mission to Bosnia and Herzegovina (February 2007);
- “Report on Domestic Violence Cases in Kosovo”, OSCE Mission in Kosovo (July 2007).

#### ➔ Civil and administrative proceedings

- “Thematic Report on the Right to a Trial within Reasonable Time in Civil Proceedings” (focus on cases that started from 2004 and closed in 2010), OSCE Mission to Montenegro (June 2011);
- “Thematic Report on the Right to a Trial Within Reasonable Time in Civil Proceedings”, OSCE Mission to Montenegro (June 2010);
- “Use of Interim Measures in Civil Proceedings in Kosovo”, OSCE Mission in Kosovo (2010);
- “Issues Concerning the Role of Professional Associates and the Initiation of Proceedings in Inheritance Cases – Issue 9”, OSCE Mission in Kosovo (2010);
- “Child Adoption Procedure in Kosovo – Issue 6”, OSCE Mission in Kosovo (2010);
- “Report on the Commercial Court of Kosovo”, OSCE Mission in Kosovo (2009);
- “Litigating Ownership of Immovable Property in Kosovo”, OSCE Mission in Kosovo (2009);
- “First Review of the Civil Justice System”, OSCE Mission in Kosovo (June 2006);
- “Report on the Administrative Justice System in Kosovo”, OSCE Mission in Kosovo (2007)

## ANNEX VII

### TRIAL-MONITORING PROGRAMME SUMMARIES OF OSCE FIELD OPERATIONS

The tables below provide a summary of trial-monitoring programmes by OSCE field operations. The information included is not intended to be exhaustive and does not include every programme undertaken by every field operation.

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

Model	OSCE staff-model programme of the OSCE Presence in Albania, funded through the OSCE unified budget.
Inception	This is a multi-year project that commenced in 2003. 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); and 3) criminal appellate proceedings (2007). From 2008, the project has been focusing on civil proceedings in the District Courts.
General goal	The goal of the current phase is to assist in the improvement of the adjudication of civil cases.
Objectives	To analyze and provide recommendations to the Albanian justice sector at large to improve the civil justice system in Albania.
Partners	None
Monitoring Staff	One OSCE local staff and one international project manager monitor produce analytical reports.
Report(s)	<ul style="list-style-type: none"> <li>• “Interim Report (on the Prosecution of Serious Crimes)” (2005)</li> <li>• “Analysis of the Criminal Justice System of Albania” (2006) and</li> <li>• “Analysis of Criminal Appellate Proceedings in Albania” (July 2007)</li> </ul>
Other Major Advocacy Activities	None

Achievements	<p>Achievements in previous phases:</p> <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; and</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	In addition to the Fair Trial Development Project, the Presence observes some civil and criminal cases on an ad hoc basis. The ad hoc observation mostly focuses on high-profile cases, e.g., corruption cases involving politicians, or cases of special interest to the Presence's mandate, e.g., trafficking cases.

## B. Trial-monitoring Project in Armenia, ODIHR and the OSCE Office in Yerevan

Model	ODIHR ad hoc programme organized in co-operation with the OSCE Office in Yerevan.
Inception	The trial-monitoring project was launched by ODIHR in the aftermath of violent post-election clashes between the police and protesters in Yerevan on 1-2 March 2008. The monitored criminal cases involved a total of 109 defendants over the period from 15 April 2008 to 31 July 2009.
Objectives	<p>To:</p> <ul style="list-style-type: none"> <li>• Gather information systematically about compliance of the monitored trials with relevant domestic and international fair trial standards;</li> <li>• Identify possible shortcomings in the criminal justice system on the basis of the monitoring; and</li> <li>• Present the Armenian authorities with recommendations aimed at improving the administration of criminal justice in light of their OSCE commitments.</li> </ul>
Partners	ODIHR, in partnership with the OSCE Office in Yerevan
Monitoring Staff	The team was composed of a combination of national and international monitors.
Report(s)	Final report from the Trial-monitoring Project in Armenia (April 2008- August 2009)
Other Major Advocacy Activities	Besides the issuance of the trial monitoring Report, the OSCE Office in Yerevan advocates for the reform of the criminal procedure, judicial independence and a reduction in the recourse to detention as a preventive measure
Achievements	<p>Topical criminal-justice discussions with the participation of representatives of the Ministry of Justice, Judiciary, Prosecutor's Office and the Chamber of Advocates;</p> <ul style="list-style-type: none"> <li>• Provision of international expertise on respective legislative provisions, including changes in legislation;</li> <li>• Increased co-operation with national officials, including the Chairmen of the Cassation and Constitutional Courts, and the Ministry of Justice in furthering judicial and criminal-justice reforms; and</li> <li>• Elaboration of a new Criminal Procedure Code, based on the recommendations of the report.</li> </ul>

Of Note	
Other monitoring activities	<p><u>Model</u> : Staff and selected programmes of the OSCE Office in Yerevan, funded through the OSCE unified budget.</p> <p><u>Inception</u>: A programmatic activity of the Office to track and support criminal-justice and judicial reform efforts.</p> <p>Objectives:</p> <ul style="list-style-type: none"> <li>• To assist the Republic of Armenia in fulfilling its OSCE commitments in the area of the rule of law;</li> <li>• To assess domestic legislation and practice compliance with international standards;</li> <li>• To enhance the efficiency and transparency of the justice system and improve public access to justice;</li> <li>• To identify further areas for capacity-building activities; and</li> <li>• To measure progress over time in the administration of the justice system.</li> </ul>

### C. Trial-monitoring Project in Azerbaijan, ODIHR and the OSCE Office in Baku

Model	Ad hoc (2003/2004), and general monitoring of criminal and administrative justice, mainly funded through extra-budgetary contributions, other than in 2008 (Unified Budget).
Inception	Other than the 2003/4 Programme that targeted specific cases, trial monitoring focused on criminal cases selected by the Office at random that covered the main court instances in the Baku capital area and some regions across the country. As of 2009, the Office expanded the scope of the Programme to cover civil cases as well. In addition, as of 2011, the Office launched a pilot project to monitor administrative justice.
Objectives	<ul style="list-style-type: none"> <li>• To assess positive and negative trends regarding courts' compliance with the accused's right to a fair trial in line with OSCE Commitments and other related international standards.</li> <li>• To develop, in co-operation with the authorities and other stakeholders, recommendations to further strengthen the justice sector, including through legal and judicial reforms.</li> </ul>
Partners	From 2003 to 2011, the Office's implementing partner, a local NGO, implemented the programmes. As of February 2012, the Office hired the 2011-2012 Programme's staff (trial observers and co-ordinators) directly.
Monitoring Staff	<p>2003/4: 21 observers, one national coordinator.</p> <p>2006/7: 12 observers, two national coordinators.</p> <p>2009: 18 observers, one national coordinator.</p> <p>2010: 16 observers, one national coordinator.</p> <p>2011/2012: 15 observers, two national coordinators.</p>
Reports	Trial Monitoring Reports issued in 2003/4; 2006-2007; 2009; 2010. 2011 and 2012 Trial Monitoring Reports currently under preparation.
Achievements	<ol style="list-style-type: none"> <li>1. Engaging the authorities and other stakeholders from the outset in the preparation of the findings and recommendations to be included in the reports.</li> <li>2. Compiling updated and reliable factual data to assess progress made by the justice sector regarding compliance with fair trial standards.</li> <li>3. Capacity building for local lawyers involved in the Programme regarding OSCE/ODIHR trial monitoring methodologies as well as fair trial standards in line with OSCE Commitments and other related international standards.</li> </ol>

Of Note	In order to facilitate regular co-operation with the authorities and other stakeholders, the Office established a Working Group involving representatives of the Ministry of Justice, Judicial and Legal Council, Bar Association, Prosecutor's Office and a senior member of the judiciary.
---------	--

#### D. Trial-monitoring Programme of the OSCE Mission to Bosnia and Herzegovina

Model	The OSCE Mission to Bosnia and Herzegovina (BiH) operates a staff-model trial-monitoring programme through the OSCE unified budget. From mid-2005 to 2009, it also supported a separate monitoring section for cases transferred from the ICTY (Rule 11 <i>bis</i> Section), funded as an extra-budgetary project. The establishment of the team of full-time monitors provided the Mission with capacity to monitor systematically and reliably the implementation of criminal law reforms and application of fair trial standards, war crimes and trafficking in human beings cases, and any legal systems issues pertinent to the Mission's Rule of Law programmes.
Inception	The Mission began monitoring war crimes cases in 1996, within the Human Rights Department. At the beginning of 2004, this was transformed into a systemic and comprehensive criminal monitoring programme of the judicial system that corresponded with dramatic judicial reforms. The programme is ongoing in its full capacity and, since January 2010, has fallen operated within the Judicial and Legal Reform Section of the Human Dimension Department.
Programme Staff	Twenty-two national staff monitor 63 courts of all instances throughout the country – at the local, entity and state levels. Supervision and guidance is provided by National Legal Advisers and Heads of Field Offices, while policy guidance is provided by the international and national legal advisers at the head office and in larger field locations.
Partners	The Mission does not have formal operational partners; the programme works closely with national and local authorities, as well as with international institutions, such as the EC Delegation, the European Union Police Mission, the Council of Europe in BiH, UN treaty bodies, international NGOs, and others.
Objective	<ul style="list-style-type: none"> <li>• To enhance transparency and respect for the rule of law within government and public institutions; and</li> <li>• To assist the national justice sector and judicial authorities in enhancing their performance in relation to effectiveness, efficiency, independence, public trust and human rights standards, including the right to a fair trial and support to transitional justice.</li> </ul>
Outcome	The criminal justice system develops mechanisms to process sensitive cases, particularly war crimes cases, fairly and more effectively.
Outputs	<ul style="list-style-type: none"> <li>• Remaining structural challenges and need for reform in the criminal justice system have been identified, and advocacy for improvement of compliance with human rights and rule of law standards is increased;</li> <li>• The effectiveness of war crimes prosecutions is improved, and public awareness of and confidence in the process are increased;</li> <li>• Enhanced protection and enforcement of the rights of vulnerable individuals, particularly victims of gender-based violence, in the criminal justice system; and</li> <li>• Efforts to prevent and combat hate crimes are stepped up significantly.</li> </ul>

Activities	<p>The Mission has developed a number of methods for using trial-monitoring findings to support the still nascent judicial reforms and rule of law programming in BiH.</p> <p><b>Monitoring:</b> The Mission has developed a comprehensive approach to monitoring, including of all phases and all actors in the criminal justice system. Thus, justice-sector monitoring focuses on monitoring the independence of the judiciary and identifying standards and good practices to enhance independence and accountability within the judiciary. It also monitors pre-trial and trial stages in cases concerning war crimes, trafficking in human beings and related offences, organized crime and corruption, juvenile justice, gender-based violence, and crimes involving vulnerable victims, such as children.</p> <p><b>Advocacy and expert advise:</b> The Mission shares its findings with the authorities and the public on a regular basis. The Mission advocates for necessary legislative, institutional and structural changes using various methods and venues. For example, the Mission provides expert assistance to the Criminal Code Assessment and Implementation Team in charge of monitoring and preparing amendments to criminal legislation. Similarly, the Mission provides assistance and shares findings with counterparts in charge of the implementation of the Justice-sector Reform Strategy, National War Crimes Processing Strategy, Juvenile Justice Strategy, and Implementation of the Action Plan for the Fight Against Trafficking in Human Beings. The Mission presents its findings at various forums, including the Judicial and Prosecutorial Training Centres, other training and capacity-building forums, and at Mission-sponsored public events.</p>
Publications	<p>The Mission has issued a number of public reports on priority issues containing recommendations for further advocacy.</p> <p>Such reports include:</p> <ul style="list-style-type: none"> <li>• Implementation of the New Criminal Procedure Code in the Courts of Bosnia and Herzegovina</li> <li>• War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles</li> <li>• Plea Agreements in Bosnia and Herzegovina: Practices before the Courts and their Compliance with International Human Rights Standards</li> <li>• The Presumption of Innocence: Instances of Violations of Internationally Recognized Human Rights Standards by Courts of Bosnia and Herzegovina</li> <li>• The Law and Practice of Restrictive Measures: The Justification of Custody in Bosnia and Herzegovina</li> <li>• Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina</li> <li>• Trafficking in Human Beings and Responses of the Domestic Criminal Justice System</li> <li>• Trafficking in Human Beings for the Purpose of Labour Exploitation: A reference paper for Bosnia and Herzegovina</li> <li>• Response to Domestic Violence and Co-ordinated Victim Protection in the Federation of Bosnia and Herzegovina and the Republika Srpska, Preliminary Findings on the Implementation of the Laws on Protection from Domestic Violence</li> <li>• Ensuring Accountability for Domestic Violence: An Analysis of Sentencing in Domestic Violence Criminal Proceedings in BiH</li> <li>• Independence of the Judiciary: Undue Pressure on BiH Judicial Institutions</li> <li>• Reasoning in War Crimes Judgments in Bosnia and Herzegovina: Challenges and Good Practices</li> <li>• Witness Protection and Support in BiH Domestic War Crimes Trials</li> <li>• The Processing of ICTY Rule 11bis cases in Bosnia and Herzegovina</li> <li>• Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005-2010</li> </ul>

Preparation	<ul style="list-style-type: none"> <li>• Training for monitors; and</li> <li>• Trial-monitoring Manual and more specific methodologies, such as on monitoring cases involving trafficking, juvenile justice and hate crimes.</li> </ul>
Of Note	Over this time, the focus of the programme has shifted from assessing the implementation of procedural reforms in the criminal justice sector to a broad ability to respect and protect human rights. By keeping its focus on BiH'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, taking into account the fragmented BiH legal system. The Mission maintains a database of the majority of proceedings monitored.

## E. Domestic War Crimes Programme, OSCE Office in Zagreb (Croatia)

Model	A staff-model programme of the OSCE Office in Zagreb, funded through the OSCE unified budget.
Inception	The OSCE Office in Zagreb officially began work on 1 January 2008 as the second OSCE field operation in Croatia. It was preceded by the OSCE Mission to Croatia, which closed at the end of 2007, after completing most of its mandate. War crimes proceedings from arrests to appeals have been monitored in a systematic manner and countrywide since 2002. In 2008, the Office continued with monitoring performed by the Mission up to that time.
General goal	Contributing to fair administration of justice in war crimes proceedings and to the elimination of impunity for violations of international humanitarian law committed during the conflict in the former Yugoslavia.
Objectives	<ul style="list-style-type: none"> <li>• To assess the application of international fair trial standards in war crimes cases;</li> <li>• To assess whether the Croatian courts are prosecuting war crimes cases impartially with respect to defendants' national origins;</li> <li>• To assess whether serious cases that have not been prosecuted are being pursued by the authorities;</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, adequacy of defence counsel and fairness of trials <i>in absentia</i>; and</li> <li>• To monitor the proceedings referred to Croatia under the Rule 11 <i>bis</i> of the ICTY Rules and Procedures (the task has been accomplished) and other cases involving ICTY evidentiary transfers; so called "Category II" cases.</li> </ul>
Partners	Between 2003 and 2006, two annual reports were issued jointly with the Ministry of Justice (although the Ministry was not officially a partner).
Monitoring Staff	One international staff member is the Head of the War Crimes Trials Monitoring Unit, co-ordinating all activities of the unit and editing the reports; five local OSCE staff members perform monitoring nationwide, working out of the Office in Zagreb, and draft the reports; one local staff member provides administrative and language assistance.

Reports	<ul style="list-style-type: none"> <li>• “Domestic war crimes trials” (annual reports 2002-2007)</li> <li>• “War Crime Procedures in Croatia and Findings from Trial Monitoring” (2004);</li> <li>• “Background Report on Domestic War Crime Prosecutions, Transfer of ICTY Proceedings and Missing Persons” (2005)</li> <li>• Background report “Ademi-Norac Trial Concluded” (2008) – the final report on the only case transferred to Croatia under the rule 11 <i>bis</i>;</li> <li>• Regular fortnightly (activity) reports on developments in domestic war crimes proceedings</li> <li>• Sort reports on important events related to war crimes proceedings</li> <li>• Status reports of the Head of Office at the end of each year on the progress achieved in mandate related issues</li> </ul>
Other Major Advocacy Activities	<ul style="list-style-type: none"> <li>• Plenary meetings with the representatives of the Ministry of Justice, Supreme Court and General State Attorney Office at which the deficiencies identified by the Office are addressed (this initiative was ceased by the Ministry of Justice; last meeting was in February 2010);</li> <li>• Exchanging information collected by the Office with the representatives of the Chief State Attorney Office at regular meetings;</li> <li>• Maintaining contacts with the Judicial Academy and the Bar Association regarding the education of judges, prosecutors and lawyers in processing of war crimes cases;</li> <li>• Meeting with the County State Prosecutors and County Court Presidents at which the issues related to prosecution of war crimes and impunity gap was discussed; and</li> <li>• Capacity-building of the NGOs involved in the monitoring of war crimes proceedings.</li> </ul>
Achievements	<ul style="list-style-type: none"> <li>• Monitoring and reports have identified and documented disparities related to ethnic bias in the prosecution of war crimes cases and an impunity gap in prosecution of serious violations of international humanitarian law;</li> <li>• Based on the observations and advocacy by the Office, some important measures have been undertaken by domestic authorities, including: <ul style="list-style-type: none"> <li>• Training for judges, prosecutors and lawyers in international humanitarian law and fair trial were organized;</li> <li>• The review of <i>in absentia</i> verdicts rendered during the nineties resulted in the reversal of final verdicts against 69 individuals, while the verdicts against 22 more are still being reviewed;</li> <li>• Legislation was changed, giving four specialized courts exclusive jurisdiction in all future war crimes trials; and</li> <li>• A roster of lawyers willing to represent clients in war crimes trials with the aim of improving the defence of the war crimes defendants was created by the Bar Association;</li> </ul> </li> <li>• Improvements in the trials of war crimes have also been observed, including a decrease in the numbers of <i>in absentia</i> trials and increased efforts by domestic authorities to pursue all individuals responsible for war crimes; and</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>
Of Note	<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, has 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 for assessing Croatia’s compliance with certain benchmarks relating to reforms necessary for EU accession, as well as co-operation commitments with the ICTY.</p>

## F. Legal System Monitoring Section (LSMS), OSCE Mission in Kosovo

Model	A staff-model programme of the OSCE Mission in Kosovo, funded through the OSCE unified budget.
Inception	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 started monitoring the administrative justice system.
Objectives	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.
Reports	<p><b>On Criminal Justice:</b></p> <ul style="list-style-type: none"> <li>• OSCE First Review of the Criminal Justice System (1 February 2000 - 31 July 2000)</li> <li>• OSCE Second Review of the Criminal Justice System (1 September 2000 – 28 February 2001)</li> <li>• OSCE Third Review of the Criminal Justice System (October 2001)</li> <li>• OSCE Fourth Review of the Criminal Justice System (September 2001-February 2002)</li> <li>• OSCE Fifth Review of the Criminal Justice System: “The Protection of Witnesses in the Criminal Justice System (2003)”</li> <li>• OSCE Sixth Review on the Criminal Justice System: “Crime, Detention and Punishment (December 2004)</li> <li>• OSCE Seventh Review on the Criminal Justice System (1999-2005): “Reforms and Residual Concerns”</li> <li>• OSCE Eighth Review of the Criminal Justice System in Kosovo (2006): “The Protection of Witnesses in the Criminal Justice System; The Administration of Justice in Minor Offences Courts; Juveniles in Criminal Proceedings”</li> <li>• OSCE Ninth Review of the Criminal Justice System in Kosovo (2007): “A Legal Analysis of Trafficking in Persons Cases in Kosovo”</li> <li>• OSCE/US Office Report: Witness Security and Protection in Kosovo: Assessment and Recommendations</li> <li>• “Four years later: Follow up of March 2004 Riots Cases before the Kosovo Justice System” (July 2008)</li> <li>• “The Treatment of Different Communities in the Kosovo Justice System: A statistical Overview of Punishments and Trial Outcomes in District, Municipal and Minor Offences Courts” (December 2008)</li> <li>• “Judicial Proceedings Involving Domestic Violence” (November 2009)</li> <li>• “The Use of Detention in Criminal Proceedings in Kosovo: Comprehensive Review and Analysis of Residual Concerns (Part I)”, (November 2009)</li> <li>• “The Use of Detention in Criminal Proceedings in Kosovo: Comprehensive Review and Analysis of Residual Concerns (Part II)”</li> </ul>

	<p><b>On Civil/Administrative Justice:</b></p> <ul style="list-style-type: none"> <li>• OSCE Spot Report: “The Appointment of Temporary Representatives in Property Disputes Involving Minorities as Respondent Parties” (April 2005)</li> <li>• “OSCE First Review of the Civil Justice System” (June 2006)</li> <li>• “OSCE Report on The Administrative Justice System in Kosovo” (April 2007)</li> <li>• “OSCE Report on Legal Representation in Civil Cases” (June 2007)</li> <li>• “OSCE Report on Domestic Violence Cases” (July 2007)</li> <li>• “Privatization in Kosovo: Judicial Review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo” (May 2008)</li> <li>• “Litigating Ownership of Immovable Property in Kosovo” (April 2009)</li> <li>• “Conflicting Jurisdiction in Property Disputes” (April 2009)</li> <li>• “Report on Commercial Court in Kosovo” (July 2009)</li> <li>• “Failure to Properly Address Interlocutory Applications in Civil Proceedings” (December 2010)</li> <li>• “Use of Interim Measures in Civil Proceedings in Kosovo” (December 2010)</li> <li>• “The Mitrovicë/Mitrovica Justice System: Status Update and Continuing Human Rights Concerns” (January 2011)</li> <li>• “Adjudication of Family Law Case in the Kosovo Justice System” (February 2011)</li> </ul>
Partners	None
Monitoring Staff	The LSMS is part of the Mission’s Department of Human Rights 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.
Achievements	<ul style="list-style-type: none"> <li>• Reports have provided more than 300 recommendations for judicial reform, many of which have been implemented;</li> <li>• Institutional reforms have included the creation of a judicial training institute, a judicial inspection unit, a criminal-defence resource centre, and a 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> </ul> <p>The LSMS has issued more than 30 public reports, seven semi-public reports, and more than 50 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; and the LSMS reports are used as a learning and training tool for the Kosovo Judicial Institute, which trains judges and prosecutors. The European Union Rule of Law Mission in Kosovo (EULEX) has posted the LSMS reports on its official website as a training material for EULEX judges, prosecutors and legal officers.</p>
Of Note	Despite the positive institutional developments noted above, the LSMS continues to monitor significant deficiencies in the administration of justice in individual cases. In the past few years, the LSMS has already begun to implement new working methods with legal actors. Such methods include the issuance of semi-public monthly monitoring reports to courts, public prosecutors and advocates, providing monitoring results, and holding regular meetings with local judges and prosecutors to discuss findings.

## G. Trial-monitoring Project in Kazakhstan, ODIHR and the OSCE Centre in Almaty

Model	ODIHR project model organized in co-operation with the OSCE Centre in Almaty
Inception	Monitoring commenced in February 2005, after a six-month planning phase.
Objectives	<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>
Reports	“Report from the Trial-monitoring Project in Kazakhstan 2005-2006” (2007)
Partners	No formal partners.
Monitoring Staff	Twenty-five local project monitors included recent law-school graduates, young practising lawyers and members of NGOs; programme supervision was provided by a programme co-ordinator, who was also a local lawyer.
Achievements	<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 recommendations to authorities; and</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 representatives of 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 country. A questionnaire reporting system permitted monitors to obtain 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.

## H. Trial-monitoring Project in Kyrgyzstan, ODIHR and the OSCE Centre in Bishkek

Model	ODIHR project model organized in co-operation with the OSCE Centre in Bishkek
Inception	Monitoring commenced in February 2005, after a six-month planning phase.
Objectives	<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>

Reports	“Results of Trial Monitoring in the Kyrgyz Republic 2005-2006” (2007)
Partners	No formal partners.
Monitoring Staff	Twenty-five local project monitors included recent law-school graduates, young practising lawyers and members of NGOs; programme supervision was provided by two programme co-ordinators, who were local lawyers.
Achievements	<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; and</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 recommendation 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.

## I. Trial monitoring conducted by the OSCE Mission to Skopje and Coalition All for Fair Trials, the former Yugoslav Republic of Macedonia

### i) Trial Monitoring conducted by the OSCE Mission to Skopje

Model	A staff-model programme of the OSCE Mission to Skopje funded through the OSCE unified budget.
Inception	The Monitoring Unit was established in 2001, along with the considerable enlargement of the Mission following the 2001 conflict, and was focused on monitoring the criminal justice system as part of the Mission’s mandate through six field offices throughout the country. The Unit’s monitoring scope decreased substantially in 2007, with the closure of the field offices and, in 2008, it merged with Judicial Reform within the Rule of Law Department. The Mission has monitored war crimes cases referred back to the country by the ICTY, along with high-profile cases.
Objectives	The mandate of the judicial reform monitors is to: monitor developments and proceedings in war crimes cases, along with cases that, because of their nature or the identity of the defendant(s), might have implications for security and stability in the country; prepare analytical and narrative reports regarding the compliance of cases with international standards, including human rights and fair trial standards; report on matters of concern; and keep senior staff and the international community apprised of events and recommend courses of action within a wider context of judicial independence and the country’s steps towards ethnic reconciliation, fair trial standards and independence of the judiciary. The final objective of monitoring is to have an accountable and responsive criminal justice system that ensures due process, the protection of human rights and respect of international standards.

Reports	<ul style="list-style-type: none"> <li>• Spot reports (summary of monitored trials and any immediate follow-up undertaken)</li> <li>• Special reports (for ongoing cases, analyses; example: 2008 Analysis on Pre-trial Detention; 2008 Summary Report on the ICTY Files; )</li> <li>• Weekly reports (providing summaries and analyses of weekly events in the context of ongoing Rule of Law Department activities)</li> <li>• Annual reports (examples: 2011: “Summary of Monitored Trials in 2010 and 2011”; “Comparative Overview of the Judicial Council Reports in the Years 2009 and 2010”)</li> <li>• Thematic reports ( examples: 2007: “Return of Cases from ICTY: A Legal Perspective”; 2008: “Access to Court Decisions, Law and Practice”; “The Current Functioning of the Newly Created Organized Crime Department in the Basic Courts”; 2008: “Nine-month Analytical Report from Countrywide Observation of Trials”)</li> </ul>
Partners	Coalition All for Fair Trials; US Embassy’s Political Section; Helsinki Committee.
Monitoring Staff	Monitoring falls under the mandate of the Judicial Reform Division of the Rule of Law Department. One international and one national officer monitor regularly, along with other officers – all lawyers, who are national and international, depending on the needs. The Head of the Judicial Reform Unit co-ordinates and provides supervision and strategic planning. The two primary monitors draft the reports under the guidance of the Head of Unit. Besides daily narrative updates, findings are compiled within the annual reports.
Achievements	<ul style="list-style-type: none"> <li>• Creation of the Coalition All for Fair Trials, a network of local non-governmental organizations, thus facilitating the process of acquiring local ownership in trial monitoring. The OSCE Mission continued to monitor, however, but in more limited manner, i.e., with a narrower area of focus;</li> <li>• Fostering the transparency of the judicial system through the preparation of thematic analyses, specific projects, advocating and sharing the findings with judges, prosecutors and other relevant stakeholders;</li> <li>• Facilitated the installation of automated case-distribution systems in all courts; and</li> <li>• Supported professional associations of judges, prosecutors and attorneys through capacity-building activities and training on various topics, including international fair trial standards, filing cases with the European Court of Human Rights, international humanitarian law and the new law on criminal proceedings.</li> </ul>
Of Note	

## ii) Coalition All for Fair Trials, a Domestic Observer Group in the former Yugoslav Republic of Macedonia

Model	A domestic trial-monitoring network consisting of 20 NGOs, organized in accordance with domestic law.
Inception	The coalition was established in May 2003, with the support of the OSCE Spillover Monitor Mission to Skopje.
Objectives	<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; and</li> <li>• To assess the implementation of new criminal procedural provisions and practices of institutions responsible for combating organized crime.</li> </ul>
Partners	None

Monitoring Staff	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 six to 80.
Reports	<ul style="list-style-type: none"> <li>• “Countrywide Observation of the Implementation of Fair Trial Standards in Domestic Courts” (interim report, 2004)</li> <li>• “Final Report, Countrywide Observation of the Implementation of Fair Trial Standards in Domestic Courts and the Assessment of the Functioning of the Judiciary” (2004)</li> <li>• “Combating Trafficking in Human Beings through the Practice of the Domestic Courts” (2005)</li> <li>• “The Successful Suppression of Election Irregularities - Key Factors for Fair and Democratic Elections” (2005)</li> <li>• “Defamation and Insult in Criminal Procedures against Journalists” (2006);</li> <li>• “Criminal Justice Responses to Organized Crime” (2006)</li> <li>• “Efficiency of the Courts When Dealing with Organized Crime” (2008)</li> </ul>
Achievements	<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 by national authorities;</li> <li>• Roundtable events, where government officials considered recommendations for reforms and made implementation commitments; and</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>
Of Note	<p>Since its inception, the coalition has undertaken a number of specific projects for the OSCE Mission, as well as with the Soros Foundation and the Finnish, and the US Embassies. Recently, the Swedish Helsinki Committee for Human Rights funded the “Assessment of the Courts’ Efficiency” project, 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 working with international organizations, the coalition is developing the capacity to engage independently in project development with donors without financial support from the OSCE.</p>

## J. Trial-monitoring Programme in Moldova, OSCE Mission to Moldova

Model	1) Project model – Trial-monitoring Programme implemented by the OSCE Mission to Moldova and ODIHR as an extra-budgetary project
Inception	1) The Trial-monitoring Programme was launched in March 2006 and completed on 31 December 2009. The initial programme document was completed on 17 July 2005; the programme was prolonged in April 2007, March 2008 and January 2009. In September 2007, the programme was extended to the south-east of the country. 2) Monitoring of high-profile court cases has been outlined annually in the Human Rights and Democratization Programme of the OSCE Mission to Moldova.
Objectives	1) The overall goal of the Trial-monitoring Programme was to enhance Moldova's compliance with its OSCE commitments and other international standards on the right to a fair trial. General objectives were: <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 the application of international fair trial procedural standards; and</li> <li>• To promote respect for human rights and the rule of law.</li> </ul> 2) The Trial-monitoring Programme focused on the following types of criminal cases: trafficking in human beings, trafficking in arms, domestic violence, crimes against the administration of justice, and corruption and other crimes committed by public officials.  2) The overall goal of the programmatic trial-monitoring activity is to monitor, assess and report on high-profile court cases and the related actions of national and regional courts
Reports	1) The Trial-monitoring Programme published three analytic reports: <ul style="list-style-type: none"> <li>• “Six-month Analytic Report: Preliminary Findings on the Experience of Going to Court in Moldova” (November 2006)</li> <li>• “Observance of Fair Trial Standards and Corresponding Rights of Parties during Court Proceedings” (June 2008)</li> <li>• “OSCE Trial-monitoring Programme for the Republic of Moldova. Final Report” (December 2009)</li> </ul> 2) Programmatic monitoring: regular reporting to the Mission's management on court hearings and the related actions of national authorities
Partners	The Trial-monitoring Programme: <ul style="list-style-type: none"> <li>• International: ODIHR and the American Bar Association Rule of Law Initiative;</li> <li>• NGO's: the Institute for Penal Reforms and the Causeni Law Center.</li> <li>• National authorities: the Superior Council of Magistrates and the General Prosecutors' Office</li> </ul>
Monitoring Staff	The Trial-monitoring Programme: The International Programme Manager (Mission's Human Dimension Officer) provided overall supervision of the Programme; the National Project Co-ordinator (a local lawyer) implemented the programme, supervised the Senior Programme Assistant and 26 monitors; the Senior Programme Assistant provided support to the Programme, 20 monitors from Chisinau (8 replaced in 2007) and 6 from the south-east of the country. Moldovan law-school graduates, young lawyers or junior law professors served as national monitors (with a nominal stipend); 2) Programmatic monitoring: OSCE Mission to Moldova national and international staff members

Achievements	<p>1) The Trial-monitoring Programme:</p> <ul style="list-style-type: none"> <li>• · Produced a trial-monitoring manual for monitors, including a detailed legal reference manual containing international and national standards;</li> <li>• · Developed detailed MoUs with national authorities – the Superior Council of Magistrates and the General Prosecutor’s Office – to assist in the identification of cases relevant to monitoring;</li> <li>• · Developed a computer database to manage the monitoring data; it was updated and improved a number of times according to emerging needs;</li> <li>• · Trained trial monitors and selected civil society representatives on trial-monitoring skills and methods, including international and national fair trial standards (March and October 2006, August 2007);</li> <li>• The courts started regularly to post public trial schedules, consequently increasing access for the general public to trials;</li> <li>• The courts introduced a system of random case assignment;       <ul style="list-style-type: none"> <li>• The Trial-monitoring Programme’s first two analytic reports served as factual materials for training activities for judges and prosecutors on the most common violations of legislation and inappropriate behaviour by legal professionals, and were widely used and quoted by other international organizations providing training activities on human rights issues (NORLAM);</li> </ul> </li> <li>• Programme findings contributed to the elaboration of the Judicial Code of Ethics (January 2008);</li> <li>• Programme findings contributed to the refurbishing of courtrooms and the provision of needed technical facilities by the Millenium Challenge Programme;</li> <li>• The programme addressed the most acute violations within the judicial system regarding the right to legal assistance, the right to trial within a reasonable time, the rights of victims and witnesses, etc. Several of these violations were further addressed by the Government in its Programme for 2009</li> <li>• The conclusions of the programme and the recommendations based on its findings were discussed during the international conference that was organized by the OSCE Mission and held on 8 December 2009 in Chisinau, with the participation of foreign experts, national authorities, civil society representatives and international organizations;</li> <li>• The conclusions related to delays and postponements served as the basis for an annual project – Efficiency of Court Proceedings – initiated and first implemented in 2010 by the Ministry of Justice, in co-operation with the Norwegian Rule of Law Mission and the OSCE Mission to Moldova;</li> <li>• As a follow-up activity to the findings of the Final Report and recommendations therein, the Mission initiated the extra budgetary project “Support for Prosecution Service Reform and Capacity Building, Based on the Experience of the Baltic States”, implemented in 2011; and</li> <li>• The issued reports contributed to the Needs Assessment of the Justice Sector, carried out by EU experts, and to the adoption of the Justice Sector Reform Strategy by Parliament in 2011.</li> </ul> <p>2) Programmatic monitoring: Around 5 high-profile court cases are monitored annually, all of which are assessed and reported on to the Mission management for agreement on further actions, (meeting high-level authorities, reporting to the Chairmanship and OSCE Institutions on violations of human rights); findings and observations have been used for strategic planning and Human Rights and Democratization Programme outlining;</p>
--------------	---

Of Note	<p>Thorough planning has been the hallmark of the Trial-monitoring Programme. Starting with the production of a comprehensive Programme Document in 2005, setting forth the aims, structure, and methodology of the Trial-monitoring Programme. The Programme has also cultivated partnerships and working arrangements with local groups.</p> <p>Co-operation and strategies have included MoUs with local authorities, regular meetings and the distribution of reports, which have led to better access to information. Roughly 800 copies of each of the three Trial-monitoring Programme Reports were distributed among legal professionals.</p> <p>All the three Trial-monitoring Programme Analytic Reports have been well received and endorsed by the Superior Council of Magistrates and the General Prosecutor's Office. All judges throughout Moldova have received copies of all the three Analytical Reports; the reports have been published on the web-page of the Superior Council of Magistrates and were thoroughly discussed at annual General Assemblies of Judges.</p>
---------	--

## K. Domestic War Crimes Trial Monitoring, OSCE Mission to Serbia

Model	A staff-model programme of the OSCE Mission to Serbia funded through extra-budgetary contributions.
Inception	The Mission has monitored war crimes trials on an ad hoc basis since 2001, and permanently since 2003.
Objectives	<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 11bis of the ICTY Rules of Procedure;</li> <li>• To track the progress of regional co-operation efforts in the collection of evidence and prosecution of those indicted for war crimes; and</li> <li>• To support judicial reform, including identifying legislative, training and institutional needs, and to help improve the fairness and effectiveness of criminal prosecutions.</li> </ul>
Reports	<ul style="list-style-type: none"> <li>• War Crimes before the Domestic Courts” (2003)</li> <li>• Daily and periodical reports on specific cases and issues were also distributed to the international community and local counterparts.</li> </ul>
Partners	None
Monitoring Staff	One national staff member of the Mission's Rule of Law and Human Rights Department, and three national staff members financed by the extra-budgetary contribution (which ended in March 2012).
Achievements	<ul style="list-style-type: none"> <li>• The identification of a need to establish regional judicial and police co-operation among Serbia and 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 identification of a need to build the capacity of judges, prosecutors and defence attorneys through training and seminars;</li> <li>• The dissemination of reports on individual war crimes cases to the ICTY, foreign embassies and international organizations; and</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>

Of Note	As a Mission activity, monitoring war crimes trials is also part of wider programming addressing war crimes, 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.
---------	---

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

Model	OSCE project-model programme organized by the OSCE Centre in Dushanbe and funded through the OSCE unified budget.
Inception	Project planning began in 2004; trial monitoring commenced in 2005.
Objectives	<ul style="list-style-type: none"> <li>• To obtain systematic and impartial information on advances and shortcomings 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 (such as judges, prosecutors, members of the executive, lawyers and the public) 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 that fair trials are accessible to all citizens; and</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>
Reports	<ul style="list-style-type: none"> <li>• "Ensuring Fair Trials Through Monitoring" (2005)</li> <li>• "Ensuring Fair Trials Through Monitoring in Tajikistan" (2006)</li> </ul>
Partners	Human Rights Centre and the law faculties of Dushanbe and Khujand Universities.
Monitoring Staff	Eight local lawyers perform monitoring under contract with the OSCE Centre in Dushanbe. The lawyers are also members of local NGOs.
Achievements	<ul style="list-style-type: none"> <li>• Increased access of monitors to court hearings monitors were initially prevented from attending at 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; and</li> <li>• The making of specific recommendations 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 the need for broader public participation in the process of exercising fair trial rights.</li> </ul>
Of Note	In 2007, a total of 103 trials were monitored at courts of first instance: 41 in Dushanbe (a total of 229 hearings) and 62 in Sughd (totalling 196 hearings). The majority of cases monitored relate to theft and illegal trafficking of narcotics. The territorial scope of the programme was increased in 2007 to include monitoring at the court in Isfara.

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

Model	ODIHR ad hoc activity organized in co-operation with the OSCE Centre in Tashkent.
Inception	The project was organized following the violence on 13 and 14 May 2005 in Andijan. Between September and November 2005, the criminal trial of the 15 individuals charged with violent crimes and other serious offences against the state was monitored.
Objectives	<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; and</li> <li>• To establish and maintain a dialogue with the Government of Uzbekistan on issues related to fair trial standards.</li> </ul>
Partners	None.
Monitoring Staff	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.
Reports	“Report From the OSCE/ODIHR Trial Monitoring in Uzbekistan – September/October 2005” (2006).
Achievements	<ul style="list-style-type: none"> <li>• Secured an invitation from the Ministry of Foreign Affairs to monitor the trials of 15 individuals before the Supreme Court of Uzbekistan;</li> <li>• Secured access to the courtroom for a majority of the trial hearings;</li> <li>• Published 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; and the right to an effective defence counsel; and</li> <li>• A series of recommendations were provided to the Government of Uzbekistan, which included: 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; and 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 shortcomings 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.

## ANNEX VIII

### SOURCES FOR SUBSTANTIVE PRINCIPLES ON TRIAL MONITORING

As explained in the text, this manual deals with methodological aspects of trial monitoring. The manual should be used in conjunction with ODIHR's *Legal Digest of International Fair Trial Rights*<sup>244</sup> which is the companion volume to this manual. Many other publications also cover the substantive aspects of trial monitoring, some of which are listed below.

Amnesty International, *Fair Trials Manual* (1998), <http://www.amnesty.org/en/library/asset/POL30/002/1998/en/81bf7626-d9b1-11dd-af2b-b1f6023af0c5/pol300021998en.pdf>.

Global Rights, *Le Monitoring du Système Judiciaire: Un manuel pratique à l'usage des moniteurs de la société civile congolaise* (2008), [http://www.globalrights.org/site/DocServer/Manual\\_on\\_Monitoring\\_the\\_Judiciary-Global\\_Rights\\_DRC.pdf?docID=11123](http://www.globalrights.org/site/DocServer/Manual_on_Monitoring_the_Judiciary-Global_Rights_DRC.pdf?docID=11123).

International Commission of Jurists, *Trial Observation Manual for Criminal Proceedings*, Practitioners' Guide No. 5 (2002), available at <http://www.icj.org/dwn/database/FinalElectronicDistributionPGNo5.pdf>.

Lawyers Committee for Human Rights (now Human Rights First), *What is a Fair Trial, a Basic Guide to Legal Standards and Practice* (2000), [http://www.humanrightsfirst.org/wp-content/uploads/pdf/fair\\_trial.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf).

Monica Macovei, *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).

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).

Office of the United Nations High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring*, Professional Training Series No.7 (2001), <http://www.ohchr.org/Documents/Publications/training7Introen.pdf>.

<sup>244</sup> ODIHR, *Legal Digest of International Fair Trial Rights*, *op. cit.*, note 2. A list of other sources for substantive standards is included in Annex VII.

## ABOUT THE OSCE/ODIHR

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) is one of main regional human rights institutions.

Based in Warsaw, Poland, ODIHR is active throughout Europe, the Caucasus, Central Asia, and North America. It promotes democratic elections, respect for human rights, tolerance and non-discrimination, and the rule of law.

ODIHR is the human rights institution of the Organization for Security and Co-operation in Europe (OSCE), an intergovernmental body working for stability, prosperity and democracy in its 56 participating States. Spanning a region from Vancouver to Vladivostok, the OSCE is the world's largest regional security organization.

Human rights and democracy are a cornerstone of the OSCE's comprehensive concept of security. All OSCE States have agreed that lasting security cannot be achieved without respect for human rights and functioning democratic institutions. They have committed themselves to a comprehensive catalogue of human rights and democracy norms. These form the basis of what the OSCE calls the *human dimension* of security.

ODIHR is tasked with assisting governments in meeting their commitments in the field of human rights and democracy. To this effect, ODIHR observes elections, promotes and monitors respect for human rights, and runs democracy assistance projects throughout the OSCE region.