



# Necessary Condition: Access to Justice

## 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> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access> 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> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access> in compliance with human rights standards.<sup>285</sup> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access> 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> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access> 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> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>

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> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access> rule of law institutions to the population by removing barriers to their use. Strengthening access also involves engaging the informal<sup>289</sup> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access> 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> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access> Increase the quantity and quality of justice administration to address these problems. 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> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access> 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> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access> Supplement legal aid schemes with paralegal aid schemes run by NGOs.<sup>293</sup> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access> 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.** 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>294</sup> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access> 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> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>) 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 society from criticizing the judiciary). Development of civil society is further addressed in [Section 8.8](http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/stable-governance/civic-particip) (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/stable-governance/civic-particip>).

**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> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>)

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

Maximizing access to justice<sup>298</sup> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>) 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> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>) Where these systems are ignored or overridden, the result can be the exclusion of large sectors of society from accessible justice.<sup>300</sup> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>)

**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> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>)

**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> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>) Determine under what circumstances cases should be referred to the formal system and create mechanisms through which judges in the formal system endorse or validate punishments handed down by the informal system.<sup>303</sup> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>) 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> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>)

*See Gap/Challenge: [Section 7.11.5](http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/trade-offs-gaps-and-challenges) (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/trade-offs-gaps-and-challenges>), [Engagement with non-state or religious justice systems](http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/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> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>) In order to seek and obtain a remedy, there has to be a 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> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>)—should also be prioritized. Other means of adjudication include national human rights commissions<sup>307</sup> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>) 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> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>) or mediation/conciliation.<sup>309</sup> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>) 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> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>) The non-state justice system will generally deal with close to 80 percent of disputes in many countries.<sup>311</sup> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>) 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> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>) 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> (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law/#Access>) 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.
- 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> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/nd-notes/rule-law/#Access>. 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> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/nd-notes/rule-law/#Access>. 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** (<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/trade-offs-gaps-and-cha#1a>), *Culture vs. human rights*.

**7.8.17 Support the enforcement of remedies.**<sup>316</sup> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/nd-notes/rule-law/#Access>. 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>

<http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/nd-notes/rule-law/#Access>

**7.8.19 Ensure equal application of the law.**<sup>318</sup> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/nd-notes/rule-law/#Access>. 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 identity 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> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/nd-notes/rule-law/#Access>. 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> <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/nd-notes/rule-law/#Access>. 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><http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law#Access> 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><http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law#Access> 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. 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><http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law#Access>

**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><http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/end-notes/rule-law#Access> 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.