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Commentary

Forensic Sector Reform: A Missing Piece of the Security and Justice Sector Reform

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“The search for truth in criminal cases has increasingly relied on the forensic science community. If forensic evidence is not objectively tested, analyzed, and interpreted by adequately trained scientists, the search for truth will potentially be compromised, if not defeated.” Betty Layne DesPortes Defense Lawyer and Chairwoman of Jurisprudence Section of the American Academy of Forensic Sciences, ABA Journal, July 2005.

This paper argues for the inclusion of Forensic Sector Reform (FSR) in any major Justice and Security Sector Reform (JSSR) program implemented in post conflict settings. It describes what is meant by FSR and why it is necessary to include it into JSSR programs. The paper analyses the procedural interconnectivity between justice institutions, emphasizing on the key role of the Forensic Sector within the criminal justice system. It discusses the consequences of ignoring this sector on any JSSR program. It provides a list of basic recommendations for FSR implementation in the field. Finally, it concludes that in order to effectively support the

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delivery of justice and truth² in post-conflicts situations and play a basic role in consolidating stabilization and recovery, the mandate of FSR experts could strongly benefit from having corrective powers.

In post-conflict contexts where massive violations of human rights and international humanitarian law have taken place or are continuing to occur, the international community may employ one of two modes of assistance:

Occasionally, as in the Balkans, massive resources have been deployed at relatively short notice to gather evidence of allegations of serious human rights and international humanitarian law violations through the exhumation of mass graves and determination of cause of death patterns and victim selection. Once these operations reach either their stated ends, or the end of their funding, the international community usually withdraws leaving behind two significant problems: First, a humanitarian crisis with numerous unidentified or mis-identified human remains and second, limited or non-functional local forensic institutions as Liberia.

A second mode of assistance in post-conflict settings, known as Justice and Security Sector Reform, consists of longer term responses which aim to rebuild or reform state systems, specifically defense, police and justice³. It is an axiom of JSSR to prioritize the establishment of capable and responsive institutions, governed by principles and norms set within an effective legal framework.

The current JSSR concept espouses a holistic approach which addresses the security and justice needs of the population. It considers the work of all relevant institutions as interconnected. If JSSR is to be implemented in one sector an equivalent intervention may be required in others⁴. Yet, so far JSSR design has neglected to include forensics as an integral element of the justice system. This, despite that the forensic sector presents several

² "Truth" not only refers to historical truth such as the one established by Truth and Reconciliation Commissions, it also refers to scientific truth which serves to answer questions posed by criminal investigations.

³ Organization for Economic Cooperation and Development (OECD) (2007). *OECD DAC Handbook on Security System Reforms: Supporting security and justice*. Paris, France. p 21. "The overall objective of international support to security system reform processes is to increase the ability of partner countries to meet the range of security and justice challenges they face, "in a manner consistent with democratic norms, and sound principles of governance and the rule of law", as defined in the DAC Guidelines on SSR. SSR helps create a secure environment conducive to other political, economic and social developments, through the reduction of armed violence and crime. The focus for international actors should be to support partner countries in achieving four overarching objectives: i) establishment of effective governance, oversight and accountability in the security system. ii) Improved delivery of security and justice services. iii) Development of local leadership and ownership of the reform process. iv) Sustainability of justice and security service delivery." As of today, there is a common understanding about the main characteristics of security sector reform: it is specifically context-driven, politically sensitive; it shall be based on local-ownership, it shall involve civil society and democratic oversight bodies and be implemented through a holistic approach since it involves cross-cutting issues.

possibilities for feasible entry points⁵. Additionally, in post-conflict settings, the work of this sector cuts across various significant issues such as establishing interaction with civil society, determining historical truth through scientific means, and contributing towards sustainable Rule of Law.

For the purpose of this paper, the forensic sector⁶ is defined as a conglomeration of scientific approaches which assist the criminal justice system in answering questions posed by the courts. From this perspective any scientific discipline may be regarded as forensic. However within criminal justice the questions are most often medico-legal in nature and relate to the establishment of the cause and manner of death and the identification of human remains. The forensic sector must also focus attention on societal needs, addressing some other cross-cutting issues related to any JSSR process such as for example gender based violence, child abuse and victim related issues. There are three primary goals of a forensic sector reform: the successful integration of the forensic system into the justice sector, the development of efficient local capacity which addresses the needs of society (including both “dealing with the past” and so-called common criminal casework) as well contributing to the development of civic trust of Rule of Law institutions.

All components of the justice system are interdependent and are each crucial to achieve sustainable rule of law. A quarter of a century ago, Feeney (1985: 10) commented that, “... what one criminal justice agency does is likely to affect and be affected by other agencies and ... a detailed knowledge of the kinds of interactions that are likely to take place is essential for undertaking system improvements.” One of the central tenets of criminological study of the justice system has been the understanding of the interdependence of each part of the process

⁴ For example, tasking a reformed Judicial and Prosecutorial Council with the role of guaranteeing the independence of the judiciary will hamper fair trial if a system of vetting and accreditation of forensic experts is not in place. Currently in Kosovo, anybody can testify as Forensic Expert.

⁵ Example of entry points are: forensic laboratory creation or modernization projects through equipment renewal, up to date training and the introduction of new analytical methodologies; introduction of new forensic expertise to target previously unaddressed social needs (For instance, sexual assault examination within forensic clinical medicine). Whilst the preferred option would be to have the necessary local “buy-in” from the beginning of the assistance program, it is clear that it is not always possible. For instance in Kosovo, there is a lucrative industry surrounding “virginity testing” (a scientifically discredited and invalid procedure which violates human rights), and local doctors have little inclination to “buy-in” its disbandment, let alone its prohibition.

⁶ Common forensic disciplines found in a forensic medicine department include: Forensic Pathologists, Medical Death Scene Investigators, Forensic Nurses, Forensic Anthropologists, Identification Officers, Forensic Toxicologists, Forensic Histopathologists, Forensic DNA Analysts and Forensic Photographers among many others. Support personnel range from autopsy technicians through to administration staff.

and the institutions involved. It has long been recognized that any proposal for reform must consider the effect they will have on other parts of the system. It therefore follows that JSSR must incorporate the forensic sector. The forensic sector lies at the basis of the criminal investigation process since it provides physical evidence and its scientifically based interpretations and opinions. Therefore the forensic sector requires attention in order for an integral criminal justice system to function efficiently and impartially.

Biased forensic testimonies are threats to the rest of the criminal chain and fair trial. If the court does not have reliable and efficient forensic expertise, the consequences may be miscarriages of justice and may be an impediment to reconciliation in the long term.

Through the mistaken or fraudulent findings of a careless autopsy, a homicide may be ruled as a suicide, determining the direction of an investigation, having far-reaching negative effects for the victims' families. Further to depriving them of justice, issues such as life insurance or other civil law matters may also be affected. On the other hand a suicide may be mistakenly ruled as a homicide leading to convictions of innocent individuals. Alternatively, unjustified delays in producing autopsy reports will impede the right to a fair and speedy trial, keeping defendants under custody for long periods before a verdict is delivered.

Spurious testimony by uncertified forensic specialists may convince courts of defendants' innocence or guilt without a shred of scientific proof. It is not uncommon that pressure is exerted on forensic specialists to guarantee a particular result which may bear no relation to scientific truth. This pressure may come from various agencies within the justice system or from external sources, such as corrupt politicians or officials. Forensic medicine specialists are particularly exposed to corrupted practices, given that very few outside this working environment understand the scientific principles behind the discipline. Corrupt forensic doctors can shield behind unintelligible and distorted scientific jargon, safe in the knowledge that neither judges, nor prosecutors nor defendants' lawyers can adequately question their results or conclusions. If a forensic department cannot protect specialists from political pressure, the independence of justice system is severely threatened. These are problems which affect even the justice systems of countries that have not suffered the ravages of armed conflict in their recent history. In a study conducted by Garrett (2009), erroneous and misleading forensic results accounted for the second most frequent cause of mis-carriages of justice in the U.S.A. Many wrongful convictions have been overturned through the application of DNA. However, in post-conflict contexts, where infrastructure has been damaged or devastated, when local expertise is depleted and where the forensic sector has not

been given appropriate importance by international donors, such rectifications of miscarriages of justice are not possible.

Even where an organized forensic sector previously functioned, it would have been designed to cope with a relatively small number of cases resulting from suspicious deaths and the occasional mass disaster. Very few forensic institutions are prepared to cope with the aftermath of violent conflict⁷, particularly where hundreds or thousands of civilians have been victimized in a relatively short period of time. These situations place great strain on the ability of forensic operations to deliver efficient and effective results to the judiciary and society at large. Lastly, in areas where there has been violence between ethnic groups, impartiality can not be guaranteed. “Victor’s justice” may define which cases are investigated and which cases are not.

Before making recommendations for reform, it is worth briefly mentioning the specificities of the forensic sector. Under normal circumstances forensic techniques and methods follow strict adherence to internationally peer-reviewed standards. In most educational systems doctors must study approximately an additional five years in order to become forensic specialists (other forensic experts must undergo similar periods of specialization). It is also crucial to realize that, for example, forensic autopsies, forensic clinical examinations or forensic exhumations are unrepeatable and irreversible analyses. Therefore all available means must be utilized in order to avoid mistakes which may prejudice a criminal case.

Therefore it follows that the forensic sector can not be reformed based on sole advice provided by international experts. A sufficiently long and thorough mentoring period with the local forensic staff must take place. This is an advisable method to ensure that international standards are adopted, implemented and eventually locally owned.

⁷ Unavailability of DNA laboratories in the region, inadequate family blood-sample collecting mechanisms, lack of adequate facilities to store multiple human remains.

This however may not be enough and so JSSR forensic experts must have a workable degree of corrective functions when forensic autopsies or other forensic analyses are being conducted by local counterparts. Forensic experts have an ethical and professional duty to prevent mistakes in technique, method or interpretation by local staff in criminal cases.

Having considered some of the specificities of the forensic sector, the following recommendations are made:

1. Include the forensic sector within the design, implementation and assessment of the JSSR process. As outlined above, the quality and impartiality of the forensic sector is a key component of an effective criminal justice system and sustainable Rule of Law.
2. International organizations must include FSR experts to their JSSR Rosters, such as those in place for Police, Defense and Justice experts. This pool of expert should be available for deployment on a very short notice.
3. FSR experts must be deployed in the fact-finding / planning missions and draft concept and strategy papers, taken into account the local social and historical context. Subsequently, in the first stages of deployment they must conduct in-depth assessments and SWOT analyses of local forensic capacity following a programmatic approach. Benchmarks will serve as the basis of the mode of intervention such as the timing and extent of monitoring and evaluating required. Thereafter, a progress tracking mechanism should be put in place which could allow resorting to corrective powers provided by a legal mandate, including measures to react to attempted political interference. An exit strategy must be developed based on the progress of benchmarks and upon completion of a self-sustained system.
4. Donors should be advised to finance forensic sector projects when willing to contribute to justice system reform. Additionally, FSR experts must make special efforts to build constructive relationships with potential donors.

5. FSR experts must coordinate with other stakeholders. The range of stakeholders may be surprisingly large: family associations, other local and international NGOs, various ministries and government commissions, various law enforcement institutions, armed forces, ombudsperson office, international organizations, among others.

6. FSR experts must consult and include civil society. This is particularly important when dealing with cases of enforced disappearances and other serious violations of human rights and international humanitarian law. Consultation primarily must be with family associations but should also include local NGOs and local media. Ideally the consultations should result in communication strategies which satisfy the needs of the stakeholders. Democratic oversight must be fostered regarding the manner in which the state manages forensic case work (“common criminality cases”).

7. FSR experts must include a gender perspective into their work, addressing the needs of women, men and children. For example in the forensic context this may mean that if considerable numbers of sexual assaults have taken place, female forensic specialists must be trained.

8. FSR experts must work towards professionalization of local counterparts through re-vetting of experts, development towards professional international standards, and accreditation of forensic experts. (For instance, this will prevent that forensic testimonies are given by non-forensic experts in court).

9. FSR experts must evaluate the forensic disciplines demanded by the context, both based on short and longer term needs. For example, does the context require a forensic anthropologist more urgently than a forensic toxicologist?

10. FSR experts must enhance the development of democratic oversight. One example can be parliamentary committees that examine important aspects related to the functioning of the forensic sector.

11. FSR experts must set up accountability mechanisms such as charters of patients' rights/families' rights, development of Code of Conduct and disciplinary measures.

12. FSR experts must develop outreach mechanisms which promote knowledge of the local forensic system by other law enforcement agencies and enrich local knowledge of international practice.

Finally it is commonly agreed that local ownership is one of the principle components for a successful JSSR. It is often also agreed that this is one of the most challenging aspect of SSR implementation. Based on field experience, it is unrealistic to expect that in early post-conflict settings there will be enough local forensic experts, if any at all, with whom to promote ownership of some of the recommendations made above. Therefore it is important that FSR experts are given authority to exercise corrective actions or direct executive functions for a certain limited time and under specific circumstances.

Throughout this paper the concept of holistic approach in SSR has been emphasized. It has been shown that all sectors are linked and therefore, before reform in one sector is conducted; its impact on others must be considered. The justice system has long been recognized as consisting of strongly interdependent processes. It is therefore logical that any reform of the justice system within a JSSR projects comprehensively incorporates the reform of the forensic sector.

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