



Achieving equal access to justice for all by 2030

Lessons from global funds

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Key messages

- Access to justice is associated with economic growth and social development and its provision is a core state function. But billions of people have limited access to justice. Donor support for justice systems is low in most countries and has fallen by 40% globally in the last four years. Thinking on long-term scaled-up funding for accessible justice is in its infancy.
- The principles and approaches underlying global funds in other areas provide useful lessons for how to achieve Sustainable Development Goal (SDG) 16.3's commitment to equal access to justice for all, including strengthening international commitment; stronger focus on learning and innovation; more effective collective donor effort and management of risk; deeper engagement with national government systems and strategies to scale up sustainable approaches; and creating new funding and partnerships.
- It is too early to assess whether a large-scale global fund would be appropriate or feasible to support access to justice for all, given the challenges and political nature of the justice system. More work needs to be done first, including to establish precise funding needs.
- In the meantime, there is a case for developing a small-scale pilot pooled donor fund focused on a specific SDG 16.3 indicator, available on a demand-driven basis to a limited number of countries. This would enable cross-country learning. It would also provide insights into the functioning of the system as a whole; global fund experience is that an initial focus on a specific 'vertical' issue over time turns into broader engagement.
- There is also a case for undertaking exploratory consultations on how to achieve significant donor re-engagement in low-income countries.

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Acronyms

| | |
|---------------|--|
| COFOG | Classification of Function of Government |
| CSO | Civil Society Organisation |
| DAC | Development Assistance Committee |
| DFID | UK Department for International Development |
| EC | European Commission |
| g7+ | intergovernmental organisation of fragile states |
| GAVI | Global Alliance for Vaccines and Immunisations |
| NGO | Non-Governmental Organisation |
| ODI | Overseas Development Institute |
| OECD | Organisation for Economic Cooperation and Development |
| PER | Public Expenditure Review |
| PNG | Papua New Guinea |
| SDG | Sustainable Development Goal |
| SI | Solomon Islands |
| UK | United Kingdom |
| UN | United Nations |
| UNDP | United Nations Development Programme |
| UNESCO | United Nations Education, Scientific and Cultural Organization |
| UNODC | United Nations Office on Drugs and Crime |
| US | United States |
| USAID | United States Agency for International Development |
| WHO | World Health Organization |

1 Introduction

This paper reviews the experience of global funds and explores whether lessons could usefully be applied to supporting Sustainable Development Goal (SDG) 16.3's commitment to equal access to justice for all by 2030. In other areas, including agriculture, health, climate change and education, global funds focused on specific problems have become a key part of international aid architecture. Global fund performance has varied, but the best ones, particularly those relating to health, have been successful in improving both the quality and quantity of aid: building multi-stakeholder partnerships, marshalling resources, enhancing the long-term visibility of resource flows, generating innovative approaches and delivering results.

The paper begins with a brief overview in section 2 of why access to justice matters and the challenges of providing it, including funding gaps. Section 3 briefly summarises donor engagement with justice to date, and section 4 looks at current promising international

initiatives to engage with SDG 16.3. Section 5 provides an introduction to global funds and then section 6 examines their common characteristics and explores how applicable these might be to the challenges of providing access to justice. Section 7 sets out three options for donor re-engagement. Section 8 sets out three key conclusions and possible next steps, namely: 1) it is premature to try and assess whether a large-scale global justice fund would be appropriate, as much more work needs to be done including on establishing funding gaps; 2) SDG 16.3's two indicators for the first time provide an internationally agreed framework around two specific results for donor and partner countries to improve access to justice globally and there is a case for a small scale pilot fund focused on one or both of these indicators; and 3) there is a case for exploratory consultations on how to achieve significant donor re-engagement in low-income countries where financing challenges are likely to be the greatest.

2 Why access to justice matters, country-level challenges, and funding gaps

2.1 Why access to justice matters

The international community has for the first time agreed international targets for justice. SDG 16.3 commits the international community to *promote the rule of law at the national and international levels* and to ensure *equal access to justice for all* by 2030.¹ The two associated indicators focus on criminal justice and relate to (1) victim reporting levels² and (2) the proportion of prisoners awaiting trial.³ SDG 16 as a whole has a much more ambitious remit encompassing anti-corruption, institutional reform, good governance, human rights, violence, democratisation, legal identity, freedom of information, and discrimination. Improved access to justice is a clear enabler for many SDGs.⁴

Access to justice is associated with economic growth and investment as well as equity and social justice. A functioning commercial justice system provides the foundations for a modern financial sector, and emerging evidence suggests particular benefits for women's ability to access finance (The Law & Development Partnership, 2015). Poor people globally say that the ability to access justice is one of their top priorities (Naraya et al., 2000). It has been said that *the opposite of poverty is justice*

(Stevenson, 2014) because limited access to justice disempowers individuals and communities from claiming their rights and defending themselves from injustice. In the past, the UK Department for International Development (DFID) recommended treating justice as a *basic or core* service on a par with other basic services such as health and education (DFID, 2009). Its provision is a core function of the state, recognised as one of the five Peacebuilding and Statebuilding Goals by donors within the Organisation for Economic Cooperation and Development (OECD) and the g7+ intergovernmental organisation of fragile states.⁵

The United Nations (UN) Commission on Legal Empowerment of the Poor (2008) argued that 4 billion people worldwide⁶ were *'robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law'*. A recent legal needs survey of seven low-income countries⁷ (World Justice Project, 2018) provides further indication of the scale of the problem, revealing that on average 35% of the population experience a civil legal problem each year (which may or may not involve engagement with the justice system), which is on a similar scale to the needs

1 See <https://sustainabledevelopment.un.org/sdg16>.

2 Indicator 16.3.1: Proportion of victims of violence in the previous 12 months who reported their victimisation to competent authorities or other officially recognised conflict resolution mechanisms.

3 Indicator 16.3.2: Unsentenced detainees as a proportion of overall prison population.

4 Most obviously gender equality (SDG 5); access to water (SDG 6); inequality (SDG 10). Securing and protecting access to land and assets is also critical for the elimination of extreme poverty (SDG 1). See Steven (2016) for fuller discussion.

5 The New Deal for Engagement in Fragile States (International Dialogue on Peacebuilding and Statebuilding, 2011) set out five new goals, with justice as the third goal.

6 At the time of the report, the UN estimated the world population at 6.7 billion. The latest UN estimate is 7.6 billion.

7 Afghanistan, Burkina Faso, Ethiopia, Madagascar, Malawi, Nepal, and Senegal. See also Barendrecht et al. (2012).

for care for health problems.⁸ This does not take into account legal needs relating to engagement with the formal criminal justice system (see Pleasence et al., 2013). A further indication of the scope of the problem is the World Health Organisation's (WHO) estimate that 35% of women worldwide have experienced sexual assault at some point in their lives (WHO et al., 2013).

2.2 Country-level challenges

Access to justice for all will involve scaled-up services to provide advice and assistance to victims and people involved in disputes and conflicts. It will also involve improving the institutional framework for resolving disputes, conflicts and crimes (for example, local dispute resolution mechanisms, police, courts, prisons). Both aspects need to be addressed. Just focusing on access to advice and assistance without improving institutions will result in people knowing their rights and how to demand them but looking to a system that cannot deliver on them.⁹ Similarly, just focusing on institutional development without enabling access to the justice system will fail to deliver on SDG 16.3's promise of equal access to justice for all. Delivering on both aspects poses enormous challenges.¹⁰

Legal advice and assistance is inaccessible for millions of people. The reasons, as highlighted in a recent *UN Global Report on Legal Aid* (UNDP and UNODC, 2016), include the lack of an organised legal aid system, the limited number of lawyers to cover legal aid needs, geographical inaccessibility, and lack of awareness of the availability of legal advice and assistance. Even if legal advice and assistance were to be available, in many low- and middle-income countries the system that deals with disputes, conflicts and crimes poses very significant challenges. State justice systems tend to be small, but often overloaded, and can be perceived as predominantly serving the urban wealthy elite. The justice system may be highly politicised. The police, often the entry point to the formal justice system, are typically underfunded, can be products of a colonial past and may be structured as predatory, regime-serving, command and control organisations ('forces' rather than 'services'). Supplemental local forces may also have a control/

oppression mandate. In sub-Saharan Africa the police and the courts are consistently cited as the key public service for which people who come into contact with them are most likely to have paid a bribe (Pring, 2015).¹¹ Justice at the community level is often delivered through independent traditional structures, with 80% of people in fragile states relying on non-state actors to provide justice (OECD, 2007). Formal justice may be complex, remote and inaccessible – geographically, linguistically, culturally and financially, and in some cases lacking in legitimacy. Local, traditional and informal justice systems may have more legitimacy and be more accessible, but (as with formal justice systems) there are concerns about the quality of justice dispensed, particularly for vulnerable and marginalised groups, including women and children (Harper, 2011). SDG 16.3's two indicators (victim reporting levels and detainees without trial) are focused on addressing challenges in the formal justice system. However, addressing these complex challenges is likely to involve engaging with the plural legal systems in many low- and middle-income countries which rely on both state and non-state justice providers.

One illustration of the challenges faced by the institutional framework for delivering justice is the proportion of the population that comes into formal contact with the police and/or criminal justice system (essentially persons being suspected, or arrested or cautioned, for a criminal offence). International comparisons are not straightforward given legal and procedural differences, including in relation to record keeping. However, as Figure 1 illustrates, the difference between low-income and OECD countries is startling. The average (median) contact, based on all countries recorded by the UN Office on Drugs and Crime (UNODC), in low-income countries is 10% of the level of contact in OECD countries.¹² In low-income countries, the low level is likely to reflect some combination of limited investigation capacity of the police, reluctance by people to report crimes and a preference for traditional/non-state mechanisms to deal with crimes,¹³ particularly if the police are regarded as predatory and/or lacking in legitimacy. The ratio in the chart below is a very imperfect measure, but the fact that there is such low engagement with the formal criminal justice system

8 Median rate of outpatient visits per person a year in low-income countries was reported as 30% in 2009. Data unfortunately is no longer collected but is likely to have improved since then. Source: World Bank/World Health Organization (WHO) <https://datamarket.com/data/set/15mv/outpatient-visits-per-capita#!ds=15mv!hni=h&display=line>.

9 See International Council on Human Rights Policy (2000) with reference to experience in Cambodia and Guatemala. See also discussion on effective and equitable legal institutions in the 2017 *World Development Report* (World Bank, 2017).

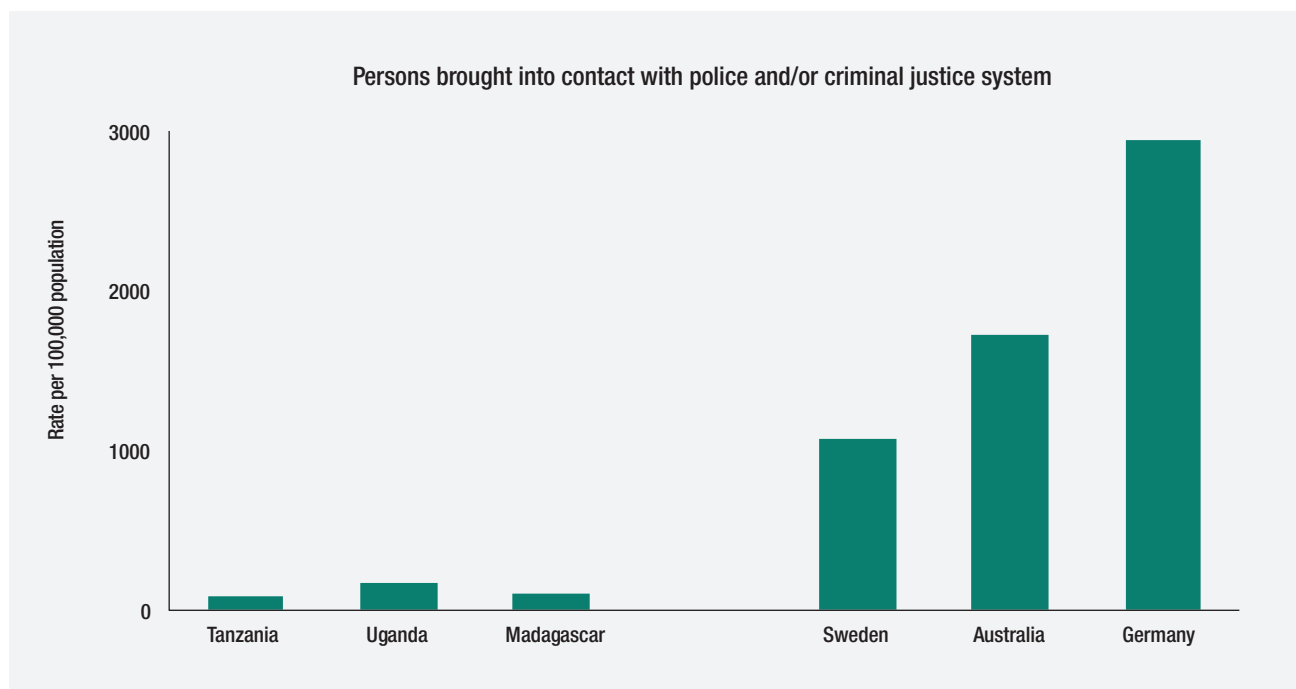
10 For a recent overview of barriers to accessing justice see OECD and OSF (2016)

11 The finding is consistent with previous Transparency International Surveys.

12 Unfortunately UNODC only has data for 5 of the 31 low-income countries. But the difference is so stark that it is worth noting.

13 Informal mechanisms may be used to deal with some crimes in high and middle income crimes as well, but the chart suggests that either the incidence of crime is much lower in low-income countries or that crimes are much less likely to be dealt with through the formal justice system.

Figure 1 Formal contact with criminal legal system is much lower in low-income countries than in OECD countries



Source: Latest year (2014 or 2015) UNODC (<https://data.unodc.org>)

in low-income countries raises questions about what effective justice provision looks like, and illustrates the scale of the challenges in providing access to formal justice in low-income countries.¹⁴

2.3 Funding gaps

One clear challenge that both legal advice and assistance programmes and national institutional frameworks face is limited funding. This is an oft cited concern but to date there has not been a comprehensive assessment of financing needs. In the absence of such an assessment section 3 of this paper explores what the level of donor financing is, and might be available, and section 6 considers the potential for funding from domestic taxation and the lessons from other

sectors about costing. This initial analysis points to a significant financing gap. It also suggests there is a significant imbalance between funding for justice and for other sectors, when the relative spending on justice in donors' own countries is compared to the levels of aid they provide. The underfunding issue is likely to be particularly acute in low-income countries, as they are known to be least able to fund core government services themselves.¹⁵ However, much more data and analysis is needed before a definitive assessment of justice funding needs can be confirmed. As comprehensive funding gap exercises have been useful in other sectors and have been done for many SDGs (e.g. Schmidt-Traub and Sachs, 2015), a similar exercise for justice would seem a priority action. This would establish justice funding needs, both in absolute terms and relative to other sectors.

14 The picture is much less clear on victimisation (SDG 16.3.1). Only 33 countries have at least one data point after 2010 (<https://unstats.un.org/sdgs/metadata>).

15 Most low-income countries cannot afford to even fund half the costs of their education and health systems (see Greenhill et al. (2015) and Manuel et al. (2018 forthcoming)).

3 Donor support of justice – quantity and quality of aid

There is a long history of donor engagement in justice, including: the Law and Development movement in the 1950s and 1960s, focused on Latin America; the large-scale rule of law programmes in the 1990s, focused in particular on post-communist transition in Eastern Europe; and many police and judicial reform programmes across Africa and Asia. However, the global focus on the Millennium Development Goals after 2000 coupled with the difficulties donors encountered in supporting the justice sector have reduced donor engagement.

3.1 Quantity of aid

The OECD Development Assistance Committee (DAC) has for many years recorded the level and purpose of all donor spending. This is built up from a project-level analysis. Where projects have multiple purposes – an education project with a water component – the amounts spent on each purpose are separately recorded. The analysis of the amount of aid spent on justice follows the international Classification of Function of Government (COFOG) categories that are used in the analysis for OECD countries' own spending on 'public order and safety', which includes police, law courts and prisons (as well as fire services). Unfortunately no distinction is made in the aid data between these different institutions.¹⁶

Over the last ten years aid funding for justice has only comprised 1.8% of total aid flows on average, compared with 13% and 8% for the health and education sectors respectively.¹⁷ And in the last five years justice aid has fallen. In 2016 it comprised only 1.3%

of all aid, a 40% reduction on the peak share of 2.3% in 2012. Data limitations mean that it is not currently possible to calculate the justice funding gap, but the analysis below (and in section 6) points strongly to the conclusion that aid to justice is both disproportionately low, and totally inadequate.

Not only is the overall donor level of support currently low, it is also limited to a few donors and is heavily skewed to a few recipient countries, which are either conflict-affected or key countries in the United States' (US) efforts to tackle the international drug trade (see Figure 2). The US is by far the largest donor.¹⁸ It used to account for two thirds of all spending ten years ago and even now accounts for over half of the total. The largest US programmes are in Afghanistan and Latin America. The European Union (EU) currently provides another 15% of the total, with the majority to European enlargement/neighbourhood countries, especially Kosovo. The next three largest donors are geographically focused: Japan and Germany on Afghanistan, and Australia on Papua New Guinea (PNG) and Solomon Islands (SI). Eight of the top ten justice aid recipients are middle-income countries.

Low-income countries receive much less support. Only three post-conflict low-income countries received more than \$20 million a year in 2016: Afghanistan, Haiti and Liberia. In the other 28 low-income countries the average (median) aid for justice in 2016 was just \$0.25 per person per year. Aid for education and for health is 15 and 50 times this amount respectively – \$3.8 and \$12.8 per person per year. As Figure 3 shows, aid to justice would increase sharply if OECD countries gave the same relative priority to justice in their aid allocations as they

16 Since 2007 donor aid to the justice sector has been reported by OECD DAC under the Creditor Reporting System code 15130 'Legal and judicial services', which includes law courts, police and prisons as well as fire services. In 2016 this amounted to \$2.3 billion. From 2016 OECD DAC also reported aid for 'Ending violence against women and girls' under Creditor Reporting System code 15180. This amounted to just \$134 million. All justice aid figures in this paper refer to the total reported under both codes.

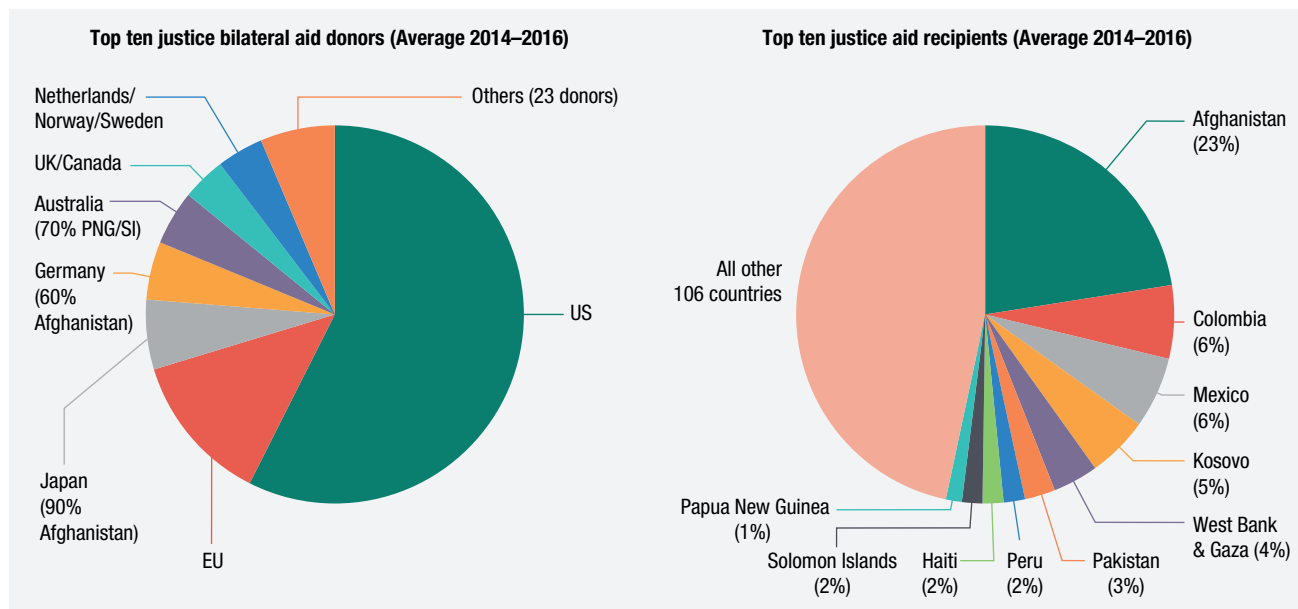
17 Authors' own calculations based on OECD DAC Creditor Reporting System. Aid figures for health include health, population and reproductive health.

18 The analysis relates to the ultimate source of funding. Bilateral funded programme delivery may be through multilateral agencies. For example the United Nations Development Programme's (UNDP) Global Programme for Strengthening the Rule of Law is funded by many different donors and operates in 40 conflict-affected countries. <http://www.undp.org/content/undp/en/home/news-centre/speeches/2018/the-rule-of-law-and-human-rights-assistance-in-crisis-affected-c.htm>

do for their own domestic spending.¹⁹ This would nearly double global funding to \$4.6 billion a year. If low-income countries were prioritised within this global total to the same extent that they are for aid to education and health,

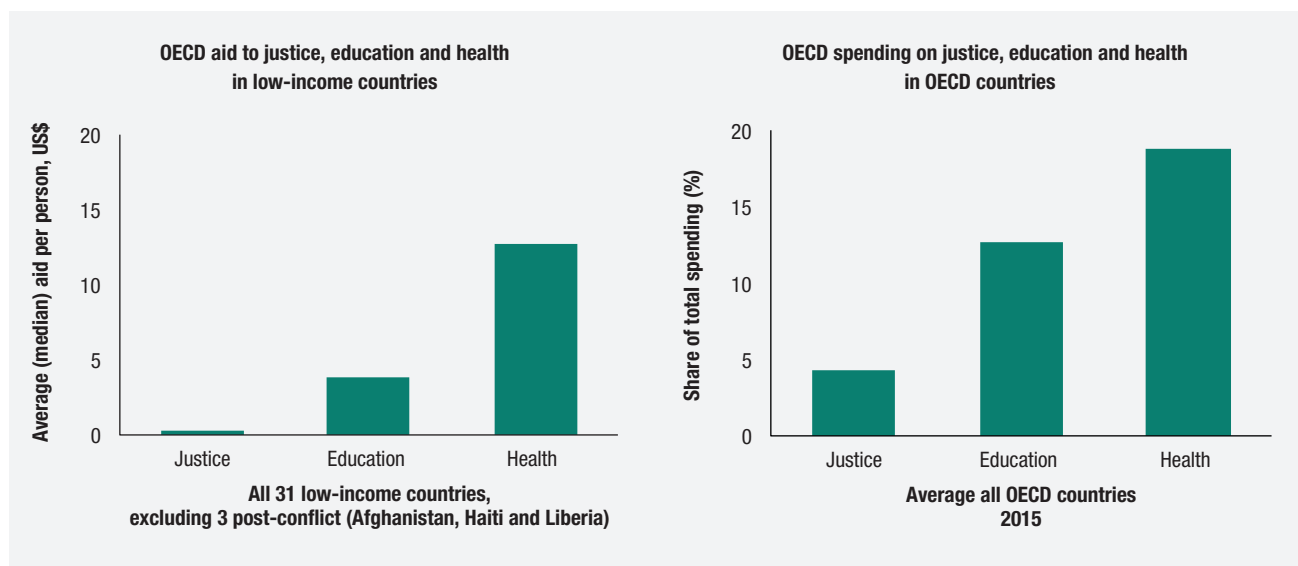
there would be a nine-fold increase in justice aid to \$2.3 per person per year.²⁰ Such increases have the potential to radically transform the prospects for achieving justice for all, especially in the poorest countries.

Figure 2 Bilateral donor support is limited to a few donors and is concentrated on a few recipient countries



Source: Authors' own calculations based on OECD DAC Creditor Reporting System

Figure 3 OECD countries give lower priority to justice in their aid than in spending in their own countries



Source: Authors' own calculations based on OECD DAC Creditor Reporting System, Manuel et al. (2018 forthcoming) and OECD (2017)

19 Figures for spending in OECD countries are for the latest year available (2015) and are based on the standard international Classification of Function of Government (COFOG) categories (in the case of justice 'public order and safety', which includes law courts, police and prisons as well as fire services). Available at: www.oecd-ilibrary.org/governance/government-at-a-glance-2017_gov_glance-2017-en

20 In OECD countries the ratio of spending on education and health to justice is 7.3 to 1. Total global aid for education and health is \$34 billion. Applying this 7.3 ratio implies justice aid of \$4.6 billion, a near doubling of current aid flows of \$2.4 billion. Combined aid spent on education and health in 28 low-income countries is \$16.6 per person. Applying the 7.3 ratio implies an aid spend of \$2.23 per person, a 9.1-fold increase compared to current spend of \$0.25 per person.

3.2 Quality of programming

The need to increase the amount of aid to justice is only part of the picture. Low donor spending has been accompanied by weak programming. External support to the sector has largely been characterised by unconnected bilateral projects and ad hoc activities, with limited coordination (International Council on Human Rights Policy, 2000). In the absence of an alternative aid architecture, some major donors have outsourced their justice programmes to private sector suppliers and consortia (Denney and Domingo, 2014). As well as bringing programme management challenges (Kleinfeld, 2013),²¹ this delivery mechanism has resulted in fragmentation of knowledge and insufficient international learning. And this piecemeal approach tends to result in high unit cost interventions which are not scalable or affordable in the long term (e.g. Carothers, 2003).

A long series of critiques of donor engagement with justice (International Council on Human Rights Policy, 2000; Carothers, 2003; Channell,

2005; Desai et al., 2011; EC, 2011; Domingo and Denney, 2012; Cox et al., 2012; Independent Commission for Aid Impact, 2015; OECD, 2016) have come to very similar, depressing conclusions. While there have been successes in some regions and on some issues, the broader picture is bleak. Criticisms include short-term timeframes with assumed linear trajectories of change; insufficient resources and over-ambition; varied, changeable and at times contradictory motivations (ranging from human rights to tackling terrorism, narcotics, and organised crime); an over-emphasis on institutional reform and inappropriate technical solutions, often from western countries; limited engagement with scale and sustainability; limited local ownership; failure to take a sufficiently politically informed approach; insufficient openness to learning; and perhaps the underlying problem – limited donor capacity and capability in the subject matter. While individual justice projects may have succeeded in their own terms, examples of significant, positive sustained impacts are rare.

21 Issues highlighted include the need to improve contracting and aid procedures to take advantage of windows of opportunity and political cycles, such as allowing flexible multi-year aid budgets supported by strategic guidance, not earmarks, and reducing multi-year planning in favour of speedy implementation and adjustment during programming.

4 Promising initiatives

Previous global initiatives such as the 2008 report of the UN Commission on the Legal Empowerment of the Poor threw light on the importance of access to justice and of the huge unmet need. More recently, the inclusion of a justice goal in the SDGs is a massive achievement, underpinned by strong political will of the international community to improve access to justice. Momentum is now gathering to deliver on the goal, with a review of SDG 16 planned in 2019 by the UN's ministerial High Level Political Forum. This is an opportunity to consolidate existing desire for change and garner renewed engagement by the international community.

Associated with the push for SDG 16.3, there have been encouraging efforts to explore new approaches to delivering improved access to justice. Non-governmental organisations (NGOs), partnerships and platforms such as Open Society Foundations, Namati, the World Justice Project, the Hague Institute for Innovation of Law, the Global Forum on Law, Justice and Development, and the Civil Society Platform for Peacebuilding and Statebuilding²² have become more visible. Their focus is generally on legal empowerment,

innovation, improving data and evidence²³ rather than what have been characterised as previous 'top-down state-centric' approaches (Domingo and Desai, 2018). Learning and advocacy networks focused on access to justice are being formed including the Knowledge Platform Security and Rule of Law²⁴ established by the Dutch Ministry of Foreign Affairs, the Global Legal Empowerment Network, and the Justice for All campaign hosted by Namati.²⁵ OECD and Open Society Foundations joint efforts have also focused attention on effective access to justice.²⁶

More recently, the governments of Brazil, Sierra Leone and Switzerland convened the *Pathfinders for Peaceful, Just and Inclusive Societies*²⁷ with its Task Force that brings together governments, international organisations and civil society organisations (CSOs) to plan for delivery of SDG 16. With thinking on long-term and scaled-up funding for justice currently in its infancy,²⁸ it is very encouraging that the Pathfinders' work includes developing a financing strategy to scale up investment in justice (Pathfinders for Peaceful, Just and Inclusive Societies, 2018).²⁹

22 See <https://www.opensocietyfoundations.org/>, <https://namati.org>, <https://worldjusticeproject.org>, www.hiil.org, www.globalforumljd.org, and www.cspps.org, respectively.

23 See for example Joseph (2013), and Domingo and O'Neil (2014). See also SDG16 data initiative www.sdg16.org

24 See www.kpsrl.org/about-us. One of the Platform's three Thematic Headlines for 2017/18 is *Moving the Needle on Goal 16.3 of the SDGs*.

25 See <https://namati.org/network> and <https://www.justiceforall2030.org>

26 For example <http://www.oecd.org/gov/delivering-access-to-justice-event.htm>

27 See <https://cic.nyu.edu/programs/sdg16plus>

28 See The Law & Development Partnership (2016) for recent, preliminary thinking.

29 See challenge paper available at www.sdg16.org

5 Global vertical funds: a brief overview

SDG 16.3 is already providing a focus for thinking, analysis and action on global access to justice. Its two indicators provide for the first time an internationally agreed framework around two specific results for donor and partner countries to improve access to justice globally. But there is a need to scale up implementation of this global target. The remainder of this paper examines the lessons from a funding mechanism that has worked well in other areas to improve the quantity of funding, the quality of programming and achieve results – ‘vertical’ global funds. It asks whether lessons from such funds could apply to thinking about how to achieve global access to justice for all, and specifically to deliver on SDG 16.3’s two internationally agreed indicators – victim reporting levels, and proportion of prisoners awaiting trial.

Vertical funds are global programmes for allocating aid that focus on a particular thematic issue across countries. They have been referred to as ‘goal-based investment partnerships’, working to deliver clearly articulated targets (Gartner and Kharas, 2013; Schmidt-Traub and Sachs, 2015). The aim is to scale up resources and impact, with donor funds crowding in other funding. By 2013 the top ten vertical funds represented approximately one seventh of all programmable aid, and in some important sectors accounted for over half of all donor commitments (*ibid*; *ibid*). Most of these new generation vertical funds emerged in response to specific global challenges in the wake of the Millennium Development Goals. Prominent examples include two health funds, namely the Global Fund for AIDS, Tuberculosis and Malaria (‘the Global Fund’) and the Global Alliance for Vaccines

and Immunisations (GAVI), the International Fund for Agricultural Development,³⁰ and the Global Agriculture and Food Security Program. There are also a range of climate funds (Nakhoda et al., 2015). Since 2013 the number of funds has continued to grow. Another health fund, the Global Financing Facility in support of Every Woman, Every Child, was launched in 2015 and the Education Cannot Wait Fund in 2016. Calls continue for further new approaches in the education sector to mobilise additional resources, reduce fragmentation and promote innovation (Schäferhoff and Burnett, 2016).

The funds have differing management, governance and implementation practices. Some have been more successful than others. In some cases, there has been criticism of vertical funds’ limited support to countries’ development of sustainable national systems and limited coordination with other donors in-country.³¹ A series of reviews (Isenman et al., 2010; Gartner and Kharas, 2013; Schmidt-Traub and Sachs, 2015; Sachs and Schmidt-Traub, 2017; Schmidt-Traub, 2018a) suggest that performance is strongly connected to fund design. Funds with more participatory governance structures, more independence and greater beneficiary involvement, clear performance-based metrics, and a close link between performance and funding (including competitive allocation of funds) have demonstrated more success in resource mobilisation, impact, innovation, learning and scaling up. The Global Fund and GAVI stand out in this respect and have been credited with bringing in new private-sector actors and enabling rapid scale-up from a global goal to successful implementation on a global scale (Gartner and Kharas, 2013; Schmidt-Traub and Sachs, 2015).

30 Which dates from an earlier era (1971).

31 See for example DFID’s latest business case and annual review of the Global Fund (DFID, 2018a; 2018b).

6 Lessons from global funds applied to achieving scaled-up access to justice

It is clear from the review of donor engagement with justice in section 3 that if the ambition of SDG 16.3 is to be met, a sea change is needed in donor engagement – both in terms of the quantity of donor funds and the quality of donor programming. This section examines how ‘vertical’ global funds have addressed these challenges in other sectors, and considers whether there are lessons that might be relevant for achieving SDG 16.3 – specifically the internationally agreed indicators of improvements in victim reporting and the proportion of un-convicted detainees. The section looks at eight interlinked potential lessons from a global fund approach, drawing on the experience of funds to date,³² in particular the Global Fund:

1. Strengthened international political commitment to engage in access to justice
2. Management of donor risk
3. Stronger focus on data, results, learning and innovation
4. More effective collective donor effort
5. Stimulation of national strategies for scaling up improved justice service delivery
6. Stronger engagement with national budgets to ensure affordable sustainable solutions
7. Crowding in new funding sources
8. Creation of new partnerships between national governments, civil society, the private sector and academia.

As will be discussed below, global funds are not a panacea: they have inherent tensions and have been the subject of much debate and criticism. A key issue is the tension between their narrow focus on predetermined problems (in the case of health for example, on particular diseases) and the need for strong local ownership and alignment with national priorities to achieve effective delivery. Another tension is their need to address complex

and sometimes politically contentious issues (e.g. strategies to tackle HIV and AIDS) while at the same time demonstrating a clear (simple) causal chain from funding to results. These kind of tensions and complexities also apply in relation to justice, although the scope and specific issues obviously differ. The discussion below is not intended to advocate for the immediate setting up of a global fund but instead considers what lessons can be learnt for achieving access to justice from a funding mechanism and delivery model that has worked to achieve scaled-up results in other sectors.

The eight potential lessons of a global fund approach are considered in turn below.

6.1 Strengthened international political commitment to engage in access to justice

Despite the momentum generated by the inclusion of SDG 16.3 as a global target, and the initiatives discussed in section 4 above, there is a need for renewed commitment to and engagement with access to justice by the international community. In the face of valid criticisms of their programming, and the desire to demonstrate results, some donors are disengaging from a ‘difficult’ sector, with DFID having ceased almost all justice programming following an adverse report from the Independent Commission on Aid Impact³³ and changes in priorities. Australia has similarly reduced its justice programming.

While justice/rule of law has been seen as integral to sustainable development, it remains a difficult and in some ways an unattractive issue for donors. It is complex, technical, and bound in social norms and political power. The UN Commission on Legal Empowerment of the Poor (2008) noted five key elements to successful reform – and three of these are

32 Isenman et al. (2010); Gartner and Kharas (2013); Schmidt-Traub and Sachs (2015); Nakhoda et al. (2015); Schäferhoff and Burnett (2016); Rogerson and Schäferhoff (2016); ODI (2016); Schmidt-Traub (2018a); as well as the latest DFID annual reviews of their contributions to various funds, available at: <https://devtracker.dfid.gov.uk> (accessed 10 May 2018).

33 Independent Commission for Aid Impact (2015). Some justice programming is continuing including through programming tackling specific issues such as violence against women and girls, and under the Conflict, Security and Stability Fund.

about politics: the need for broad political coalitions; the right political context; and strong political leadership. Other recent research has also highlighted the political challenges around engaging with justice (e.g. Domingo, 2016; Denney and Domingo, 2017). Engaging with justice can include working with ‘unsafe’ institutions such as the police and prisons (ibid.). Failures in the justice sector can result in torture, summary executions, brutality and impunity (International Council on Human Rights Policy, 2000). While some bilateral donors, such as the UK, Germany, Australia and New Zealand, have engaged with police reform, the largest bilateral donor in the sector – the United States Agency for International Development (USAID) – has a specific challenge in that it is barred from engagement in law enforcement. The US Congress has secured a similar ban on World Bank activities, so World Bank programming has tended to focus on the judiciary and law reform. Yet the police are at the centre of the formal justice system – the largest element in the sector in terms of personnel and funding, and often people’s entry point into the justice system and the part of the system that has greatest citizen interaction. SDG 16.3’s two indicators relate to criminal rather than civil justice.

Given its complex political context, justice reform is unlikely to be straightforward or linear: set-backs and unforeseen events are inevitable. In terms of public support, funding justice in other countries may be particularly unappealing, with legal aid budgets being cut at home (e.g. Hirsch, 2018), and prison reform (see SDG indicator 16.3.2) an unlikely vote-winner, even domestically. These challenges have contributed to the difficulty in catalysing strong support for investment in justice in international aid, despite the clear need.

The case for enhanced donor engagement with access to justice in low- and middle-income countries needs to be strengthened for politicians and the public. Global funds (especially in health) have had a strong role in consolidating and catalysing political commitment (Schmidt-Traub and Sachs, 2015). The key to this has been their ‘verticality’: their clear mission, very specific mandates and limited goals that have strong resonance with the public and politicians (Isenman et al., 2010). Global health funds in particular have articulated their messages skilfully, ensuring their aims are expressed simply and clearly in terms of lives saved (Gartner and Kharas, 2013). Their focus on particular diseases and the visible delivery of results created trust, which as time went on enabled the funds to tackle more complex health challenges (Isenman et al., 2010).

What are the lessons from global funds for providing the focus for more widespread renewed international political commitment to justice? SDG 16.3 for the first time provides an organising framework for the justice sector with internationally agreed goals and indicators, and there is already powerful public messaging available on why justice for all matters (see for example Stevenson (2012) and Meru (2017)). Lawyers, of all people, should be able to advocate skilfully and make the case for SDG 16.3. Civil society³⁴ already has a strong voice on access to justice. In general strong civil society participation in a global fund’s governance has resulted in effective advocacy in support of that fund’s objectives (Gartner and Kharas, 2013; Schmidt-Traub and Sachs, 2015). But it has proved hard to build strong political will around some global funds, such as agriculture, which are not as amenable to simple messaging (Gartner and Kharas, 2013).³⁵ The justice sector similarly may find it problematic to demonstrate (and so articulate) a clear causal chain from resources to results, given the complexity of the issues and the limited ability of donor programming to demonstrate significant results. Mitigating against this last point is the potential to use the SDG 16.3 indicators – on victim reporting and pre-trial detainees – as the focus for renewed donor engagement. While some have seen these indicators as unsatisfactory or inadequate,³⁶ they have the merits of being internationally agreed and of having a framework for international reporting and monitoring through the SDG process, and the potential to demonstrate a causal chain between funding and results (see discussion in sub-section 6.3 below).

6.2 Management of donor risk

A donor pooled funding mechanism has the potential to manage the national donor political risk inherent in engaging with the justice sector, including the risk of association with human rights abuses. A pooled funding mechanism would enable risk to be shared across donors, with ‘arms-length’ funding mechanisms seen as effective enablers of reform in politically challenging areas (Booth, 2013). For example, in relation to the risks of human rights abuses, rather than a single abuse resulting in a cessation of funding (as would be the risk for bilateral funding) a pooled funding mechanism might be able to tackle the issue of human rights abuses more effectively by enabling funding to be determined by a pattern of occurrences and to take into account the credibility of efforts to reduce abuses.³⁷ This approach may be harder for a bilateral donor. Taking this further, a pooled funding mechanism may be able to facilitate dialogue between contesting parties, for example assisting with

34 For example Saferworld, Open Society Foundations, Namati.

35 Simple messaging does not automatically lead to success: education might be seen as amenable to simple messaging, and yet the global fund mechanism has had limited impact.

36 For a discussion of the indicators in relation to fragile states, see Smits et al. (2017).

37 As the EU, for example, does when responding to reports of human rights abuses through its Cotonou Agreement (2000).

the development of national justice priorities. The European Commission (EC) has had some success in this regard through its justice programming, where in a range of contexts³⁸ the Commission was regarded as a ‘neutral’ player without a bilateral agenda and was therefore considered a more appropriate partner for facilitating dialogue on sensitive and political issues (EC, 2011).

In the health sector, one striking feature of the Global Fund is that it has been tougher and more effective on issues of financial fraud than many bilateral and multilateral agencies have been. When issues have been identified, the Global Fund has not had to weigh up the impact of its action on other sectoral programmes or take into account wider national interest and political/diplomatic relationships of donor countries. Similarly, the Global Fund has been successful in ensuring adherence to best practice in ways that would have been extremely challenging for a bilateral donor. For example, China’s AIDS funding requests were initially turned down because they did not meet medical best practice. China at first protested and was rejected again, before changing their approach, and the results have been extremely positive (Schmidt-Traub, 2018a). Also relevant to donor’s ability to manage political risk has been the success of the Global Fund in promoting the role of CSOs in their watchdog and delivery roles (see sub-section 6.7 below).

6.3 Stronger focus on data, results, learning and innovation

Critical to the success of the health global funds has been their ability to demonstrate a clear causal link between financing, interventions and results (Gartner and Kharas, 2013; Schmidt-Traub and Sachs, 2015). As discussed above, donor programming in the justice sector is widely seen as having failed to demonstrate strong impact, with criticism of the tendency to set overly ambitious targets, which are then not delivered (see for example Independent Commission for Aid Impact, 2015; OECD, 2016). More fundamentally, what counts as evidence of progress is contested (Domingo and Desai, 2018). What is seen as ‘just’ also varies in

different contexts, and past programming has been criticised for its normative approach.

A series of studies on the deficiencies of donor justice programming have highlighted the sector’s weak knowledge base (Carothers, 2003; Alexander et al., 2013). Donor analytical capacity on justice issues is in general spread too thinly and is often located in consultancy firms, where competitive pressures limit collaboration.³⁹ While interesting cross-country metrics are now being produced such as the World Justice Project’s Rule of Law Index,⁴⁰ and Gallup polls on confidence in Judiciary,⁴¹ performance data at country level is often fragmented between different organisations, or unavailable (Gramckow and Fernandez-Monge, 2014; Smits et al., 2017). It is striking that the World Bank tracks over 1,500 development indicators for over 200 countries yet not one refers to justice issues. UNODC gathers data on 74 crime and criminal justice indicators yet its coverage is pretty incomplete. There is no data for most of the low-income countries. Information on legal aid is only captured for 12 countries.

There is, however, increasing knowledge about interventions that have worked to deliver improved justice to poor people. Examples include initiatives undertaken by the World Bank’s Justice for the Poor initiative.⁴² On indicator 16.3.2 (unsentenced detainees as a proportion of overall prison population), there is good evidence of the role that prison-based paralegals can play. In Uganda, for example, these reduced the remand population at a cost of \$20 per prisoner. As it cost \$40 every month to keep a prisoner locked up, this investment provided an extraordinarily high rate of return (Manuel, 2011). In the US, public support has been harnessed to get unsentenced prisoners out of jail through crowd-funded bail bonds.⁴³ And there is now considerable learning on strategies to respond to violence against women and girls.⁴⁴ Reporting this kind of violence could be an entry point for delivering on indicator 16.3.1 (victim reporting levels). It may be possible to develop simple messages around such narrow interventions, where funding clearly delivers results, in much the same way that the health funds started with less complex issues with clear results chains amenable to simple messaging.

38 Afghanistan, Algeria, Angola, Chad, Colombia, Haiti, Indonesia, Lebanon, Philippines, Rwanda and Timor-Leste.

39 E.g. in 2010 DFID outsourced 75% of its security and justice spending (compared to 10% in other sectors) (Denny and Domingo, 2014). UNDP is one notable exception with 70 rule of law professionals (in 2014).

40 See <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018>

41 See <http://news.gallup.com/poll/178757/confidence-judicial-systems-varies-worldwide.aspx>

42 Which operates in Cambodia, Indonesia, Papua New Guinea, Solomon Islands, Timor-Leste, Vanuatu, Kenya, Nigeria and Sierra-Leone (www.worldbank.org/en/topic/governance/brief/justice-rights-and-public-safety).

43 See for example www.fundedjustice.com/abolitionistbailfund?ref=ab_1LoIQ44XLMa1LoIQ44XLMa and <https://nomoremoneybail.org>

44 For example the DFID-funded Violence Against Women and Girls Helpdesk (www.sddirect.org.uk/our-work/vawg-helpdesk) and *The Lancet* Special Series on violence against women and girls (Ellsberg et al., 2015; García-Moreno et al., 2015a; García-Moreno et al., 2015b; Jewkes et al., 2015; Michau et al., 2015).

Encouragingly, as highlighted in section 4, innovation and dissemination of knowledge is a growing feature of the justice community. There is growing global knowledge about what works and a sharing of that knowledge through online platforms and networks. A key gap is the systematic engagement and participation of national governments with this learning. This is probably linked to national leadership and governance deficits (see sub-section 6.5 below). This problem needs to be solved. National government engagement with innovation and learning (which may then be subject to contested political choices) is vital to deliver scaled-up justice services: improving the quality of government institutions needs to be addressed alongside legal empowerment.

The experience of other sectors is that global funds have had an important role as learning platforms, bringing together and disseminating knowledge across countries. In the health sector the availability of significant funding provided the incentive for national governments and other actors to respond and work out how to deliver on internationally agreed goals, and to develop interventions that delivered cost-effective results. Learning has been stimulated by performance-based funding, based on independent technical review and competitive allocation of funds. A key aspect of the global health funds has been their ability to stimulate a process of ‘demand discovery’ (Schmidt-Traub and Sachs, 2015) leading to rapid innovation and learning. In the case of the Global Fund, separate funding windows for different issues (in this case, diseases) has been key to promoting learning. Applications to the funds are transparently appraised in the light of latest research, and interventions subjected to rigorous monitoring and evaluation. The global nature of the funds has enabled rapid and scaled-up learning, with efficient knowledge transfer and then systematic implementation of this learning across countries. With all fund documents available online, countries are able to learn quickly about how to make successful applications; about how to design and implement national-scale programmes; and at the operational level, about the latest research. In addition, there has been a massive acceleration of innovation through business engagement (see sub-section 6.7 for further discussion) (Schmidt-Traub and Sachs, 2015).

Of particular relevance for justice interventions is the impact the Global Fund has had on transitioning from knowledge about what has worked at the intervention level to deepening knowledge at systems levels. In relation to access to justice, the internationally agreed indicators are potential entry points for donor engagement. These two ‘vertical’ issues may be seen as ‘low hanging fruit’ but, on the basis of the experience of the health funds, they have the potential to expand into deeper engagement with the justice system as a whole (see sub-section 6.5 below for more detail on this), and to generate lessons about those systems. This approach, of engaging initially with a specific problem

that stakeholders care about, and then through a series of ‘small bets’ testing out what works through a process of engagement and discovery, is consistent with the latest systems thinking and problem-driven approaches to institutional reform.⁴⁵

6.4 More effective collective donor effort

A key potential advantage of global funds is the focus they can bring to donor efforts, reducing fragmentation of donor engagement. They can enable better funding – longer-term, coordinated, larger, and predictable through donor multi-year funding commitments (Isenman et al., 2010; Schmidt-Traub and Sachs, 2015; Schäferhoff and Burnett, 2016; Schmidt-Traub, 2018a). While only a few donors tend to be involved in justice programming in any one country, the issue of fragmentation between donor justice programming has been highlighted as problematic for the sector (see section 3 above). In addition, there is fragmentation even within individual donors. Kleinfeld (2013) has noted the need to streamline the number of US government agencies involved in rule of law reform and increase oversight over intelligence community programmes. Similarly, the World Bank has acknowledged the need to develop streamlined internal structures to enhance its ability to deliver on justice reform (Legal Vice Presidency of the World Bank, 2012). Fragmentation of efforts between donors and within donor agencies in relation to justice programming tends to compound the dysfunctionality and lack of cohesiveness of justice reform efforts in countries which receive aid.

One reason for the fragmentation of donor efforts is the lack of clarity on objectives. Donors may have different views on justice delivery, based on their own specific forms of justice institutions, and may have a range of objectives including regarding justice as a sub-component of security or drug enforcement. A global fund could help to marshal donors to identify and commit to common long-term objectives, and stay committed for the long haul. As justice improvements are long-term endeavours, commitment beyond the 3–5-year timeframe of most bilateral justice programmes is crucial.

While global funds can reduce donor fragmentation, one of the original concerns about the Global Fund was that it would increase fragmentation by adding another agency to an already crowded market. The fact that the Global Fund is still being criticised for ineffective in-country coordination with other donors 15 years after it started suggests these concerns were valid. However, in the case of justice there is a reverse problem: as discussed in section 3 above, there are far too few donors involved.

As noted previously, aid to the justice sector is currently insufficiently targeted at low-income countries, which need assistance the most. It is therefore interesting to note that global health funds have led to improved aid allocation within the sector, with more aid being targeted

45 There is extensive literature, but see for example Whaites et al. (2015).

to countries most in need. Indeed, the Global Fund outperforms all other major multilateral and bilateral donors in this respect (Manuel et al., 2018 forthcoming). The Global Fund achieved this initially through its ‘rounds based’ process and then (from 2013) moving towards predetermined country allocations to eligible countries. Criteria for aid allocation have become more transparent and rational, linked to resource mobilisation parameters (per person income levels and total national income), ‘willingness to pay’, and a clarity that aid should only come in where core needs cannot be financed domestically (Schmidt-Traub and Sachs, 2015; Schmidt-Traub, 2018b).

6.5 Stimulation of national strategies for scaling up improved justice service delivery

A global fund for access to justice has the potential to turn current donor funding mechanisms for justice on their head. Justice programming has been criticised for its limited local ownership and donor-imposed models of reform. In contrast, the lesson from the health funds is that effective country-led programmes and national ownership are vital to success, with performance dependent on the strength of country-based planning mechanisms (Gartner and Kharas, 2013; Schmidt-Traub and Sachs, 2015). The health fund approach has been to stimulate demand-led, truly country designed and driven strategies through a competitive process of rounds-based applications for significant volumes of funding. Awards made on the basis of independent technical evaluation of country-led proposals by scientists and practitioners are subject to rigorous testing for value for money (Gartner and Kharas, 2013; Schmidt-Traub and Sachs, 2015; Schmidt-Traub, 2018a). The availability of scaled-up pooled funding for health has catalysed political leadership and improved governance. It mobilised finance and health ministers to work together effectively to develop national programmes, for example for controlling malaria (ibid; ibid.). However, despite increasing national efforts with regard to the treatment of specific diseases, the Global Fund has received some criticism for insufficiently supporting the development of the overall national health systems⁴⁶ due to insufficient resources for such investment (Sachs and Schmidt-Traub, 2017).

What are the lessons for access to justice? Would it be possible to stimulate similar improvements in national leadership, country-level policy-making and planning and so to community-level service delivery? National justice systems may be characterised as uniquely complex and challenging in two key respects. First, justice systems

are inherently deeply political, and lie at the heart of countries’ formal constitutional and informal power-sharing arrangements. Political elites may not in all cases welcome an effective independent judiciary that enables challenges to executive power or wish to prioritise improved human rights and the empowerment of poor and marginalised people to use justice mechanisms to improve their social, political and economic situations (Domingo and O’Neil, 2014; Domingo and Desai, 2018). This relates to the second challenge faced by national justice systems – that of leadership and responsibility. This tends to be highly fragmented. Typically, a ministry of justice’s prime responsibility is to provide legal advice to government, rather than primarily being concerned with providing accessible justice to communities. Responsibility for the various actors in the system usually lies across a range of ministries including, for example, ministries for the interior/home affairs (police, prisons); local government (often responsible for community-level justice); as well as justice (typically responsible for prosecutions and for regulating the legal profession). And of course the judiciary is a key player and is usually constitutionally independent. This fragmentation inhibits coherent policy-making, planning and resource allocation across the system, as well as presenting coordination and delivery problems on the ground. In some countries⁴⁷ the need for coherent policy-making, planning and operations across the justice system has been recognised, and the response has been to set up justice sector coordination mechanisms at policy-making and operational levels.

A global access to justice fund focused (at least initially) on SDG 16.3’s two indicators would enable countries that ‘buy in’ to these internationally agreed targets to develop policies and plans to address them. But even addressing the relatively narrow entry points of SDG 16.3.1 and 16.3.2 would require high degrees of cooperation, coordination and communication across a wide range of justice actors in-country. The prospect of a significant injection of additional funding for national strategies – say matching current levels of funding to the judiciary – may have the potential to stimulate the necessary leadership, policy and operational coherence to produce (context-specific) demand for quality at the country level. There is some evidence to support this proposition. In Uganda in the late 1990s and in Rwanda in the 2000s the prospect of a large-scale donor pooled/co-ordinated funding approach at a national level stimulated improved coordination and cooperation within the justice sector, and the development of national strategies and plans for improved service delivery.⁴⁸ However, this is an area that would require further exploration and careful design to address.

46 DFID annual reviews, see DFID Devtracker for details. Available at: <https://devtracker.dfid.gov.uk/projects> (accessed 10 May 2018).

47 For example Rwanda, Sierra Leone, Uganda.

48 In Uganda the Justice Law and Order Sector developed a national plan for the delivery of improved justice services focusing on commercial and criminal justice initially. Rwanda’s National Justice, Reconciliation, Law and Order Strategies (first one 2009-12) were more wide-ranging.

6.6 Stronger engagement with national budgets to ensure affordable sustainable solutions

A key failing of donor justice programming to date is its focus on capital expenditure and capacity development, and the commensurate failure to address the wider budgetary problems of the chronic underfunding of recurrent costs. Key issues include the number of judicial and police officers and their pay and conditions. On police numbers, UNODC has data for six of the 31 low-income countries⁴⁹ and the average (median) rate is 85 police officers per 100,000 population, about a third of the level in OECD countries.⁵⁰ This under-provision mirrors the situation in education. In low-income countries the ratio of teachers to school-age children is a third of that of OECD countries.⁵¹

A global fund mechanism has the potential to stimulate thinking about scaled-up service delivery through engagement with national budgets, particularly with recurrent budget issues, vital to the development of sustainable and affordable national strategies. This is in contrast to the current donor preferred programming modality of bilateral programmes contracted out to service providers, which by their very nature tend to focus more on capital expenditure and capacity development.

Donors' limited engagement with national justice budgets is in stark contrast to the health and education sectors. Here, donors' engagement has enabled scale-up of national health and education services resulting in substantial increase in the number of health workers and teachers. The global health funds have arguably stimulated more national government funding on health (Gartner and Kharas, 2013; Schmidt-Traub and Sachs, 2015). At the very least they have necessitated strong engagement with national budgets, through their focus on sustainable and affordable national strategies, the potential national resource envelope, and 'willingness to pay'. This has involved issues such as the affordability of service provision in relation to per capita income levels. This kind of basic thinking is in its infancy in relation to access to justice.

World Bank Public Expenditure Reviews (PERs) could be one entry point into better understanding of national justice budgets. The first justice PER was in Bulgaria in 2008, and justice PERs have subsequently been undertaken in a few other countries.⁵² A World Bank paper (Gramckow and Fernandez-Monge, 2014) noted the usefulness of engaging at this level, including introducing a much-needed budget perspective for reform plans, and thus asking basic questions such as *what future type and scale of justice system can the country afford?* and *how are resources and performance best aligned?* These questions are highly pertinent in resource-constrained environments with plural legal systems incorporating both formal and informal providers.

However, as noted in the PERs, a key challenge in engaging at this level in the justice system is gaps in data availability, reliability and lack of performance standards. For example, although OECD countries report spending, there is currently no consolidated international data on national justice sector budgets in low- and middle-income countries. This is a common challenge in other sectors. Even in well-researched sectors such as education and health, gathering budget data is a time-consuming and fiddly exercise.⁵³ Engaging with justice budgeting on an international level will require significant research investment because of the difficulties of gathering comparable international data. This is in part because different legal systems have differing institutional set-ups for justice provision.

While engaging with national budgets is in its infancy in relation to access to justice, the limited budgetary analysis that has been undertaken has been revealing in relation to national resource envelopes and ability/willingness to pay. A recent basic legal service study (The Law & Development Partnership, 2016) analysed spending on the judiciary across 11 countries.⁵⁴ One striking conclusion was that low- and middle-income countries are already strongly prioritising spending on judiciary, spending a much higher proportion of their national budgets on the judiciaries than OECD countries do. Recent research on the potential for low- and middle-income countries to increase their budgets by raising taxes throws further light

49 Source: <https://data.unodc.org> (accessed 10 May 2018).

50 The latest numbers are US 198, England and Wales 222, Australia 263, Denmark 185 and Germany 304. Comparisons on judiciary are subject to much greater definitional differences, even within the OECD. UNODC reports the number of professional judges and magistrates per 100,000 as being 0.75 in US, 5 in Australia, 25 in Germany and 43 in England and Wales. Low-income country rates are between 2 to 5.

51 Authors' estimates based on data from the United Nations Educational, Scientific and Cultural Organization (UNESCO). In education the key metric is the inverse ratio, i.e. school-aged children per teacher. The typical ratio in low-income countries is 50:1, and 15:1 in OECD countries. Available at: <http://data.uis.unesco.org> (accessed 10 May 2018).

52 Croatia, El Salvador, Liberia, Morocco, Romania, Serbia and Somalia. See Gramckow and Fernandez-Monge (2014).

53 While the International Monetary Fund (IMF) Government Financial Statistics database covers spending in all sectors by all countries, in practice there are blank entries for many countries. Specialist UN agencies do gather data for their areas (e.g. WHO) on health; International Labour Office (ILO) on social protection; UNESCO on education). The World Bank development indicators include expenditure on education. See also www.governmentspendingwatch.org (accessed 10 May 2018) for more discussion of the challenges for gathering expenditure data for low- and middle-income countries.

54 Argentina, Australia, Bangladesh, Canada, Kenya, Liberia, Rwanda, Sierra Leone, South Africa, the UK and Ukraine.

on the issues (Greenhill et al., 2015; Manuel et al., 2018 forthcoming). While there is considerable potential for middle-income countries to increase their taxation, the scope in low-income countries is much more constrained. Even if low-income countries maximised their tax-raising efforts, the tax revenue in a typical low-income country would only be \$120 per person a year (The Law & Development Partnership, 2016). Allocating a 4.3% share of this to justice (the share in OECD countries – see Figure 3 in section 3) implies a budget envelope for all justice institutions of \$5.20 per person a year. As noted in section 3, even if donors increased their aid to justice in low-income countries nine-fold, this would only translate to \$2.30 per person a year. So the combined (domestic plus donor) resource envelope in low-income countries would be just \$7.50 per person a year. Such a modest resource envelope in low-income countries is a fundamental constraint and points to the need to find low-cost models of delivering justice in such countries.

Work has been undertaken on the affordability of scaled-up provision of legal advice and assistance through potentially low-cost models such as community paralegals. The basic legal service study (The Law & Development Partnership, 2016) revealed that the unit costs of such support averaged only \$0.70 per person a year in low-income countries.⁵⁵ While the amount seems very low in absolute terms, even these costs look unsustainably high compared to what countries currently spend on judiciaries, and what total funding for all institutions could be if countries increased their taxation and donors increased their aid to justice. In such resource-constrained contexts, it is unsurprising that the UN Global Study on Legal Aid (UNDP and UNODC, 2016) revealed that only 14% of least developed countries had a separate budget line for legal aid and the majority of legal advice and assistance services were funded by donors.

While there is now some insight into the potential costs of providing scaled-up legal advice and assistance to communities, less work has been done to analyse the costs of putting in place a functional system for processing disputes, conflicts and crimes. It is possible to develop some high-level indicative costings as other sectors have done. For example, as part of the Global Partnership for Education/Education for All initiative, UNESCO has costed the provision of primary and secondary education in many low- and middle-income countries based on uniform pupil ratios for classrooms,

teachers and textbooks, with teacher salaries set relative to gross domestic product per person (UNESCO, 2015). The WHO and World Bank, in partnership with others, has funded work to cost the delivery of health SDGs and universal health care (e.g. Jamison et al., 2017). A similar approach was adopted for justice delivery in Uganda in 2000, with estimates developed on the basis of target ratios for key determinants of spend such as the ratio of police officers to population, and of vehicles to number of police officers.⁵⁶ But to date this kind of national-level analysis has been very limited in relation to justice systems.

Donor focus on capacity development and capital expenditure has resulted in very limited international community engagement on the basic affordability and unit cost issues discussed above. Deepened international engagement with these issues is key to the prospect of delivering scaled-up access to justice on a sustainable basis, and could stimulate realistic (and potentially innovative) thinking at national levels about issues such as low-cost models of service provision, and numbers of service providers per head of population. A global fund for access to justice has the potential to encourage thinking on cost-effective ways to scale up provision, and to move donors away from ‘old style’ programming towards a much more strategic engagement. As with the Global Fund, the fund design would need to encourage engagement of this nature, and there would need to be access to sufficient funds to encourage countries to develop national strategies to deliver on SDG 16.3, linked to realistic resource envelopes.

6.7 Crowding in new funding sources

In the health sector two vertical funds have become the key driver of the expansion of global health funding over the last decade, although health sector success in this respect has not been mirrored in education or agriculture (Gartner and Kharas, 2013). Overall global health aid funding tripled in real terms between 2002 and 2010 and vertical funds accounted for two thirds of that growth. Health share of total aid rose from 11% to 16% and has remained at this level ever since.⁵⁷ In addition, the funds have been spectacularly successful in generating new funding from domestic, private and social enterprises (Schäferhoff and Burnett, 2016). The clear focus on results has been key to this success.⁵⁸ Engaging in capital markets helped, for example the International Finance Facility for Immunisation⁵⁹ used long-term pledges from

55 In the three low-income countries covered in the basic legal service study, unit costs, averaged across the whole population, were \$0.70 per person a year in Rwanda, \$0.78 in Liberia and \$0.35 in Sierra Leone.

56 This was prepared by one of the authors as part of the costing of the national Poverty Eradication Action Plan in 2000. The detailed costings were never published.

57 OECD DAC data. Figures include funding for reproductive health and population programmes.

58 E.g. DFID annual reviews over the years and business case for continuing to support such funds. Available at: <https://devtracker.dfid.gov.uk/projects> (accessed: 10 May 2018).

59 Established in 2006 to generate funding for GAVI programmes.

donor governments to sell ‘vaccine bonds’ in the capital markets, raising more than \$5 billion – three times the donor funds received.⁶⁰

There may similarly be scope for the justice sector to access innovative funding sources – particularly if focused on clear ‘vertical’ issues. This is already happening. In the US, funds for bail bonds are being crowd sourced.⁶¹ In the UK, the Peterborough Prison initiative used a social impact bond model to link payment to results on recidivism (Disley et al., 2011; Ainsworth, 2017). Building on this approach, a recent paper for DFID considered the potential for the development of pilot access to justice ‘investible products’⁶² in low- and middle-income countries. The paper identified justice initiatives that delivered strong cost–benefit ratios in terms of social and/or commercial returns and which were potentially suitable for impact investing. The paper argued that as well as bringing in additional finance, this approach had the potential to bring different types of expertise to bear on access to justice challenges to catalyse change and achieve impact at scale (Hooper et al., 2016).

6.8 Creation of new partnerships between national governments, civil society, the private sector and academia

The global health funds’ success in crowding in new funding and catalysing innovation is associated with their success in creating new partnerships involving national governments, CSOs, businesses, international organisations, philanthropic foundations and the scientific

community. This has created a ‘dynamic ecosystem’ around the funds’ shared goals (Schmidt-Traub and Sachs, 2015; Schäferhoff and Burnett, 2016). Different partners have had complementary roles. For example, the importance of civil society’s involvement in the governance of the Global Fund, with its persistent global voice advocating on issues such as anti-retroviral treatment of poor people, has been seen as key to the success of the Fund (Gartner and Kharas, 2013; Schmidt-Traub and Sachs, 2015).

Achieving such partnerships may be more problematic in the justice sector: there can be significant tension between state justice institutions on the one hand, and national and international CSOs on the other, as they advocate for human rights and use the justice system to challenge state authority. The need to maintain judicial independence may be seen as another barrier. But coming together to focus on the globally agreed goals and ‘vertical’ targets could be a good starting point for collaboration where it is appropriate. There are plenty of examples at the country level of state justice providers and CSOs working together to improve service provision – for example, providing support to women who have been subjected to sexual violence (UNDP and UNODC, 2016). There is also scope for deeper involvement of the private sector, building on existing engagement. Pro bono work – the provision of free legal advice and assistance by private sector lawyers – is already a feature of the profession in many countries, and is also provided through international networks which are increasingly linked in with the international development agenda.⁶³ In some cases the private sector is directly involved in funding justice initiatives – for example, in Ghana business associations routinely fund judicial training courses.

60 See www.iffim.org/about/origins-of-iffim

61 See for example Funded Justice (no date) *Liberation Fund for New York City*. Available at: www.fundedjustice.com/abolitionistbailfund?ref=ab_25ihsfEwhLm25ihsfEwhLm (accessed: 10 May 2018); National Bail Out (no date). Available at: <https://nomoremoneybail.org> (accessed: 10 May 2018).

62 In this case commercial law and justice, but as the Peterborough Prison initiative shows, the concept has wider applicability.

63 Including through ‘brokerages’ such as the International Senior Lawyers Project (<http://islp.org>) and Advocates for International Development (www.a4id.org). For a useful discussion of the issues see Andrews (2017).

7 Options for donor re-engagement

The new international commitment to equal access to justice, set out in SDG 16.3, provides an opportunity to reconsider donor engagement. SDG 16.3's two indicators – improving victim reporting rates, and reducing the proportion of pre-trial detainees in prison – provide for the first time an internationally agreed focus for action, with a global commitment to monitor progress in a public and verifiable manner. Interventions will need to address the twin issues of providing legal advice and assistance and addressing the institutional framework for dealing with disputes, conflicts and crimes.

This section considers the case for three specific potential options for long-term, scaled-up donor re-engagement.

7.1 The case for a large-scale global fund

This paper has explored the extent to which the lessons from global funds are applicable to the justice sector and identified eight potential lessons from such an approach. While some global funds have been more successful than others, the overall consensus is that well-designed funds have the potential to enable rapid movement from the articulation of global goals to successful implementation across a broad range of operating environments. A fund's ability to mobilise resources, especially for the poorest countries, is important but is not the only consideration. The ability to engage with national governments and other stakeholders to simulate improved policy-making, planning and resource allocation at the national level, catalyse innovation and learning, galvanise donor coordination and develop new partnerships are all important too. Global fund experience is that an initial focus on specific 'vertical' issues over time broadens out into 'horizontal' engagement with the system as a whole.

However a global fund for access to justice would not be a panacea for delivering on SDG 16.3. And **it is clear that it is premature to try and assess whether a large-scale global fund for access to justice would be appropriate – or indeed feasible.** Much more work needs

to be done first, for example to establish precise funding needs and financing gaps, as well as on-going assessment and dissemination of knowledge about 'what works' to deliver on the two SDG 16.3 indicators. More work is also needed to ensure the risks of a large-scale fund could be appropriately managed. Part of this process would be informed by considering the risks identified from the experience in other global funds,⁶⁴ including the risk that a focus on measurable issues can undermine efforts to tackle other important but less readily measurable issues. While all countries have agreed on the SDG 16.3 indicators, concentrating on global priorities may detract from funding existing work on more critical justice issues from a country perspective.

The clear lesson from global funds is that they require careful design, including as to their hosting and governance. What is also clear is that engagement on access to justice needs to include both scaling up provision of legal advice and assistance, as well as improving the 'front line' institutional framework for resolving disputes, conflicts and crimes, which would be likely to include the police. This poses a particular design challenge, as some donors are unable to engage with the police.⁶⁵ Also important will be the need (as with other global funds) to enable interventions and lesson learning to be 'demand driven' and determined by local context (not easy to do in what can be a politically contentious sector), while engaging with cross-country learning.

7.2 The case for a small-scale pilot fund focused on one SDG 16.3 indicator

One possible way forward would be to fund the scale-up of known low-cost/high-return initiatives narrowly focused on one SDG 16.3 indicator. The provision of paralegal advice to detainees is an example (see section 6.3 above for more detail).⁶⁶ Where these initiatives currently exist, funding tends to be ad hoc, short-term and uncertain.⁶⁷

⁶⁴ For example see Sachs and Schmidt-Traub (2017) for an analysis of five initial concerns about the global health fund.

⁶⁵ This was successfully managed in Afghanistan through a dedicated UNDP trust fund.

⁶⁶ For an insight into current initiatives see Penal Reform International's website www.penalreform.org/?s=paralegals.

⁶⁷ A recent survey of the Global Legal Empowerment Network found that a third may not be able to operate at all due to lack of funding (<https://namati.org/news/5-key-takeaways-annual-network-survey-2016>).

A new small-scale pilot fund narrowly focused on providing legal advice to detainees, together with some funding to support coordination between the institutions involved in detentions,⁶⁸ working in a few countries has the potential to provide insights into the functioning of the system as whole,⁶⁹ as well as cross-country learning. The unit costs for such programmes in Uganda suggest that an initiative focused on low-income countries might only require \$25–40 million, over a five-year period.⁷⁰ Early cost-effective results would help build the case for growing the fund and engaging for the long term. Another SDG 16.3 starting point could be a multi-country initiative that aimed to increase reporting of violence against women and children.

In order to plan for the long term, as with any pilot, the design of any programme should ensure the approach is affordable and sustainable at a national level and should also embrace the potential for future scale-up to more countries and for encompassing a broader set of issues. The experience of the global health funds was that initial focus on specific ‘vertical’ issues has led to increased ‘horizontal’ engagement with national service delivery mechanisms. But a strong degree of realism about more systematic reform is needed: as the 2011 *World Development Report* pointed out, institution-building is difficult and even in the fastest-reforming countries a significant improvement takes 40 years to achieve.⁷¹

7.3 The case for exploratory consultations on how to achieve significant donor re-engagement in low-income countries where financing challenges are likely to be the greatest

Another complementary starting point would be to work with a small pilot group of low-income countries to further explore what national and global approaches and mechanisms might be developed that would lead to donor re-engagement in low-income countries on the scale that donors currently do in some European neighbourhood, Latin American and post-conflict countries. One way of framing the issues would be to look at the eight lessons this paper draws from full-scale global funds in other sectors and see what short-term, simpler initiatives might be possible that would start to deliver similar outcomes for justice. The consultations could in particular look at how to simulate improved policy-making, planning and resource allocation at the national level, catalyse innovation and learning, galvanise donor coordination and pooled funding and develop new partnerships. The consultations could also explore what other barriers to re-engagement exist and the case for a global fund for access to justice in the longer term.⁷² It would be good to include in the pilot group countries with a wide range of experiences of donor engagement so that the lessons from these could be factored in at the same time.⁷³ It would also be helpful if these consultations could be undertaken soon so as to feed into the High Level Political Forum review of SDG 16 in 2019.

68 For example the governments of Uganda, Rwanda and Sierra Leone have set up and run small Justice Coordination Offices for at least ten years to support cooperation between the wide range of institutions involved in delivering justice.

69 This would also be consistent with recent research about the value of Problem Driven Iterative Adaptation (PDIA) approaches to reform. It would also build on the work of the Global Legal Empowerment Network, hosted by Namati.

70 Based on World Prison Brief figures for prisoners on remand (which covers 24 of the 31 low-income countries) (<http://www.prisonstudies.org/>) and authors’ own experience with paralegal and justice coordination projects. More details available from the authors on request.

71 The *World Development Report 2011* noted that a one standard deviation improvement in rule of law takes 41 years in the 20 fastest-reforming countries (World Bank, 2011).

72 This echoes the approach adopted in candidate countries to help them prepare to access US Millennium Challenge Corporation (MCC) funding.

73 For example post-conflict countries that have received large-scale donor support, such as Afghanistan, Liberia and (much earlier) Sierra Leone as well as countries that have benefited from sectoral programmes, such as Uganda and Rwanda.

8 Conclusions and next steps

Access to justice is associated with economic growth and investment as well as equity and social justice. Justice provision is a core function of the state, recognised as one of the five Peacebuilding and Statebuilding Goals by all OECD donors and the g7+ group of fragile countries. Poor people globally say that the ability to access justice is one of their top priorities.

However, justice systems are currently inadequate in many countries. Donors have attempted to support the development of effective justice systems for over 50 years but recent reviews in general suggest that donor efforts have had limited impact with only rare examples of significant sustained success. With the exception of a few countries, donor support for justice systems is currently low – and falling. Global aid to the sector has fallen by 40% in the last four years.

There are promising initiatives to explore new approaches to delivering improved access to justice, focused on legal empowerment, innovation and improving data and evidence. But thinking on long-term and scaled-up funding for strengthening national institutional frameworks for providing justice, as well as for improving access to legal advice and assistance, is currently in its infancy.

SDG 16.3 is an opportunity for re-thinking donor engagement, in an area where donor programming has struggled to have impact in the past. The experience of global funds is relevant for scaling up access to justice including their successes in mobilising resources; engaging with national governments and other stakeholders to simulate improved policy-making, planning and resource allocation at the national level; catalysing innovation and learning; and galvanising donor coordination.

The purpose of this paper is not to advocate one way or another for a global justice fund. It is clearly premature to make a full assessment of whether that would be appropriate. But it is hoped that the analysis will prompt a debate around the needs and the issues involved in donor engagement and lead to the discovery of appropriate ways for donors to re-engage in order to accelerate the delivery of justice for all.

This paper suggests three possible next steps:

1. Undertake more work to establish the precise access to justice financing needs and funding gaps and consider whether the risks of a large-scale global fund for access to justice could be managed.
2. Initiate a small-scale pilot pooled donor fund, narrowly focused on one SDG 16.3 indicator, available on a demand-driven basis to a limited number of countries. Funding would be available for the scale-up of known low-cost/high-return initiatives, for example the provision of paralegal advice to detainees. Fund design should ensure the approach is affordable and sustainable at a national level.
3. Undertake consultations with a small pilot group of low-income countries to explore what national and global approaches and mechanisms could be developed that would lead to donor re-engagement in low-income countries. Key issues could include how to simulate improved policy-making, planning and resource allocation at the national level, catalyse innovation and learning, galvanise donor coordination and pooled funding and develop new partnerships. Ideally these consultations would happen in time to feed into the High Level Political Forum review of SDG 16 in 2019.

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