

# SECTION 7

## RULE OF LAW



## Rule of Law

*Ability of the people to have equal access to just laws and a trusted system of justice that holds all persons accountable, protects their human rights, and ensures their safety and security.*

### 7.0 What is the rule of law?<sup>189</sup>

Rule of law refers to an end state in which all individuals and institutions, public and private, and the state itself are held accountable to the law, which is supreme. Laws must be consistent with international human rights norms and standards, legally certain, legally transparent, drafted with procedural transparency, and publicly promulgated.<sup>190</sup> This end state requires equal enforcement and equality before the law, independent adjudication of the law, fairness in the application of the law, and avoidance of arbitrariness. Access to justice—the ability of people to seek and obtain a remedy through informal or formal institutions of justice—is a mutually reinforcing component of rule of law. The rule of law requires the separation of powers and participation in decision-making. Rule of law is the ideal that states strive for; stabilization requires urgent focus toward this end.

### 7.1 What are the key rule of law challenges in societies emerging from conflict?

Historically, the justice system may have been repressive and discriminatory, particularly against marginalized populations, and may have been used only as a tool of powerful elites or criminal power structures. Impunity for those in power constitutes another common barrier to reform. Compounding this challenge is the likelihood that conflict has paid handsomely—through illicit means—leading to criminalization of state institutions, including the justice system. Public trust may be very low. The population may prefer to access justice through non-state, localized systems of justice or vigilante groups to solve grievances instead. The justice system may be severely debilitated or may have collapsed. Its infrastructure (e.g., court houses, public buildings, prisons, police stations, and ministries) may be destroyed, looted or dilapidated and in need of repair. Basic material resources may also be lacking. There may be a shortage of qualified rule of law actors (e.g., judges, court staff, police, prosecutors, prison officials, lawyers).

### 7.2 Why is the rule of law a necessary end state?

Without rule of law, criminal and politically motivated violence will perpetuate the threat that warring parties posed during violent conflict. A poorly functioning justice system will allow petty crime, violent crime, politically and ethnically motivated crime, sexual and domestic violence, and organized criminal activities to flourish. Crime may be perpetrated or tacitly supported by those in power, where government structures have become criminalized, and by former warring parties that have transformed into organized crime gangs.

189. United Nations Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict States (UN Doc S/2004/616)*, 2004. Hereafter: *UN Sec-Gen, Secretary-General's Report*, 2004.

190. Procedural transparency means that the public can easily see the process by which a law is drafted, including what body is drafting new laws and any process by which the public can make comments on proposed laws.

Unless groups that have been involved in violent conflict regard the justice system as a more attractive alternative to violence for resolving disputes, peace will not be sustainable. For the population, rule of law is necessary to ensure safety and security for individuals, families, property, and businesses and to allow freedom of movement to access public services such as education and health. Rule of law is the foundation for economic and political recovery<sup>191</sup> and prosperity.<sup>192</sup>

### 7.3 What are the necessary conditions to achieve the rule of law?

- **Just Legal Frameworks** is a condition in which laws are consistent with international human rights norms and standards; are legally certain and transparent; are drafted with procedural transparency; are equitable, and are responsive to the entire population, not just powerful elites.
- **Public Order** is a condition in which laws are enforced equitably; the lives, property, freedoms, and rights of individuals are protected; criminal and politically motivated violence has been reduced to a minimum; and criminal elements (from looters and rioters to leaders of organized crime networks) are pursued, arrested, and detained.
- **Accountability to the Law** is a condition in which the population, public officials, and perpetrators of past conflict-related crimes are held legally accountable for their actions; the judiciary is independent and free from political influence; and horizontal and vertical accountability mechanisms exist to prevent the abuse of power.
- **Access to Justice** is a condition in which people are able to seek and obtain a remedy for grievances through formal or informal institutions of justice that conform with international human rights standards, and a system exists to ensure equal and effective application of the law, procedural fairness, and transparency.
- **Culture of Lawfulness** is a condition in which the general population follows the law and seeks to access the justice system to address its grievances.

### 7.4 General Guidance for the Rule of Law

**7.4.1 Build host nation ownership and capacity.** Partnership rather than substitution is an appropriate paradigm for host nation ownership. Host nation actors who are committed to making the peace process work should be involved from the beginning. Promoting ownership takes time and commitment and has two components: capacity and willingness. Capacity can be developed through helping the host nation articulate needs,<sup>193</sup> engage in strategic planning, manage reforms, and build rule of law knowledge. Strengthen willingness by demonstrating that violent opponents of the peace process will be confronted and that those who take risks for peace will be supported. Willingness may be fostered through dialogue with justice institutions, and among justice institutions, civil society, and the population.<sup>194</sup> Where there is little political will at

191. United Kingdom Stabilisation Unit, *Stabilisation Issues Notes: Rule of Law and Stabilisation*. 2008. Hereafter: UK Stabilisation Unit, *Rule of Law and Stabilisation*, 2006.

192. United Nations Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All* (UN Doc A/59/2005), 2005.

193. United Kingdom Justice Assistance Network, *Principles of Engagement*, 2005. Hereafter: UK JAN, *Principles of Engagement*. 2005.

194. Organisation of Economic Co-operation and Development, Development Assistance Committee, *Hand-*

the top, a push from the bottom, namely civil society and the general population, may stimulate reform, although this will be a long-term process.

**7.4.2 Act only with an understanding of the local context.**<sup>195</sup> A proper rule of law assessment is vital because assistance should be designed in relation to the context rather than universal templates. A multidisciplinary team comprising both host nation and international actors, that covers both urban and rural areas, is optimal. Consult the users of the system as well as justice institutions. Key questions for assessment include the following:

- What does the formal justice system look like on paper and in practice? Can it perform basic rule of law functions?
- What are the informal rules, traditions, and culture that underlie the system and its capacity<sup>196</sup> and needs?
- What subsystems of justice are used by the population, including non-state justice and policing?
- What are the broader conflict-related factors, including regional influences, the security/crime situation, how human rights are being protected, the socioeconomic and political context, the cultural context, and the treatment of marginalized groups?
- What was the role of the justice system in the conflict? Was it part of the problem or part of the solution?
- What are the key drivers and mitigators of conflict that are affecting or could affect rule of law?

*See Gap/Challenge: Section 7.11.1, Comprehensive, coordinated rule of law assessments.*

**7.4.3 Prioritize to stabilize.** Immediately after violent conflict, a window of opportunity exists to improve the rule of law. Rather than attempting to fix everything at once, the international community and host nation counterparts should adopt a human rights-based approach to rule of law;<sup>197</sup> pay special attention to marginalized groups, and focus on urgent problems including major crimes, human rights violations, and politically motivated violence.<sup>198</sup> See also Section 9.5.27. Providing legitimate state monopoly over the means of violence and providing legal authority that extends to all people in all parts of the country are priorities.<sup>199</sup> Generally no rule of law strategy

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*book on Security Sector Reform* (Paris, France: OECD Publishing, 2007). Hereafter: OECD DAC, SSR Handbook, 2007.

195. United Nations Office on Drugs and Crime, *Criminal Justice Assessment Toolkit*, 2006. United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector*, 2006. Hereafter: UNHCHR, *Rule of Law Tools: Mapping the Justice Sector*, 2006.

196. See United Nations Development Programme, *Access to Justice Practice Note*, 2004. Hereafter: UNDP, *Access to Justice*, 2004.

197. This means that human rights principles (e.g., universality, nondiscrimination, equality) should guide activities, and activities should enhance the ability of “duty bearers” to meet their obligations and the ability of “rights bearers” (i.e., the population) to claim their rights. (United Nations Secretary-General, *Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance*, 2008. Hereafter: UN Sec-Gen, *UN Approach to Rule of Law Assistance*, 2008).

198. UN Sec-Gen, “UN Approach to Rule of Law Assistance,” 2008. United Nations Development Group, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies*, 2003.

199. United States Agency for International Development, *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*, 2008. Hereafter: USAID, *Guide to ROL*, 2008.

exists and the groundwork for one should be laid very early on. A strategy must go beyond establishing institutional capacity and shape the local context by disrupting, dislodging, and dismantling spoiler networks that are bent on subverting the rule of law. The entire legal spectrum, from intelligence to incarceration, will need to be capable of transforming systemic threats to the rule of law. Developing effective strategies for overcoming deficits in the willingness and ability of the host nation legal system to confront systemic threats, including impunity of war criminals and warlords, will be the primary determinant of whether rule of law emerges.

*See Trade-off: Section 7.10.2, Security vs. human rights.*

*See Trade-off: Section 7.10.4, Quick fixes vs. a strategic approach.*

*See Gap/Challenge: Section 7.11.3, Prioritization and sequencing.*

**7.4.4 Use a conflict lens.** Rule of law reform involves asking political as well as technical questions,<sup>200</sup> which can be extremely sensitive following violent conflict. Pay special attention to the political aspects of rule of law reforms.<sup>201</sup> For example, reforming a police force is inherently political as it involves shifting of power and influence. The political buy-in of senior-level government officials is essential for funding and supporting new laws that may need to be adopted.<sup>202</sup> Understand that officials who derive their power from violence, intimidation, and illicit sources of revenue will likely resist reforms and may use political power to influence adjudication of cases. Be aware of the need to foster political will of informal leaders who hold de facto power in society, such as religious leaders, tribal elders, and village chiefs. In the allocation of power, everything has the possibility to create conflict or be perceived as rewarding one party or another. Examples include the appointment of judges and police chiefs and the location of courts and prisons. Take this into account when assigning authority to groups or individuals or locating rule of law facilities.

**7.4.5 Recognize interdependence.** Rule of law requires more than an exclusive focus on formal justice institutions. It is an interdependent system of many parts involving institutions that manage justice (e.g., ministries), law enforcement agencies, courts, prisons, oversight bodies, law reform agencies, and legal education institutions. The justice system also depends on interaction with non-state justice systems, non-state actors (e.g., civil society), and the general population. Progress in security, governance, economic development and social well-being are all dependent on a functioning rule of law system.

## 7.5 Necessary Condition: Just Legal Frameworks

### 7.5.1 What are just legal frameworks? Why are they a necessary condition?

Just legal frameworks refer to the body of domestic or international laws<sup>203</sup> that apply in a particular country, that give structure to the relationship between the state and the population, and define the parameters for legal conduct. Under this condition, laws are consistent with international human rights norms, legally certain, drafted in a

200. UN Sec-Gen, "Secretary-General's Report," 2004.

201. UN Sec-Gen, "UN Approach to Rule of Law Assistance," 2008.

202. UK JAN, "Principles of Engagement," 2005.

203. This includes the constitution, legal codes, acts, decrees, binding regulations, bylaws, standard operating procedures, case law, peace agreements, Status of Forces Agreements, and Security Council resolutions.

transparent way, publicly promulgated, and ensure the separation of powers, including judicial independence. Just laws will vindicate the rights of persons and punish wrongs committed.<sup>204</sup> Just laws are also fair, equitable, responsive to the needs and realities of the host nation<sup>205</sup> and benefit the entire population, not just powerful elites. This condition is necessary for stabilization and reconstruction as just laws define the role of justice sector institutions and actors; form the basis for social, economic, and political order; help a society overcome the legacy of official abuse of power; and protect the rights of vulnerable and marginalized groups.

### 7.5.2 Guidance for Just Legal Frameworks

#### 7.5.3 *Approach: Legal Framework Assessment*

Understand the existing legal framework as the first step in working toward a just one. Laws may be chaotic, meaning it is difficult to answer the question of what law applies. They may also be deficient, meaning they contain provisions that are inconsistent with human rights or are antiquated and fail to address common S&R challenges, such as property rights, human trafficking, and organized crime. In most war-torn states, the legal framework frequently exhibits signs of neglect and political manipulation, contains elements of discrimination and seldom meets the requirements of international human rights and criminal law standards.<sup>206</sup> Legal framework assessment involves a comprehensive mapping of all laws and decrees—formal and informal—followed by an analysis that identifies areas that require urgent attention or longer-term treatment.

**7.5.4 *Gather, catalogue, and distribute the applicable laws first.*** Reach out to legal practitioners, ministries, the courts, the police, the prison services, law schools, academics, NGOs, and legal diaspora to collect applicable laws. This will involve multiple sources of law. Identify and collect core documents including the constitution, criminal code, civil code, commercial code, civil procedure code, administrative law, citizenship law, and property law.<sup>207</sup> Also, look for regulations, acts, bylaws, internal procedures (e.g., police procedures), and laws and decrees regulating the customary justice system or parallel justice systems (e.g., rebel laws). Catalogue the laws gathered and translate and share them among host nation and international colleagues.

**7.5.5 *Conduct a comprehensive analysis of the applicable law.*** The laws gathered need to be analyzed to ascertain compliance with international human rights law, criminal law, civil law, and commercial law (e.g., treaties on organized crime; drug trafficking; the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Rights of the Child); to assess how religion impacts the law; and to understand what problems are not addressed in the laws. One body or organization should coordinate this analysis. Have a mixed team of academics and practitioners, legal and nonlegal, who can contextualize the law as it relates to the host nation. The analysis should be carried out by both host nation and international actors, and the team should consult widely within and outside the justice system. Start the assessment early; a full assessment can take up to one or two years.

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204. UN Sec-Gen, "Secretary-General's Report," 2004.

205. Ibid.

206. Ibid.

207. Hereafter: Dobbins/Jones/Crane/Cole DeGrasse, *Beginner's Guide*, 2007.

**7.5.6 Realize the inherent constraints of new laws if they are not enforced.** New laws are essential in these environments, but law reform can be a fatal attraction for those wishing to bring about changes in war-torn states. New laws will remain paper tigers if they do not result in changes in patterns and behavior and if they allow continuation of impunity for prominent spoilers or criminalization of the state and legal system.

#### **7.5.7 Approach: Short-Term Law Reform**

Consider whether short-term law reform is necessary. Short-term measures may be necessary to address deficiencies in the law that will impact stability and to address laws that are inconsistent with human rights conventions and standards. While criminal justice laws usually receive the most attention, the majority of disputes and procedural issues that arise—and directly affect the population—initially involve nonviolent offenses that may escalate into violence if victims have no legal recourse. Short-term reform should also address gaps in civil and commercial code and procedure. In this context, short term refers to the first two years after the cessation of hostilities.

*See Gap/Challenge: Section 7.11.4, Non-criminal justice assistance.*

**7.5.8 Consider the need for legal restatement in the aftermath of conflict.** Where there is no agreement on what laws should apply, legal restatement that designates what body of law applies should be considered by competent legislative authorities. Legal restatement aims to ensure legal certainty and may have been addressed in a peace agreement. But designating a particular body of law, typically mandated to be compliant with human rights, has proven challenging in practice. Lawyers end up applying provisions that meet international human rights law, disregarding those that do not, and substituting others—in effect rewriting the law. Understand the complexity of this undertaking and try to ensure that the designated law is clear. The designated law should also be politically acceptable to the legal establishment and the host nation population or it will risk being ignored.<sup>208</sup>

**7.5.9 Undertake discreet legal reform in the short-term if necessary.** Whether law reform should be conducted in the short term will depend on the context. Reforms may be deferred because changes to the law may make little difference. New laws that have been drafted in haste may not have been researched sufficiently, or political will for reform may be lacking. In either case, work with what is there and find creative legal solutions to filling gaps in the law or addressing deficient provisions of law (e.g., where there is no criminal offense for trafficking, use tax evasion provisions). Short-term reforms should involve discreet changes to existing laws rather than a long-term overhaul. Address urgent problems such as laws that grossly undermine human rights or inadequate laws for pretrial detention. In the economic arena, providing for predictable contract enforcement, including oral and informal contracts, is critical.<sup>209</sup> Dealing with real and personal property claims, developing mechanisms to resolve property (especially land, livestock, and commercial) disputes, and determining inheritance rights will always be

208. Mark Baskin, *Lessons Learned on UNMIK Judiciary* (Ottawa: Government of Canada, Department of Foreign Affairs and International Trade, 2001).

209. United Nations Department of Peacekeeping Operations, *Primer for Justice Components*, 2006. Hereafter: UNDPKO, *Primer for Justice Components*, 2006. UNHCHR, “Rule of Law Tools: Mapping the Justice Sector,” 2006. Dobbins/Jones/Crane/Cole DeGrasse, *Beginner’s Guide*, 2007. UNDP/USAID, “First Steps,” 2007.

an urgent need.<sup>210</sup> Be aware of the impact that new laws or legal provisions will have on other laws and justice institutions.

### **7.5.10 Approach: Law Reform Process**

The process by which laws are drafted is as important as the content of the new laws. In fact, experience shows that the process of making and reforming laws determines effectiveness, not content.<sup>211</sup> The process should be transparent and participatory and involve the adoption of a reform strategy, designation of a coordinating body, and the establishment of a sound program for promulgating and publicizing laws.

**7.5.11 Support and engage in a transparent and participatory process.** The law reform process must be procedurally transparent and participatory. Procedural transparency should prevent laws from being drafted behind closed doors. Declare who is responsible for the drafting of new laws and describe publicly any formal process for public comment. Participation is recognized as a human right<sup>212</sup> and is defined as the process through which people with a legitimate interest (stakeholders) influence and share control over initiatives and the decisions and resources that affect them.<sup>213</sup> Participation makes the population more invested in new laws, bringing the laws increased acceptability and public legitimacy. This buy-in is vital to effective enforcement of the laws. Involve a broad spectrum of society (justice actors, civil society, marginalized groups and the general population) in settings that are not overly formal or intimidating. Depending on the context, engage in public consultation using a system of written comments or open meetings. Use local media, television and radio to raise awareness of draft laws and invite comments. This consultation process may need to be preceded by a public education and awareness campaign to apprise the public of the law reform process and what potential reforms are being discussed.<sup>214</sup> For more on civic participation and empowerment, see Section 8.8.

**7.5.12 Decide upon a reform strategy and establish a coordinating body.** Law reform should be part of a broader justice sector reform strategy, but it needs its own strategic plan. Without a strategy, an uncoordinated, *ad hoc* approach can lead to the promulgation of overlapping or conflicting laws. Ensure the strategy is locally led and created in a transparent, coordinated manner with international partners. It should also take into account other reform measures (e.g., the drafting of a new constitution), reforms that are pending, and how the planned reform will affect other areas of law. The strategy should:

- State the vision and desired outcomes.

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210. Kirsti Samuels, *Rule of Law Reform in Post-conflict Countries: Operational Initiatives and Lessons Learnt*, (Washington, D.C.: World Bank, 2006). Hereafter: Samuels, *Rule of Law Reform*, 2006. UNHCHR, "Rule-of-Law Tools: Mapping the Justice Sector," 2006. Agnes Hurwitz and Kaysie Studdard, *Rule of Law Programs in Peace Operations* (New York: International Peace Academy, 2005). Hereafter: Hurwitz/Studdard, *Rule of Law Programs*, 2005.

211. David Berkowitz, Katharina Pistor, and Jean-Francois Richard, *The Transplant Effect* (Cambridge, Mass.: Harvard University, Center for International Development, 2000).

212. See United Nations Committee on Human Rights, *International Standards of Elections: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 1996.

213. Inter-American Development Bank, *Resource Book on Participation*, [www.iadb.org/aboutus/VI/resource\\_book/table\\_of\\_contents.cfm?language=english](http://www.iadb.org/aboutus/VI/resource_book/table_of_contents.cfm?language=english) (accessed July 8, 2009).

214. Lani Blackman, "Products of Law Reform Agencies," in *The Promise of Law Reform* (Sydney: The Federation Press, 2005).

- Designate a body responsible for implementing the strategy and coordinating the drafting of new laws.
- Determine the personnel and other resources available to draft new laws.
- Define how the coordinating body will work with stakeholders within and outside the justice system.
- Determine a participation strategy with a timetable for consulting on, drafting, and vetting the new laws.
- Decide how the process will be reviewed, monitored, and evaluated.

The coordinating body may be a working group, a division of a line ministry or a law reform commission. A coordinating body will require a secretariat to support its work, along with essentials like office space, supplies, research tools and research support.

**7.5.13 Set realistic time frames.** In these settings, unrealistic time frames often govern law reform processes and overlook the importance of assessment, participation, and consultation. Laws drafted in haste are often replete with mistakes or omit key issues. Remember that a law reform timeline is between two and seven years.<sup>215</sup> Inevitably, there is a tension between the need to reform bad laws and the need to ensure a comprehensive law reform process. However, there is no way to accelerate the law reform process.

**7.5.14 Use outside experts wisely.** Foreign experts have led many law reform processes in societies emerging from conflict, and solutions to legal problems are often externally conceived.<sup>216</sup> In some instances, international actors draft laws or transplant laws without consultation. A coordinated, supportive, partnership-approach to law reform, with international actors providing support, should be established. International actors can bring rich experiences from other countries and act as resource persons or providers of comparative knowledge and information. Facilitate exchanges between those who have been involved in law reform in similar environments and those currently engaging in reform efforts.

**7.5.15 Engage multidisciplinary, multi-skilled teams.** The idea that law reform is too important to be left to the lawyers is well accepted. Cultivate a broad community of practitioners and legal and academic experts. Engage generalists (meaning they have a general knowledge of the whole areas of law, e.g., criminal law) and specialists (they have knowledge of a specific area, e.g., addressing organized crime).

**7.5.16 Conduct an impact assessment of new draft laws, and factor training into the strategy.** Countless laws have been passed in war-torn states that are never implemented or enforced. An impact assessment can look at the costs, consequences, and side effects of new laws.<sup>217</sup> It can determine whether new provisions are financially or systemically viable. For example, if the criminal code requires juveniles to be detained in a non-prison environment such as a juvenile detention center, do such centers exist? If not, how much will it cost to build and to sustain them? Impact assessments look at whether new provisions will necessitate other reforms (e.g., a new law on money laundering will require certain banking laws) or secondary legislation (e.g., standard operating procedures, judges

215. Ibid.

216. UN Sec-Gen, "Secretary-General's Report," 2004.

217. SIGMA (A Joint Initiative of the OECD and the European Union), *Improving Policy Instruments Through Impact Assessment*, Sigma Paper no. 31, 2001.

“bench books,” administrative protocols). Moreover, an impact assessment will also evaluate human resource implications from new legal provisions and the level of training required for new or existing justice actors.

**7.5.17 Ensure a sound promulgation and publicization process.** New laws should be publicly promulgated. This means that they should be officially proclaimed, published, and generally publicized so that the population at large is aware. The official proclamation is usually done by an official act of the government or legislature. Once promulgated, publish new laws so they are available to justice actors and the population. Conduct public awareness campaigns to ensure the population is aware of new laws. New laws should not come into effect immediately but be followed by a period of time between the promulgation of a new law and its enforcement. This allows training and publication to occur. Understand the strong implications of new laws on the curricula of any national academic institutions or training centers, such as universities, police academies, or magistrates’ schools.

#### **7.5.18 Approach: Content of New Laws**

The legitimacy of laws is based on societal consensus.<sup>218</sup> The determination of content involves thinking about the principles, values and approaches that will underlie new laws based on dialogue with the host nation population. Old laws may have been repressive or may have violated human rights and only benefited the rich. In drafting new laws, there is an opportunity to redefine key principles and take a rule-of-law and human-rights-based approach to lawmaking.<sup>219</sup>

**7.5.19 Think about the details of drafting early on in the process.** Technical drafting of codes is integral to creating laws that are understandable and workable. Consider who is drafting new laws. The process should be led by a single, trained legal drafter, rather than a drafting committee, to ensure a consistent style of drafting. Another consideration is a new “plain English” style, which seeks to move away from lengthy and complicated sentences and archaic legal expressions that are inaccessible to the ordinary person.<sup>220</sup> This style can support legal certainty and transparency. In war-torn states, many novice justice actors may apply the law to ensure that the new laws are sufficiently detailed. Leaving provisions open to interpretation or relying on forthcoming secondary legislation for detail that may take years to draft may not be wise.

**7.5.20 Use international standards as the normative framework for law reform.**<sup>221</sup> The assessment of the preexisting legal framework discussed in Section 7.5.3 will reveal where the existing laws are consistent with international standards and what standards are binding on the state. It is easy to remove provisions from the preexisting law; it

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218. USAID, “Guide to ROL,” 2008.

219. Vivienne O’Connor and Colette Rausch, eds., *Model Codes for Post-Conflict Criminal Justice: Model Criminal Code (Volume I)* (Washington, D.C.: U.S. Institute of Peace Press, 2007). Hereafter: O’Connor/Rausch, *Model Codes: Volume I*, 2007. Vivienne O’Connor & Colette Rausch, eds., *Model Codes for Post-Conflict Criminal Justice: Model Code of Criminal Procedure (Volume II)* (Washington, D.C.: U.S. Institute of Peace Press, 2008). Hereafter: O’Connor/Rausch, *Model Codes: Volume II*, 2008. See also, United Nations Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 2002.

220. International Monetary Fund Legal Department, *Plain English Tax Law Drafting*, 2008.

221. UN Sec-Gen, “Secretary-General’s Report,” 2004.

is harder to draft new provisions that comply with international standards. Those involved in the drafting process should be aware of the international legal standards by which the host nation is bound and integrate them into new laws. Capacity development initiatives, such as training or consultation with outside experts on international standards, would be useful in this regard.<sup>222</sup> It is especially important to integrate key international standards for marginalized groups.

**7.5.21 Forget the common law and civil law debate, and think about hybridization.**

Many of those involved in law reform processes think of legal systems in black and white terms: they are either civil law or common law. This may be historically accurate but in a contemporary context, this distinction is less clear. So-called civil law systems vary greatly, as do common law systems. There has been so much borrowing across systems that the divide that once existed is now blurred.<sup>223</sup> Now there is a trend toward hybridization. Drafters should choose and blend features and legal provisions from many traditions that work best in the context of the host nation.

**7.5.22 Consider how to appropriately use foreign laws to inform the process.**<sup>224</sup> Be careful about how foreign laws are used in the law reform process. Where a law is not adapted to local conditions, is imposed through an external process, or is unfamiliar to the population, its acceptance may be weak. Conversely, voluntary borrowing of external provisions, where states make an informed decision to copy them fares much better. Consider alternatives and undertake extensive comparative research in advance of adopting a foreign provision of law.

**7.5.23 Consider the relationship between the formal and informal justice sectors when determining new content.** When undertaking reforms of certain areas of law (e.g., criminal law), consider whether these cases are dealt with through informal systems rather than through the formal system or whether certain new provisions will apply to these systems (e.g., a bill of rights in a constitution). In some instances, it may be appropriate to consider creating or modifying the legislative relationship between the formal and informal justice systems. This may involve deciding what crimes fall under the purview of which system or providing for appeal rights from the informal system to the formal system.<sup>225</sup>

## 7.6 Necessary Condition: Public Order

### 7.6.1 What is public order? Why is it a necessary condition?

Public order is a condition characterized by the absence of widespread criminal and political violence, such as kidnapping, murder, riots, arson, and intimidation against targeted groups or individuals.<sup>226</sup> Under this condition, such activity is reduced to an

222. In the realm of criminal justice, there are certain tools that may also assist in this process. See O'Connor/Rausch, *Model Codes: Volume I*, 2007 and *Model Codes: Volume II*, 2008.

223. USAID, "Guide to ROL," 2008.

224. Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd ed.) (Athens, Ga.: The University of Georgia Press, 1993).

225. USAID, "Guide to ROL," 2008.

226. Colette Rausch, ed., *Combating Serious Crimes in Post-Conflict Societies: A Handbook for Policymakers and Practitioners* (Washington, D.C.: U.S. Institute of Peace Press, 2006). Hereafter: Rausch, *Combating Serious Crimes*, 2006.

acceptable minimum, perpetrators are pursued, arrested, and detained, and the local population—no matter which party to the conflict they may belong to—is able to move freely about the country without fear of undue violence. Public disorder can be profoundly destabilizing for societies emerging from conflict. It can instill constant fear in the local population, undercut efforts to strengthen state security institutions, and jeopardize the success of the peace process. Criminal and politically motivated activity is often accompanied by widespread violation of human rights, including torture; rape; cruel, inhuman, or degrading treatment; and arbitrary arrest and detention. The population has few means by which to address these threats—the police are usually in short supply, with a legacy of abuse and corruption. There are few judges, and confidence is low in their ability to adjudicate cases independently. Prisons are overflowing. Without public order, people will never build confidence in the public security system and will seek security from other entities like militias and warlords.<sup>227</sup>

### 7.6.2 Guidance for Public Order

#### 7.6.3 Approach: A Comprehensive System

Public order is the domain of police or other policing agencies, courts, prosecution services, and prisons—all of which make up the criminal justice system. Understand that this system is chain-linked—all elements need to work together.

**7.6.4 Take a holistic approach when developing a strategy for public order.** Often, the police are prioritized at the expense of other parts of the criminal justice system, especially criminal defense and corrections.<sup>228</sup> While reconstructing police may be a priority, nest this within a broader strategy. Police require criminal codes, courts, and prisons, and courts require timely delivery of evidence by the police to adjudicate cases. Arbitrary or politicized sentencing, an incompetent or corrupt judiciary, or inhumane prison conditions will undermine the benefits that come from better policing and public order in general.<sup>229</sup> Increased information flow and cooperation among criminal justice actors is critical. The goal is not to simply grow the number of institutions and officials, but to improve the overall delivery of criminal justice.

**7.6.5 Transform systemic threats to public order as a prerequisite.** In these environments, it is unlikely that peace accords will recognize and address all abuses and sources of dysfunction that have afflicted judicial systems. It is also highly unlikely that the parties to accords will comply fully without any need for assistance in dealing with the impunity of spoilers, the legacy of politicization of the legal system, or the risk of institutional criminalization rooted in illicit revenue sources.<sup>230</sup> In this context, local police, judges, and jailers who seek to uphold the law will not survive for long, even with comprehensive vetting, training, and mentoring programs. To enable public order, the mission may need a very broad spectrum of capabilities that goes beyond establishing institutional capacity to include disrupting and dismantling spoiler networks that

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227. Rausch, *Combating Serious Crimes*, 2006.

228. Hurwitz/Studdard (IPA), “Rule of Law Programs,” 2005.

229. Seth G. Jones, Jeremy M. Wilson, Andrew Rathmell, K. Jack Riley, *Establishing Law and Order After Conflict* (Santa Monica, Calif.: RAND Corporation, 2005).

230. Covey/Dziedzic/Hawley, *Quest for Viable Peace*, 2005.

subvert the rule of law. For more on spoilers, see Section 6.5.10; for a discussion on economic-based threats, see Section 9.6.

### **7.6.6 Approach: Interim Law Enforcement**

Law enforcement—the capacity to apprehend and arrest suspected criminals—is vital for security and cannot be postponed for months. Because local forces will likely be weak, discredited, or a party to the conflict, assistance from international actors may be necessary to ensure that urgent law enforcement functions are performed while local institutions undergo reform. International police, both individual and formed units, can fill this role.

**7.6.7 Move quickly to prevent criminal elements and political spoilers from cementing their grip on power.**<sup>231</sup> In the lawlessness of these environments, asserting authority early on is essential to securing the trust of the population. Waiting too long to confront violence can permit spoilers, organized crime syndicates, and their militias to perpetuate instability and entrench themselves in the new political system, which allows them to protect their interests and solidify public support through intimidation. A culture of impunity results.

**7.6.8 Be prepared to perform critical law enforcement functions when necessary.** Certain public order functions are critical whether performed by international or host nation actors. Calibrate the international police mandate according to needs on the ground. International police may have to perform critical law enforcement functions on the ground in cases where public disorder is high, local capacity is nonexistent, or local forces are responsible for systemic human rights violations. The performance of law enforcement functions by international forces typically requires an executive mandate for the UN mission or other authority. Key law enforcement functions include the following:<sup>232</sup>

- Street patrols
- Arrests and detention
- Criminal intelligence and surveillance
- Criminal investigations and evidence collection (including war crimes)
- Crowd and riot control
- Public dispute resolution
- Protection of critical infrastructure
- Border security
- Witness protection to address the impunity of political criminals
- High-risk arrest capacity for political violence and extremism.

**7.6.9 Coordinate public order functions between the military and the police and ensure that any gap is filled.** Establishing public order in war-torn societies requires unique capabilities that do not belong solely to either the military or the police. Incidents involving political violence and extremism, for example, may require greater force than the police can employ. Ultimately, military and police capabilities must be coordinated to fill this gap and share critical intelligence, while overcoming differences in culture, capabilities, legal constraints, and command and control structures. For more on intelligence, see Section 6.5.15. The military will likely be first on the scene and

231. Dobbins/Jones/Crane/Cole DeGrasse, *Beginner's Guide*, 2007.

232. *Ibid.*

will probably have to perform some public order functions, but it is not the ideal instrument for the job. Equipped with lethal firepower, the military is better primed to confront threats to the peace process and could actually jeopardize the mission by using excessive force. The police are better trained in the measured use of force, negotiation techniques, and control over lawlessness.<sup>233</sup> In the emergency phase, the military may have to perform critical law enforcement functions. These responsibilities, however, should be transitioned as quickly as possible to an international police force or, if they are reliable, the local security forces. Sound rules of engagement for the military should define the procedures for investigation, arrest, and detention. Public order activities by the military include protecting high-value facilities to prevent looting, run security checkpoints, perform vehicle inspections, regulate public gatherings, undertake high-risk searches, arrest and detain people who disrupt public order, and regulate the freedom of movement, which is further discussed in Section 6.9.3.

*See Trade-off: Section 6.10.4, Public order functions performed by the military vs. the police.*

**7.6.10 Deploy local forces whenever possible without compromising human rights and justice.** As soon as it is prudent and possible, local law enforcement should participate in public order operations to begin building capacity, albeit with extreme caution. The local police force will likely have played a role in human rights abuses. Thorough reforms will have to take place. But shifting public order functions to local forces is the ultimate goal and can also minimize confrontation between international actors and the population.<sup>234</sup> Local forces also speak the language, know the culture, and are more familiar to local populations, which is vital for good policing.<sup>235</sup> Colocating international police with local forces at police stations can improve cooperation, the effectiveness of the mentoring process, and the transfer of skills.<sup>236</sup> It can also help the international police better assess the state of policing. But colocation programs should be used cautiously—extended periods of colocation in isolated areas can lead to internationals losing their objectivity or impartiality. Human rights are further addressed in Section 3.7.3; police vetting is also addressed in Section 6.7.21.

**7.6.11 Address illegal armed groups and informal policing structures.** If illegal armed groups continue to operate, including informal policing structures, this constitutes an unacceptable threat to law and order. Whether militias, vigilante groups, or gangs; state-sponsored, community based, or private security companies; religious, ethnic, or tribal, they must either be demobilized and reintegrated into society or, if they qualify on an individual basis, allowed to be integrated into one of the entities comprising the security sector. In most cases the process for doing this will be stipulated in a peace agreement, but noncompliance will need to be anticipated and dealt with effectively.<sup>237</sup>

**7.6.12 Support the building of host nation police capacity.** Careful decisions need to be made about the type of equipment, infrastructure, training, and ongoing monitoring

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233. Oakley/Dziedzic/Goldberg, *Policing the New World Disorder*, 2002.

234. Ibid.

235. Dobbins/Jones/Crane/Cole DeGrasse, *Beginner's Guide*, 2007.

236. UK FCO, *Police Personnel*, 2007.

237. Etannibe E.O. Alemika and Innocent C. Chukwuma, *The Poor and Informal Policing in Nigeria: A Report on the Poor's Perceptions and Priorities on Safety, Security and Policing in Access to Justice Focal States in Nigeria* (Lagos: Center for Law Enforcement Education, 2004).

that is provided to the police force and leadership. The law and the rules and regulations around the use of weapons should be analyzed to ensure compliance with international human rights norms and standards.<sup>238</sup> Undertake training to improve the operational law and order skills of the police, organizational management, and supervisory skills of police leadership and education about democratic principles of policing (e.g., representative policing, responsive policing, accountable policing).<sup>239</sup> Police mentors can provide training on the job (e.g., UNPOL or other international police advisers). Promote accountability by drafting, publicizing, and enforcing disciplinary procedures and codes of conduct.<sup>240</sup> Ongoing education and training of police will be required as well as the development of training facilities (e.g., police schools or academies), if not already in place. Further efforts to enhance capacity involve human resources systems, organizational restructuring, budget and asset management, procurement rules, and infrastructure. For more on institutional governance functions, see Sections 8.6.7 to 8.6.9; for more on police reform, see Sections 6.7.21 to 6.7.23.

### **7.6.13 Approach: Interim Judiciary<sup>241</sup>**

An interim judiciary should not be an afterthought. In the aftermath of violent conflict when local institutions are still being built or transformed, an interim judiciary may be necessary to handle urgent cases of impunity and political violence and resolve disputes that arise over housing, land, and property.<sup>242</sup> Work must also begin to assess which host nation institutions or actors in the judiciary can perform judicial functions. A weak or politicized judiciary, a prevalent phenomenon in societies recovering from violent conflict, can lead to corruption, extrajudicial murders, and arbitrary or politicized sentencing.

**7.6.14 Deploy core elements for an emergency judiciary.**<sup>243</sup> Prevent arbitrary exercise of power. An interim capacity for administering justice and resolving disputes, particularly highly sensitive cases, may be needed from international actors. This may include the deployment of international judges, prosecutors, defense attorneys, court administrators and court reporters to accompany deployments of international police for law enforcement functions. Without these judiciary elements, the police function will be of little or no value. This holistic judiciary team should help host nation personnel set up hybrid special courts to adjudicate cases of political violence and organized crime until host nation institutions are capable of confronting impunity.

*See Gap/Challenge: Section 6.11.8, Holistic security strategy.*

**7.6.15 Employ informal systems when it makes sense.** Before a formal justice system is functioning or strengthened, it may be necessary to rely on informal mechanisms

238. See United Nations, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 1990.

239. United Nations Department of Peacekeeping Operations, *Handbook on United Nations Multidimensional Peacekeeping Operations*, 2003. Hereafter: UNDPKO, "Handbook on UN Peacekeeping Operations," 2003.

240. David H. Bayley, *Changing the Guard: Developing Democratic Police Abroad* (Oxford: University Press Oxford, 2006). Hereafter: Bayley, "Changing the Guard," 2006.

241. For the purposes of this manual, the judiciary refers to courts, including judges, court administrative staff (court administrators, court clerks), other staff under the court's control (bailiffs, court guards), and prosecutors (depending on the local context). (USAID. "Guide to ROL," 2008.)

242. United States Army, *Field Manual 3-07: Stability Operations* (Washington, D.C.: Department of the U.S. Army, 2008). Hereafter: U.S. Army, *FM 3-07*, 2008.

243. Rausch, *Combating Serious Crimes*, 2006.

for resolving disputes. These could include independent bodies like complaint commissions or an ombudsmen office or even an informal, non-state justice system. These institutions should be held accountable for their actions.<sup>244</sup> The arbitration of disputes can have many political ramifications in many decisions; be cautious in how the resolution of these cases is communicated to the population.

**7.6.16 Protect the judiciary from physical harm and outside influence.** Three elements of the judiciary must be protected from outside influence and physical harm:

- Facilities, such as courts and auxiliary locations
- Documents and evidence, including both criminal and property records
- Individuals who participate in the system, such as court personnel and witnesses.<sup>245</sup>

Courts must operate with security in mind. Over the long term, security improvements will require significant resources, but interim measures, such as creating a corps of court security officers and clarifying practices about where both victims and witnesses will sit while awaiting proceedings and during court hearings, can also have a high impact. Often mission components can provide some security to the judiciary and affiliated individuals.<sup>246</sup> Also manage court personnel to ensure their impartiality. International staff can assist with judicial functions until host nation personnel are adequately vetted and trained. For more on judicial independence and accountability, see Sections 7.7.7 and 7.7.8.

**7.6.17 Ensure that witnesses and victims are adequately protected and supported.** Key witnesses and their families may be threatened because of their involvement in a trial. Methods to protect witnesses before, during, and after the trial (e.g., close protection, witness protection measures, witness relocation programs) are necessary.<sup>247</sup> Victims, who are potential witnesses, may also be in danger. They may need other types of support, particularly in cases of domestic and gender violence or trafficking.<sup>248</sup> NGOs or legal resource centers can help victims to claim their rights and provide support services.<sup>249</sup>

**7.6.18 Vet the judiciary.** In these environments, some judicial personnel may have committed human rights violations, are corrupt, or are connected to spoilers and criminal elements. Lustration or vetting may be necessary and result in a need to recruit new personnel. These personnel should be strictly vetted for past human rights violations or links to criminal organizations. Ensure that judicial personnel reflect the population in terms of gender, ethnicity, religion, and linguistic groups.

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244. UK FCO, "Police Personnel," 2007.

245. USAID, "Guide to ROL," 2008.

246. UNDPKO, "Primer for Justice Components," 2006.

247. For a discussion on witness protection, see Articles 147–62, "Model Code of Criminal Procedure" in O'Connor/Rausch, *Model Codes: Volume II*, 2008. See also Rausch, *Serious Crimes Handbook*, 2006.

248. For a discussion on the support of victims of trafficking, see United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women, Supplementing the United Nations Convention against Transnational Organized Crime*, 2000.

249. See United Nations Office of the High Commissioner for Human Rights, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 1985.

**7.6.19 Use mobile courts and paralegals to meet immediate needs.**<sup>250</sup> Where court-houses are destroyed or nonexistent, consider mobile courts that can move around the country to administer justice. Mobile courts can handle more cases than regular courts. Another option is to leverage judicial power (if it exists under the law) to set up a court anywhere. Consider establishing this power under a new law if it is not in the current code. Judges can hear applications for bail and dispense with cases on the spot, demonstrating responsiveness. Mobile investigation, prosecution, and defense teams should complement the mobile courts. A society emerging from conflict will likely have a severe shortage of lawyers and no state-run legal aid programs. In this situation, paralegals can be employed to provide legal advice.

### **7.6.20 Approach: Humane Detention and Imprisonment**

Detention and prison management and capacity are critical security priorities that are too often neglected relative to police and judicial functions.<sup>251</sup> The ability to run detention centers and prisons effectively in adherence to international standards has a direct impact on the possibility for lasting peace and security. The capacity to securely incarcerate dangerous spoilers is critical to transform systemic threats to the rule of law. Common challenges include dilapidated facilities, chronic underfunding, lack of training for prison staff, antiquated prison laws, overcrowding, prolonged pretrial detention, and serious violations of human rights.<sup>252</sup>

*See Gap/Challenge: Section 6.11.3, Corrections.*

**7.6.21 Meet minimum international standards for treatment of detainees.** Depending on the nature of the mission mandate, detention may be handled early on by either the mission or host nation government. When capacity is low, which is often the case, the mission will have to assume responsibility, in which case a strategy for transitioning prisoners over to the host nation government must be developed.<sup>253</sup> At all stages of this process, detainees must be handled in accordance with international standards. The *UN Standard Minimum Rules for the Treatment of Prisoners* is a good place to start. Some basic principles include the following:<sup>254</sup>

- All persons deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
- Everyone charged with a criminal offense shall be presumed innocent until proved guilty.
- Pretrial detention shall be the exception rather than the rule.
- No detainee shall be subject to torture or to cruel, inhuman, or degrading treatment or punishment or any form of violence or threats.

250. Ibid.

251. For the purposes of this discussion, prisons refer to facilities used to house convicted individuals. Detention refers to any deprivation of personal liberty other than the result of a conviction.

252. United Nations Department of Peacekeeping Operations, *Prison Support Guidance Manual*, 2006. Hereafter: UNDPKO, *Prison Guidance*, 2006.

253. Ibid.

254. United Nations Office of the High Commissioner for Human Rights, *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police*, <http://www.unhcr.ch/html/menu6/2/training.htm> (accessed June 18, 2009).

- Detained persons shall be held only in officially recognized places of detention and their families and legal representatives are to receive full information.
- Decisions about duration and legality of detention are to be made by a judicial or equivalent authority.
- Detainees have the right to be informed of the reason for detention and charges against them.
- Detainees have the right to contact the outside world and to visits from family members and the right to communicate privately and in person with a legal representative.
- Detainees shall be kept in humane facilities, designed to preserve health, and shall be provided with adequate water, food, shelter, clothing, medical services, exercise, and items of personal hygiene.
- Every detainee has the right to appear before a judicial authority and to have the legality of his or her detention reviewed.

**7.6.22 Take measures to provide for prison security.** Develop a prison security system that both prevents prisoners from escaping and protects corrections officers from harm. Key issues often include untrained and poorly paid prison staff, who do not have appropriate weapons and equipment, as well as the lack of prison buildings and infrastructure that can be secured. Solutions depend on the degree of damage to existing prison facilities, the proficiency of the prison staff, their affiliation with groups associated with the conflict, the international and host nation resources available, and the political will to implement reform. Establish an adequate level of prison security that meets international human rights standards and can be sustained by a new government. International corrections professionals can improve prison security by securing prison infrastructure and professionalizing staff and procedures after a careful assessment of the national prison law, existing infrastructure, and the capacity of prison staff.<sup>255</sup>

**7.6.23 Address illegal and excessive pretrial detention and prison overcrowding.** Work to ensure that those who are illegally detained are released from detention immediately and address the problem of excessive pretrial detention, a violation of basic human rights that puts a massive strain on overcrowded prisons. If no transportation exists to bring a detainee to court, putting a mobile court in the prison to review the legality of continued detention is an option. Consider creating a case flow management committee, which can be established with civil society participation even in the absence of other justice institutions.<sup>256</sup> The committee can review the status of detainees and recommend release pending trial or the dropping of charges for less serious crimes. Children detained for less serious crimes should be released from custody. Establish mechanisms over the long term to protect the right to liberty,<sup>257</sup> such as a system for bail or other alternatives to detention<sup>258</sup> (e.g., house arrest). If the law allows, the prosecuting authority can simply refrain from pressing charges for less serious crimes.

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255. International Network to Promote the Rule of Law, “Prison Security in Societies Emerging from Conflict,” Consolidated Response (07-007), 2007.

256. United Nations Office on Drugs and Crime and United States Institute of Peace, “DRAFT: Handbook on Criminal Justice Reform,” 2009.

257. For a discussion of the right to the presumption of liberty, see “Model Codes of Criminal Procedure,” Article 169, in O’Connor/Rausch, *Model Codes: Volume II*, 2008.

258. For a discussion on alternatives to detention, see “Model Codes of Criminal Procedure,” Article 184, in O’Connor/Rausch, *Model Codes: Volume II*, 2008.

An official warning or an apology to the victim may be used. In systems that require a formal legal basis for this action, known as diversion, or that require mandatory prosecution of suspected crimes, consider drafting legal provisions on diversion.

**7.6.24 Improve prison conditions.** Prisons and jails in a society ravaged by conflict invariably fall far short of international human rights standards. Improving prison conditions will be an imperative. New structures should conform to international human rights standards, particularly those concerning the use of punishment units, local climatic conditions, ventilation, natural light, the number of toilets and shower units, area for preparing and cooking food, and waste disposal.<sup>259</sup> Former “dark cells” and other punishment units within the prison should be adjusted to conform to international standards or removed entirely.<sup>260</sup> International agencies may be engaged to provide food for prisoners or to set up prison farms. Separate women and children from men as required by international standards by at least housing women and children in a different part of the prison.

**7.6.25 Prevent torture and focus on evidence-based criminal investigation.** Torture by justice actors may have been commonplace prior to and during the conflict. Work to ensure that torture as a practice in criminal investigations is stopped in compliance with international human rights law.<sup>261</sup> Focus on evidence-based investigations and integrate a prohibition on torture into the law.<sup>262</sup> Vertical and horizontal accountability mechanisms, discussed in Section 7.7, can support the monitoring of torture in the justice system. Training of justice officials will be required, including the proper investigation of crimes (e.g., taking of forensic evidence). Finally, support from senior political and justice officials for the prohibition of torture is necessary, along with the ability to ensure there are consequences for violations of the prohibition.

## 7.7 Necessary Condition: Accountability to the Law

### 7.7.1 What is accountability to the law? Why is it a necessary condition?

Accountability refers to the processes, norms, and structures<sup>263</sup> that hold the population and public officials legally responsible for their actions and that impose sanctions if they violate the law. Accountability is essential if systemic threats to the rule of law are to be corrected. This involves ensuring there are consequences for criminal behavior (which is addressed in Section 7.6); mechanisms to address impunity for past crimes; and horizontal accountability (state institutions overseeing the actions of one another) and vertical accountability (citizens overseeing the actions of the state). Without accountability, human rights will be denied, crime will flourish, and impunity for past conflict-related crimes will persist, undermining legitimacy and prospects for reconciliation. The concentration of power in any one branch, institution, or level of

259. Ibid.

260. Ibid. See Penal Reform International, *Making Standards Work: An International Handbook on Good Prison Practice*, 2001, for an authoritative commentary on the application of international standards to prisons.

261. See United Nations Office of the High Commissioner for Human Rights, “International Covenant on Civil and Political Rights,” Article 7, 1976.

262. United Nations, “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” Article 15, 1987.

263. United Kingdom Department for International Development, Briefing, “Justice and Accountability,” 2008.

government often leads to abuse of power and corruption that horizontal and vertical accountability mechanisms can help prevent. Accountability also aims to mitigate against capture of justice institutions by political and economic spoilers that enables impunity, favoritism, and unequal application of the law.

### 7.7.2 Guidance for Accountability to the Law

#### 7.7.3 *Approach: Transitional Justice*

Transitional justice aims to end impunity for past crimes associated with the conflict, including genocide, crimes against humanity, mass atrocities, and other war crimes. It is defined as the “full range of processes and mechanisms associated with a society’s attempt to come to terms with the legacy of past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”<sup>264</sup> In order to make perpetrators accountable for conflict-related crimes, transitional justice mechanisms may be employed, such as tribunals, truth commissions, or traditional approaches. Inter- and intra-group reconciliation is addressed in Section 10.8.3.

*See Trade-off: Section 7.10.3, Peace vs. justice.*

**7.7.4 Protect and preserve evidence.** The gathering and preservation of evidence of genocide, crimes against humanity, and war crimes is essential if there is a decision to prosecute perpetrators. International military forces and civilian actors (including specialists like forensic anthropologists) should be involved in the protection and preservation of evidence. Make this an early priority as the host nation population is often eager to recover evidence and remains of relatives. Recovery by non-professionals can jeopardize the validity of the evidence. Evidence and physical sites (e.g., mass graves) must be protected from both well-intentioned as well as hostile interference and appropriately preserved for future analysis. For more on the protection on war crimes evidence, see Section 6.8.12.

**7.7.5 Choose the most appropriate transitional justice options.** Support a national dialogue on transitional justice, especially with victims and marginalized groups to look at the different options. Each transitional justice process must spring from the particular needs of the country and its religious, moral or cultural norms.<sup>265</sup> The imposition of prepackaged solutions by the international community is not advised.<sup>266</sup> The judicial and nonjudicial options below may be combined or used separately:

- *Special courts or tribunals.* War crimes, genocide, serious human rights violations, and crimes against humanity are typically the purview of special courts. A special court may be purely host nation, purely international, or a hybrid of the two. In establishing special courts and tribunals, international legal professionals such as judges, prosecutors, and lawyers often work with host nation counterparts to co-administer justice. Successful courts and tribunals depend on political will of regional and international actors<sup>267</sup> and significant international funding.

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264 Ibid.

265. Judy Barsalou and Victoria Baxter, *The Urge to Remember* (Washington, D.C.: U.S. Institute of Peace, 2007).

266. UN Sec-Gen, “Secretary-General’s Report,” 2004.

267. United States Agency for International Development, Office of Transition Initiatives, *Guide to Program Options in Conflict-Prone Settings*, 2001.

- *Truth and reconciliation commissions.*<sup>268</sup> Truth and reconciliation commissions are official, nonpermanent, nonjudicial, and investigative bodies that can be used to address conflict-related crimes and their impact on society. Their primary purpose is to allow a society emerging from conflict as a whole to understand *what* happened during the conflict as well as *why* it happened and to pursue communal resolution.
- *Customary or traditional approaches.* When incorporating customary or traditional approaches into a rule of law framework, consult knowledgeable host nation actors.<sup>269</sup> Analyze the advantages and disadvantages of incorporating each customary method. Confirm that suggested approaches are valid cultural elements and are not an attempt by factions to create new mechanisms of control. Consideration of international human rights standards and fair play are paramount.<sup>270</sup> Long-standing customary mechanisms may be used as a form of transitional justice. In addition, customary mechanisms that have fallen out of use or completely novel non-state mechanisms may also be established. This may involve establishing new mechanisms or resurrecting those that have fallen out of use.
- *Reparations.*<sup>271</sup> Reparations include redress for harm suffered in the form of restitution, compensation, rehabilitation, and guarantees of non-repetition. They can also include public apologies, commemorations or days of remembrance, exhumation, reburial, erection of tombstones, return of the remains of deceased relatives, issues of death certificates, holding of ceremonies for the disappeared, and teaching school children about past abuses.
- *Lustration.* Lustration bars a class of individuals from public employment, political participation, and the enjoyment of other civil rights based on involvement with a prior regime. Best practice lustration methods make individual determinations, do not treat the whole group as black and white, and establish an administrative system to adjudicate claims for exemption in an impartial and reasonably expeditious manner.<sup>272</sup>
- *Vetting.* Vetting seeks to exclude individuals lacking integrity from public institutions. Integrity refers to a person's ability to serve in accordance with fundamental human rights, professional, and rule of law standards.<sup>273</sup> Vetting requires an administrative system to carefully determine who will be excluded.

268. United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions*, 2006.

269. For further reference on customary approaches, see United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programs*, 2006.

270. IPA, "Securing the Rule of Law," 2005.

271. See United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programs*, 2008.

272. Jens Meierhenrich, "The Ethics of Lustration," *Ethics and International Affairs*, no. 1, 2006.

273. United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Vetting*, 2006.

- *International Criminal Court (ICC)*. A state can refer a case to the ICC for prosecution. Where a state has ratified the Statute of the International Criminal Court, and where it decides it will not prosecute, the ICC may nonetheless assume jurisdiction where a crime was committed by a national or on the territory of the state.

*See Trade-off: Section 10.9.7, Restorative vs. retributive justice.*

### **7.7.6 Approach: Horizontal and Vertical Accountability**

Accountability of those in power can take many forms: it can either be horizontal, meaning state institutions oversee the actions of one another, or vertical, meaning citizens oversee the actions of the state. It may be proactive or reactive; it may be centralized or decentralized;<sup>274</sup> and it may be formal (written in law) or informal.

**7.7.7 Promote the separation of powers and judicial independence.** The separation of powers, a core element of the rule of law, should ideally be articulated in a newly drafted or reformed constitution, along with judicial independence. The judiciary should function as a check on executive and legislative authority. In the immediate aftermath of violent conflict, the justice system is often the sole means for holding those in power accountable for criminal conduct. Matters such as judicial appointment, judicial qualifications, duration of terms, conditions of promotion, the transfer and cessation of their functions, and judiciary independence from the executive and legislative branches should be written into law and be consistent with international standards.<sup>275</sup> Protecting judges from intimidation or harm and ensuring that judges are adequately remunerated<sup>276</sup> helps prevent improper influence from those seeking to control or undermine the justice system. Medium- to long-term initiatives to strengthen judicial independence include (1) ensuring that there is a sufficient number of judges in relation to case loads and providing the courts with necessary support staff and equipment;<sup>277</sup> (2) passing codes of conduct; (3) providing for self-governance where the judiciary can control its own administrative, oversight, and disciplinary functions through bodies such as a judicial council; and (4) providing for random and automated case assignments, simplified procedures to reduce undue delay, public court hearings, publication of court verdicts, and public information centers.<sup>278</sup>

**7.7.8 Support the use of horizontal accountability mechanisms.** A new constitution can establish such mechanisms but understand they require resources and long-term sustainment. Significant international assistance will be needed to establish and maintain many of these accountability mechanisms after conflict. This includes providing technical assistance in the drafting of related laws, facilitating the sharing of comparative experiences from other societies emerging from conflict, giving initial financial support

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274. OECD DAC, *SSR Handbook*, 2007.

275. See United Nations Committee on Human Rights, *Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 1984.

276. UNDPKO, "Primer for Justice Components," 2006. United Nations, *Basic Principles on the Independence of the Judiciary*, Principle 11, 1985.

277. United Nations, *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary*, Procedure 5, 1989.

278. UNDPKO, "Primer for Justice Components," 2006.

for infrastructure, capacity building, and training and monitoring the performance of those engaged in these mechanisms. Horizontal accountability mechanisms can take many forms:<sup>279</sup>

- Internal accountability through supervision, internal reviews of actions, code(s) of conduct, disciplinary systems, and performance reviews.
- Executive accountability by the head of state, ministries, national justice advisory boards, or coordinating bodies through command authority, setting of basic policies, budget management, and power to investigate claims of abuse.
- Legislative accountability by the parliament or parliamentary oversight bodies through hearings, budget approval, enacting laws, and visiting and inspecting facilities.
- Judicial accountability by courts through adjudicating cases brought against justice actors, protecting human rights, monitoring the powers of justice officials, assessing constitutionality, providing remedies, and inspecting police or prison facilities.
- Accountability by independent bodies (e.g., an ombudsman, national human rights institutions, audit offices, inspectors general) that receive complaints, raise awareness of human rights, investigate claims of failures and abuses, and ensure proper use of public funds and compliance with policy.<sup>280</sup>

**7.7.9 Provide for vertical accountability mechanisms.** Vertical accountability is typically undertaken by civil society and media with the support of the general population. It occurs through analyzing, being part of consultations on new laws, lobbying, providing alternative views to the population, investigative reporting, and monitoring of the justice system and other branches.<sup>281</sup> Promote accountability through involvement in budget formulation, analysis, and tracking of justice sector and other government expenditures; the establishment of watchdog or monitoring functions; public interest litigation; and participatory performance monitoring of public service delivery. The population can support the accountability mechanism by filling out scorecards or surveys rating the performance of the justice sector and that of other government institutions. Vertical accountability requires a well-established civil society and independent media. See Section 8.8 for more on accountability through civil society and the media.

**7.7.10 Consider international engagement as a necessary safeguard for accountability.**<sup>282</sup> The international community often plays an important role in creating effective accountability structures, including those for initial vetting, hiring, and disciplinary processes for criminal justice actors. The international role requires host nation invitation or an international mandate. If an international process is in place, engage host nation actors early and frequently. Consider the establishment of a hybrid international-host nation commission or a host nation commission with an international secretariat. For the transformation from impunity to accountability to take place, host nation members of these institutions must take increasing risks and responsibility for disciplinary

279. See United Nations Office of the High Commissioner for Human Rights, *Principles Relating to the Status of National Institutions*, 1993.

280. OECD DAC, *SSR Handbook*, 2007.

281. *Ibid.*

282. UNDPKO, "Primer for Justice Components," 2006.

action. Those who do so should not be abandoned by the international community. Rather, their success should be guaranteed by a long-standing commitment to ensure the ability of accountability structures to prevent impunity from reasserting itself.

### 7.8 Necessary Condition: Access to Justice

#### 7.8.1 What is access to justice? Why is it a necessary condition?

Access to justice is more than improving an individual's access to courts or guaranteeing legal representation.<sup>283</sup> Access to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances<sup>284</sup> in compliance with human rights standards.<sup>285</sup> There is no access to justice where citizens (especially marginalized groups) fear the system, see it as alien, and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system. Access to justice involves normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight.<sup>286</sup> Access to justice supports sustainable peace by affording the population a more attractive alternative to violence in resolving personal and political disputes.

#### 7.8.2 Guidance for Access to Justice

##### 7.8.3 Approach: Equal Access<sup>287</sup>

In societies emerging from conflict, large segments of the population may not have had access justice. Equal access involves extending the reach of formal<sup>288</sup> rule of law institutions to the population by removing barriers to their use. Strengthening access also involves engaging the informal<sup>289</sup> sector to enhance its reach, effectiveness, and compliance with human rights standards.

**7.8.4 Address barriers to both quantity and quality.** In a society recovering from violent conflict, several barriers to justice—financial, geographic, linguistic, logistical, or gender-specific—are present. Improving access is not just about more courtrooms or more staff. It is also about quality of justice. Justice systems that are remote, unaffordable, slow, or incomprehensible to the public effectively deny legal protection.<sup>290</sup> Increase the quantity and quality of justice administration to address these problems.

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283. UNDP, "Access to Justice," 2004.

284. A grievance is defined as a gross injury or loss that constitutes a violation of a country's criminal or civil law or international human rights norms and standards. Ibid.

285. United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner's Guide to Human Rights-Based Approach to Access to Justice* (Bangkok: UNDP, 2005). Hereafter: UNDP, *Programming for Justice*, 2005.

286. UNDP, "Access to Justice," 2004.

287. United States Agency for International Development, *Rebuilding the Rule of Law in Post-Conflict Environments*, 2006. Hereafter: USAID, *Rebuilding the ROL*, 2006.

288. The formal justice system includes courts, prosecution, police, prisons, and public defense. Ibid.

289. The informal system includes modern processes, (e.g., noncourt mediation and arbitration) and customary justice (e.g., tribal councils, village elder councils, or other local dispute resolution approaches). USAID, "Rebuilding the ROL," 2006.

290. United Kingdom Department for International Development, "Safety, Security, and Accessible Justice," 2002.

Better prepared defense attorneys, more citizen-oriented court staff, more reasonable hours, better information about the justice system are all means for improving quality. The justice system should be linguistically accessible with local language proceedings or provision of interpretation.

**7.8.5 Enhance physical access.** Courthouses and police stations may only exist in urban, populated areas, leaving the rest of the country without proper access to the formal justice system. Bring judges, prosecutors, defense counsel, court administrative staff (including translators), police, and corrections officials, as well as logistical/security support and public information capacity to areas where the justice system has ceased to function. While mobile courts may be needed in the emergency phase to deal with the most acute needs, they can also provide a long-term solution to endemic access to justice challenges.<sup>291</sup> Efforts to build and staff courthouses and police posts outside of urban areas should also be undertaken to increase access to justice.

**7.8.6 Increase access through provision of legal aid.** Legal information centers and legal aid offices that offer free or low-cost legal advice and representation, pro se projects that train people to represent themselves, and paralegal-based projects that train and employ people to serve as advocates and mediators, can all increase public knowledge of the legal system.<sup>292</sup> Supplement legal aid schemes with paralegal aid schemes run by NGOs.<sup>293</sup> Paralegals are trained in criminal law and procedure in order to provide legal advice to suspects or accused persons who are brought before the informal justice system. They also sit in on police interviews and go to court to provide advice (but do not represent the accused). Legal assistance can also be provided by law students or recent graduates through their law schools or legal resource centers.

**7.8.7 Promote legal awareness.**<sup>294</sup> For the population to access justice, they must understand their rights and the means for claiming them. For most people in a war-torn state, the laws and the formal justice system are alien institutions they fear or do not understand. Legal awareness helps counter this misunderstanding and promote access to justice. Legal awareness campaigns can be conducted by the state but they are most effective when conducted by civil society at a grassroots level or through the media. Because providing information to huge populations is a significant challenge, trusted and familiar social networks (i.e., community-based formal and informal networks) can be used to enhance legal awareness efforts.<sup>295</sup> Legal awareness of suspects and the accused should also be promoted. Messages should be in local languages and should take into account literacy rates.

**7.8.8 Strengthen civil society as the foundation for promoting access to justice.** Even though civil society may be shattered after violent conflict, its role in promoting access to justice and for reforming rule of law is important.<sup>296</sup> Civil society organizations should have a legal status to appear in court to undertake public interest litigation. Legal barriers to their work will need to be removed (e.g., laws that prohibit civil

291. UNDPKO, "Primer for Justice Components," 2006.

292. Dobbins/Jones/Crane/Cole DeGrasse, *Beginner's Guide*, 2007.

293. UNDP, "Programming for Justice," 2005.

294. *Ibid.*

295. UNDP, "Access to Justice," 2004.

296. USAID, "Rebuilding the ROL," 2006.

society from criticizing the judiciary). Development of civil society is further addressed in Section 8.8.

**7.8.9 Recognize that increased access to justice depends on public confidence in the justice system.** The citizen-friendliness and quality of institutions are as important as proximity to the population they serve. Increasing access to justice is not always about quantity—quality is very important when designing legal aid programs because poor legal representation is not necessarily better than lack of legal representation. In war-torn societies, marginalized groups are especially vulnerable to discrimination and unequal treatment. Thus, justice systems must be linguistically and culturally accessible. Try to ensure that staff members are representative of the host nation population. Simplified procedures and widely promulgated laws and decisions help too.<sup>297</sup>

#### **7.8.10 Approach: Remedies for Grievances**

Maximizing access to justice<sup>298</sup> involves the use of both informal/non-state and formal/state justice mechanisms based on strict compliance with human rights standards. This will likely require harmonizing informal practices with international human rights law.

**7.8.11 Understand informal justice mechanisms.** These systems derive legitimacy from traditional, customary, or religious sources. In these environments, they often help resolve disputes because the formal, state-based system does not reach the entire population, the population views informal mechanisms as more legitimate and effective, and the volume of cases may be too large for the formal system to process. Informal practices may also continue functioning at the local level in the absence of a formal and codified legal system.<sup>299</sup> Where these systems are ignored or overridden, the result can be the exclusion of large sectors of society from accessible justice.<sup>300</sup>

**7.8.12 Use the local context to determine how and to what extent local practices should be incorporated into the formal legal system.** During transitional phases, there will inevitably be overlap and contradictions between formal and informal justice mechanisms. Consider the compatibility of local practices with international norms, whether they can be integrated within the formal justice system or have to stand alongside it, and whether the practices serve to divide society or unite it.<sup>301</sup>

**7.8.13 Modify or use informal systems in combination with formal mechanisms to ensure adherence to international human rights standards while maximizing access and public trust in the system.** Some informal systems violate international human rights standards or promote biases and tensions that are drivers of conflict. Modifications can be made, for example, to allow religious courts to have jurisdiction in certain cases but prevent them from carrying out punishments that would be considered violations of human rights.<sup>302</sup> Determine under what circumstances cases should be referred to the formal system and create mechanisms through which judges in

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297. USAID, “Guide to ROL,” 2008.

298. Eric Scheye, *Pragmatic Realism in Justice and Security Development: Supporting Improvement in the Performance of Non-State/Local Justice and Security Networks* (The Hague: Clingendael Institute, 2009).

299. UNDP/USAID, “First Steps,” 2007.

300. UN Sec-Gen, “UN Approach to Rule of Law Assistance,” 2008.

301. United Nations, “Law Overruled: Strengthening the Rule of Law in Postconflict States,” 2008.

302. USAID, “Guide to ROL,” 2008. Dobbins/Jones/Crane/Cole DeGrasse, *Beginner’s Guide*, 2007.

the formal system endorse or validate punishments handed down by the informal system.<sup>303</sup> Informal systems should be subject to the same level of oversight and accountability as the formal system in order to promote public trust in their integrity and legitimacy.<sup>304</sup>

*See Gap/Challenge: Section 7.11.5, Engagement with non-state or religious justice systems.*

**7.8.14 Support the adjudication of claims for a remedy through the formal state justice system and civil society.**<sup>305</sup> In order to seek and obtain a remedy, there has to be an adjudication procedure in place. In the early days after conflict, mobile courts may be used. Initiatives that enhance the independence of the judiciary—a cornerstone for access to justice<sup>306</sup>—should also be prioritized. Other means of adjudication include national human rights commissions<sup>307</sup> or alternative dispute resolution mechanisms that can be led by the state, by a non-state justice system (NSJS), or by non-state actors (e.g., civil society) such as through arbitration<sup>308</sup> or mediation/conciliation.<sup>309</sup> The establishment of arbitration or mediation through the state justice system will require both law reform measures and specific mechanisms. This is a long-term venture. Arbitration and mediation through the non-state justice system or by non-state actors may already be ongoing and can be supported in the short term. Mediation or arbitration by civil society works where credible and influential NGOs can be identified.

**7.8.15 Support the adjudication of claims for a remedy through the informal non-state justice system.**<sup>310</sup> The non-state justice system will generally deal with close to 80 percent of disputes in many countries.<sup>311</sup> Non-state justice systems are systems that have some form of non-state authority in providing safety, security, and accessible justice to the population and include traditional, customary, religious, and informal mechanisms.<sup>312</sup> Consider ways to work with these systems, despite challenges such as human rights violations and the fact that NSJSs cannot address crimes outside their communities, such as organized crime, or disputes between communities.<sup>313</sup> In the short term, international and host nation actors should consider some of the following options:

- Restoring internal accountability mechanisms (such as methods for selecting customary justice authorities or ensuring the possibility of appeal) and training non-state justice authorities in mediation techniques and familiarizing them with domestic laws.

303. United Kingdom Stabilisation Unit, “ROL and Stabilisation,” 2008.

304. UK PSO Guide.

305. Ibid.

306. Ibid.

307. UNDP, “Programming for Justice,” 2005.

308. Arbitration involves “a simplified version of a trial involving less strict rules of evidence.” Decisions are binding and this form of alternative dispute resolution (ADR) “is often used to resolve commercial or business disputes.” (UNDP, “Access to Justice,” 2004).

309. Mediation/conciliation involves a third-party intervention (the mediator or a panel of mediators) in which the disputing parties meet and negotiate face-to-face and where the mediator may advise on, or determine the process of, mediation (UNDP, “Access to Justice,” 2004).

310. UNDP, “Programming for Justice,” 2005.

311. United Kingdom Department for International Development, *Non-State Justice and Security Systems*, 2004.

312. Ibid.

313. UNODC/USIP, “DRAFT: Handbook on Criminal Justice Reform,” 2009.

- Promoting rights awareness or training community members or paralegals to advocate for women and marginalized groups before the NSJS.
- Encouraging the recording of cases and their resolution to promote consistency of decisions and to provide a basis for appeal to the formal system.
- Improving linkages between the formal and informal systems on criminal matters in the short term and working out criteria for when the NSJS can deal with criminal matters and when they must refer them to the formal system.
- Working with customary authorities, state actors, and civil society to incorporate restorative principles such as compensation and reconciliation, into cases dealt with by the formal justice system.
- Working to mitigate harmful practices such as witchcraft trials. With regard to the latter activity, top-down prohibitions tend to be ineffective and counterproductive.<sup>314</sup> A more effective way is to work with tribal leaders and others to gain their acceptance of change.

**7.8.16 Develop culturally acceptable alternatives to harmful practices.**<sup>315</sup> Dialogue and community initiatives to develop culturally acceptable alternatives to harmful practices are important. Another option is to develop alternatives for those who may potentially be subject to harmful practices by the NSJS by providing them with legal aid or resources to access the formal system. Focus on longer-term initiatives between the formal and informal systems to identify problems and construct solutions. Draw on comparative examples from other countries that have struggled with the integration of the formal and NSJS to help design possible models of integration.

*See Trade-off: Section 7.10.1, Culture vs. human rights.*

**7.8.17 Support the enforcement of remedies.**<sup>316</sup> Remedies are useless if they are not enforced. The enforcement of remedies is the province of the prosecution service, the police, and the prison service. NGOs may also monitor the enforcement of remedies.

### **7.8.18 Approach: Fairness**

A society emerging from conflict often suffers severe case backlog and other deficiencies. In spite of this challenge, the justice system must handle cases efficiently and predictably, according to set principles and procedures, including equality before the law and equal application of the law. An efficient system can provide some level of deterrence against criminal acts and discourages delaying cases, such as by bribes from those trying to influence decisions.<sup>317</sup>

**7.8.19 Ensure equal application of the law.**<sup>318</sup> In a society emerging from conflict, individuals with power and marginalized populations may receive unequal treatment. This imbalance in application will likely have caused deep mistrust in the system or may have led to violent resolution of disputes. Applying the law equally regardless of iden-

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314. Ibid.

315. Ibid.

316. UNDP, "Programming for Justice," 2005.

317. Rachel Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners* (Washington, D.C.: Carnegie Endowment for International Peace, 2005).

318. USAID, "Guide to ROL," 2008.

tity is critical to creating a semblance of fairness and legitimacy. This involves applying laws in a nondiscriminatory manner, treating all parties equally in the courtroom, and having rulings that are consistent with the law regardless of the identity of the parties (gender, class, religion). Ensure the law is consistently and equally applied in both criminal and civil matters (land titling, enforcement of leases, landlord-tenant disputes, and debt collection).

**7.8.20 Promote procedural fairness.**<sup>319</sup> Procedural fairness helps mitigate abuse by police, judges, and prosecutors by establishing fair rules for legal proceedings and adhering to them. For criminal offenses, procedural fairness involves guaranteeing the right of those accused of crimes to know the charges levied against them in a language they understand, the right to obtain or be provided counsel, the right to present evidence in their defense, the opportunity to hear or review the prosecutor's evidence, the opportunity to confront and cross-examine witnesses (where oral proceedings exist), and a right to a speedy trial, particularly if incarcerated. In civil matters, procedural fairness ensures that all parties have a full and equal opportunity to be heard, to present evidence and arguments in support of their position, to have notice of and opportunity to respond to the case presented against them, and to receive timely and adequate notice of all court proceedings. Adequate procedural protection helps ensure that law enforcement cannot violate the rights of individuals.

**7.8.21 Facilitate transparency in all judicial processes.**<sup>320</sup> Transparency throughout the justice system guards against abuse of power by officials, such as court personnel destroying court records or judges altering the outcome of cases or making judgments that contradict evidence. Consider transparent case-tracking mechanisms, which make it difficult to tamper with files, and transparent trial processes, which prevent judges from ruling in favor of power brokers when the evidence should lead to conviction.

**7.8.22 Ensure effective application of the law, ensure adequate authority to enforce judgments, and improve the efficiency of court administration and management.** Judgments are useless unless they are effectively enforced. Consider the need for sufficient authority for judges and enforcement agents to enforce judgments, including authorities for issuing interim orders to freeze assets.<sup>321</sup> Further, if individuals do not feel that their grievances will be addressed in an efficient and timely manner through a legitimate system, they may resort to violent alternatives. The majority of people should see the judicial system as viable, responsive, and fair. Understand the roots of inefficiency, which may include inadequate procedures, lack of access, and discrimination.<sup>322</sup> Legal reform programs should emphasize case management, budgeting, personnel, and financial policies. Due to the importance of court administrative functions, a specific administrative office is established in some systems. Where possible, automation of records and processes can significantly increase efficiency, enabling other reforms and improving the quality of judicial decisions, even while pursuing longer-term reform and streamlining of processes. Online storage of legal materials, case information, previous decisions, and other materials can improve the quality of judicial decisions.

319. Ibid.

320. Ibid.

321. Ibid.

322. USAID, "Guide to ROL," 2008.

These automated solutions can strengthen court statistical and analysis functions, which can assist with more efficient assignment of work and can support budget and staffing decisions.<sup>323</sup>

**7.8.23 Increase the knowledge and professionalization of justice personnel to dispense justice.** Education and training, as well as increased access to laws, are also critical to ensuring professionalism of justice system personnel.<sup>324</sup> For example, lawyers need to have adequate knowledge of the law and legal procedures to effectively represent parties in court, while judges need to fully understand applicable laws and trial procedures. Judicial and bar associations can serve as a community where good conduct is supported and promoted.

## 7.9 Necessary Condition: Culture of Lawfulness

### 7.9.1 What is a culture of lawfulness? Why is it a necessary condition?

A culture of lawfulness means that the population in general follows the law and has a desire to access the justice system to address their grievances.<sup>325</sup> It does not require that every single individual in that society believe in the feasibility or even the desirability of the rule of law but that the average person believes that formal laws are a fundamental part of justice or can be used to attain justice and that the justice system can enhance his or her life and society in general.<sup>326</sup> Without a culture of lawfulness, the population will have no desire to access the system and may resort to violence to resolve grievances. For the rule of law to be fully realized, the population needs to follow the law and support its application voluntarily rather than through coercion.

### 7.9.2 Guidance for Promoting a Culture of Lawfulness

#### 7.9.3 Approach: Participation and Communication

Participation and communication can help build the foundations for a culture of lawfulness, which may not exist in a society emerging from conflict. Participation means that the population feels they are a part of the process and can use the law to improve their lives. Communication means that an open dialogue exists between the rule of law community and the population in general and that the public has the means to obtain information from the government.

**7.9.4 Support legal empowerment of marginalized communities.**<sup>327</sup> Legal empowerment refers to “the use of legal services and related development activities to increase disadvantaged populations’ control over their lives.” Legal empowerment aims to prevent the poor from being excluded from legally recognized systems, particularly concerning property and labor rights.<sup>328</sup> This involves development that is community-driven and rights-based

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323. UNDPKO, “Primer for Justice Components,” 2006.

324. Ibid.

325. Roy Godson, “A Guide to Developing a Culture of Lawfulness,” presented at the Symposium on the Role of Civil Society in Countering Organized Crime: Global Implications of the Palermo, Sicily Renaissance, 2000. Hereafter: Godson, “Culture of Lawfulness,” 2000.

326. Ibid.

327. Stephen Golub, *Beyond Rule of Law Orthodoxy: Legal Empowerment Initiative* (Washington, D.C.: Carnegie Endowment for International Peace, 2003).

328. United Nations Commission on the Legal Empowerment of the Poor, *Concept to Action*, 2006.

and is seen as an alternative to more conventional rule of law programs. Specific mechanisms for legal empowerment can include legal services that reduce poverty, promote the rights of marginalized populations, and connect these populations to the rule of law system. Focus on civil society initiatives that strengthen legal capacities and power of marginalized populations, but also engage the government wherever possible.

**7.9.5 Promote public participation.** In many societies emerging from conflict, the population may be afraid to speak out and voice their opinions.<sup>329</sup> They may have little experience with participation. The international community should promote participation in rule of law reforms. When the population starts to feel part of the process, they connect to their society, thus strengthening social cohesion and their investment in promoting the rule of law, and they begin to trust in their government and the justice system,<sup>330</sup> both of which are essential for planting the seeds of a culture of lawfulness and respect for the rule of law.

**7.9.6 Promote communication between the justice system and the population.** In societies emerging from conflict, a lack of mutual understanding and trust commonly exists between the population and the justice system. The international community should support efforts to open the lines of communication to help enhance mutual trust and understanding through dialogue between the public and the justice system. Dialogue can be convened around key issues affecting both the population and the justice system or through permanent communication structures such as local community-police fora. These dialogue sessions can also provide a forum for justice actors and the population to put forward joint proposals for rule of law reforms. Another way to foster communication and understanding is to establish more permanent communication structures such as local community policing boards in which the police meet with the population on a regular basis to discuss issues of concern to both sides.

**7.9.7 Ensure transparency.**<sup>331</sup> For the media or civil society to be able to report on government conduct, there needs to be transparency in government operations that affords the population access to budget information and other government documents. Laws and procedures that provide for transparency (e.g., public budgets, freedom of information legislation) should be put in place to help the media or civil society report on government conduct.

### **7.9.8 Approach: Education and Culture**

Building a culture of lawfulness involves civic- and school-based education, centers of moral authority, and mass media and popular culture. Strive to affect the way citizens understand, use, and value the law rather than just building institutions and structures in the society.<sup>332</sup> These activities work to improve community-justice system relations and build knowledge, trust, and respect for the law and the justice system.

329. See Deepa Narayan, Robert Chambers, Meera K. Shah, Patti Petesch, *Voices of the Poor: Crying Out for Change* (Oxford: Oxford University Press, 2000). Hereafter: Narayan/Chambers/Shah/Petesch, *Voices of the Poor*, 2000.

330. *Ibid.*

331. Godson, "Culture of Lawfulness," 2000.

332. Thomas Carothers, "The Problem of Knowledge," in *Promoting the Rule of Law Abroad* (Washington, D.C.: Carnegie Endowment for International Peace, 2006).

**7.9.9 Support school-based education.**<sup>333</sup> By including rule of law curriculum as part of school education for children, a strong culture of lawfulness message is sent not only to students but to the families and the community. School education programs should help young people understand how the rule of law improves quality of life and why they should follow the law, as well as develop knowledge of the justice system and skills for preventing crime.

**7.9.10 Involve centers of moral authority.**<sup>334</sup> Centers of moral authority might be faith-based institutions and leaders of religious movements, artists, writers, teachers, or locally well-known courageous figures. These individuals or groups can support a culture of lawfulness through their statements, teachings, and pastoral messages. For example, they may send messages to the population about the need to embrace the rule of law and about their roles and responsibilities. They may also mobilize the community against crime and openly condemn it.

**7.9.11 Engage the mass media and popular culture.**<sup>335</sup> The mass media and popular culture are powerful institutions in many countries. They can send strong messages that support a culture of lawfulness and the rule of law. The media can also expose crime and corruption and provide a forum for the population to express their views on the rule of law by covering related issues or topics and by providing a forum for national discussion. Popular culture, through films, popular songs, television, advertising, and art can all convey positive rule of law messages. The role of media outlets is discussed further in Section 8.8.10.

**7.9.12 Work with law enforcement agencies.**<sup>336</sup> Law enforcement agencies are at the front lines and are the first point of contact of the justice system with the population. Law enforcement officials should send a message that rule of law matters, that corruption will not be rewarded, and that officers are expected to ensure responsive, service-oriented policing. Accountability mechanisms also support a culture of lawfulness. Education of law enforcement officials is necessary, as are performance reviews that take into account how the official has upheld the rule of law.<sup>337</sup> Community policing is addressed in Section 6.7.23.

## 7.10 Trade-offs

**7.10.1 Culture vs. human rights.** Rule of law requires that all laws and institutions conform to international human rights norms and standards.<sup>338</sup> But best practice suggests that a state's culture should be respected. Very often, human rights standards are at direct odds with aspects of culture (e.g., treatment of women; cruel, inhuman punishments delivered by the non-state justice system). The international community can take a firm position that the country should work toward achieving international human rights standards, a goal which can be achieved incrementally. Certain core standards such as the

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333. Godson, "Culture of Lawfulness," 2000.

334. Ibid.

335. Ibid.

336. Ibid.

337. See in general, <http://www.cultureoflawfulness.org/>.

338. UN Sec-Gen, "Secretary-General's Report," 2004.

prohibition against torture can be insisted upon in the short term. In other cases, the international community should support dialogue on human rights and culture and support reform constituencies that are pro-human rights.

**7.10.2 Security vs. human rights.** Security and human rights are often pitted against each other in the aftermath of conflict, where insecurity reigns. Some insist that security takes precedence over human rights. The provision of security to the population, however, is a human right, and these are not mutually exclusive concepts. States around the world work to balance the need to protect the security of the population with human rights guarantees. Violations of human rights will have been the hallmark of the prior oppressive regime. In the aftermath of conflict, abandoning human rights principles at the very moment they need to be promoted sends a message to the population that human rights do not matter and they will be harder to build later.

**7.10.3 Peace vs. justice.** There is a strong call for justice after conflict for conflict-related abuses. At the same time, the imperative of peace needs to be protected. In some instances, measures to ensure that justice is administered against certain individuals may ignite tensions and may negatively impact a fragile peace. The question often arises about whether to prosecute and ensure justice or not to prosecute and preserve peace. Some argue that there should be no political considerations taken into account and that justice should prevail at any cost. Others argue that it is more important to preserve peace than to go after individual perpetrators immediately after conflict. Any decision on whether to pursue justice against certain individuals, whose prosecution may impact peace, should be carefully considered.

**7.10.4 Quick fixes vs. a strategic approach.**<sup>339</sup> There is the temptation, coupled with a sense of urgency, to “do” and to start fixing the justice system immediately. This approach has resulted in suboptimal results in the past. There are certainly activities that can promote rule of law in the short term. However, a strategic approach is much more likely to be successful in the long term.

## 7.11 Gaps and Challenges

**7.11.1 Comprehensive, coordinated rule of law assessments.** Assessments need to be taken more seriously and more money, time, and effort need to be invested in them, both immediately after conflict and thereafter. A standard assessment methodology involving the legal and extra-legal components needs to be developed. A greater effort to share assessments among the international community is also required.

**7.11.2 Monitoring and evaluation.** Monitoring and evaluation of rule of law assistance is not taken seriously by the international community; many staff are not trained and funds are not allocated to do it properly. Monitoring and evaluation needs to be prioritized and the results need to be shared widely so that the field as a whole can grow and learn from past experiences.

**7.11.3 Prioritization and sequencing.** There is no methodology or policy guidance on how to sequence and prioritize rule of law assistance. The international community does not fully understand what assistance to provide when and at what juncture that assistance will

339. UK Stabilisation Unit, “Rule of Law and Stabilisation,” 2006.

be the most effective. This is because it knows little about how positive change occurs and how to support it.<sup>340</sup> There is an urgent need for systematic research and discussions on change and how rule of law is brought about.<sup>341</sup>

**7.11.4 Prioritization of noncriminal justice assistance.** Criminal justice is often prioritized as the primary focus for rule of law assistance. Other important areas of potential assistance, such as property rights or public administration reform, have not been addressed. Property issues and displacement can affect a large percentage of the population.<sup>342</sup> More people may deal with the state's public administration than with the criminal justice system on matters such as civil registration and health services.<sup>343</sup> Research and the development of best practices in these fields needs to be developed.

**7.11.5 Engagement with non-state or religious justice systems.** While it is agreed that there needs to be engagement with the non-state justice system to promote the rule of law, the international community does not fully understand these systems, how they operate, what to do with regard to human rights issues, and even less so, what assistance measures promote the rule of law. Empirical, comparative research is needed. In addition, research is needed to look at how to deal with non-state, religious systems of justice and how to integrate religious considerations into rule of law assistance overall.

**7.11.6 Capacity development of international and host nation rule of law staff.** Rule of law practitioners often go to work in societies emerging from conflict with very little rule of law experience. The rule of law community needs to ensure the highest level of training for rule of law practitioners, coordinate around core content of education and training, and require that practitioners have the requisite skills and knowledge to do their job. Rule of law practitioners could also benefit from a community of practice, where new initiatives, documents, or research can be shared and discussed.<sup>344</sup> The international community should support the training of host nation actors on rule of law to support ownership and capacity development.

**7.11.7 Gender mainstreaming.** The international community is not adept in mainstreaming gender through rule of law assistance, including ensuring women's needs are met by justice institutions, that women have equal access to justice and fair treatment under the law,<sup>345</sup> and that women participate in the development of rule of law strategies. Many of the crimes committed against women in conflict and after (e.g., domestic violence, rape) are not adequately addressed. Just like human rights, gender should be mainstreamed through all rule of law assistance measures. The international community should develop strategies for this to address sexual- and gender- based violence that occurs during and after violent conflict.

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340. Samuels (WB), "Rule of Law Reform," 2006.

341. Ibid.

342. Scott Leckie, ed., *Housing Land and Property Rights in Post-Conflict United Nations and Other Peace Operations: A Comparative Survey and Proposal for Reform* (London, UK: Cambridge University Press, 2008).

343. Per Berling, Lars Bejstam, Jenny Ederlöv, Erik Wennerström, and Richard Zajac Sannerholm, *Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development* (Sweden: Folke Bernadotte Academy, 2008).

344. See for example, the International Network to Promote the Rule of Law ([www.inprol.org](http://www.inprol.org)).

345. For a primer on ensuring access to justice for women, see United Nations Development Programme, *Gender Equality and Justice Programming: Equitable Access to Justice for Women*, 2007.