A CRISIS OF CONFIDENCE, COMPETENCE AND CAPACITY:

PROGRAMMING ADVICE FOR STRENGTHENING MALI'S PENAL CHAIN

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Having said this, the report represents a fully independent work and responsibility for its contents lies solely with its authors. It reflects developments up to mid-May 2015.

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Executive Summary

It is only 25 years ago that Mali initiated its transition from dictatorship to a more inclusive democracy and a more equal society. In many ways it is, therefore, no great surprise that the country has not been able to either transcend personalised power politics or overcome critical socio-economic cleavages. These issues manifested themselves most recently in the 2012 crisis that almost undid the country, causing a sharp rupture with Mali's previous status as 'poster child of democracy'. The episode also once more made it abundantly clear that the country's 'social contract' requires significant progress before it can express an agreement between those governed and those governing on how power should be used and resources distributed – an agreement that would be perceived as just, representative and effective.

Mali's justice system, in particular its penal process, is an important component of this equation because the fair, transparent and effective adjudication of disputes arising from the clash between the rights and duties of Mali's citizens and their state could improve the terms of the country's social contract. This report analyses the organisation and performance of the penal process in Mali, with the aim of providing advice on how that process could be strengthened in ways that would enable it to act as a unifying element in Mali's development by holding state and citizens accountable to the same standards of conduct.

From this perspective, it is of significant concern that the formal penal process in Mali, as laid down in its constitution and laws, is severely defunct. While it may be tempting to pretend that at least the penal process is the unique preserve of the state's legal system and firmly run by its representatives and professionals, this is not the reality of how criminal justice is actually administered in Mali. Most Malians turn to 'customary justice' actors for both civil and criminal cases, making the state-run penal process irrelevant to large sectors of the population in many parts of the country – prominently the north. This is the case for a variety of reasons, such as the ease of access, low cost of usage, and familiarity with and prevalent social attitudes towards the acceptable modes of dispute resolution that 'customary justice' actors embody.

In part, the state justice system fulfils such a modest role in the lives of many Malians because it is characterised by a daunting array of interconnected problems, of which the most important are a lack of judicial independence, chronic corruption, a quantitative and qualitative shortage of both staff and material resources, and insufficient connections with 'customary justice' actors given their relevance. These problems have the combined effect of massively reducing access to the state justice system and to the judicial fairness Malians can expect from the state's legal system. They also severely limit the ability of the state justice system to correct itself.

International and Malian efforts to improve the state of the penal process have so far largely ignored 'customary justice' actors, focusing instead on bringing change about in a more top-down fashion through the central justice apparatus in Bamako. However, it appears that a great many of these efforts have made little difference. Hence, the barriers to comprehensive top-down reform must be

considered too formidable to overcome for the time being. In addition, joint donor strategising, coordination and action in the justice sector appear to be in a poor state and would require a significant increase of functionality before more concerted dialogue and negotiation with the central Malian justice authorities can effectively be conducted.

Despite the shortcomings of a number of top-down reform efforts in the past, there seems to have been little variation or innovation in how the many challenges that plague the penal chain have been addressed programmatically. Fortunately, there is a rich array of international programming experience that can be leveraged to introduce a greater variety of approaches in Mali, as long as they are appropriately contextualised. This report's analysis of these lessons, together with its in-depth analysis of the key challenges of Mali's penal chain, suggest that four programmatic starting points are essential for designing and implementing programmes that seek to improve criminal justice in Mali with a chance of success:

- Develop bottom-up, pilot-type programmes that engage on a limited number of issues in a limited number of 'justice localities' that can be scaled up as experiences, learning and results permit. In other words, discontinue the practice of some donors to favour central, top-down reform efforts.

- Focus on bringing local improvements about in the accessibility and quality of criminal justice that make a direct difference in real-life problems. In other words, discontinue the practice of having programmes work mostly on training, infrastructural or equipment needs. While these are serious and do exist, they do not represent factors that are decisive to improving the quality and accessibility of justice.

- Work more collaboratively in the process of programme design and implementation with three core groups of local stakeholders – local state representatives of the penal process, 'customary justice' actors and civil society representatives – in ways that give them maximum autonomy to jointly set the operational direction of improvement programmes. In other words, engage beyond the formal justice sector to ensure relevance of effort.

- Monitor programme implementation on the basis of behavioural change on the part of Malian stakeholders to gauge programme effects. In other words, let go of the 'mission impossible' to connect programme outputs with social impact, and focus instead on whether a change of behaviour could be brought about that could subsequently be put on a sustainable footing.

Together, these programmatic starting points can stimulate much-needed innovation via more local, flexible and experiential approaches that, if successful, could be scaled up to create accumulating pressure for more systemic change.

As this report was researched and written on a tight timeline (mid-January to mid-May 2015), it does not provide either historical analysis or a complete overview of all aspects of Mali's penal chain. Instead, it focuses on the issues that emerged as the most salient ones in the course of the research. Moreover,

the various past and present efforts to improve the Malian justice system have only been examined in terms of the results they have achieved so far, without much by way of deeper inquiry into the challenges or constraints that these efforts have undoubtedly encountered. In consequence, the report is best read as a panoramic snapshot of Mali's 'state of criminal justice' at this particular point in time, which it subsequently translates into general considerations and building blocks for programming efforts that seek to strengthen Mali's penal chain.

Contents

Glossary of English and French legal terms

English	French	Abbreviation
Functions		
Judicial police	Police judiciare	PJ
Judge	Magistrat	-
Legal bodies		
Superior council of the magistracy	Conseil Supérieur de la Magistrature	CSM
Police court	Tribunal de Police	TP
Justices of the peace	Justices de Paix à Compétence Etendue	JPCE (being phased out)
Courts of first instance (new style)	Tribunaux d'Instance	TI (meant to replace the JPCE)
Courts of first instance (old style)	Tribunaux de Premiere Instance	TPI (being phased out)
Superior courts	Tribunaux de Grande Instance	TGI (meant to replace the TPI)
Administrative courts	Tribunaux administratifs	TA
Courts of appeal	Cours d'appel	CA
Administrative courts of appeal	Cours administratives d'appel	CAA
Supreme court	Cour suprême	CS
Constitutional court	Cour constitutionelle	CC
High court of justice	Haute cour de justice	HCJ
Acts		
Felonies	Crimes	-
Minor infractions	Infractions	-
Misdemeanours	Délits	-
Statement	Procès-verbal	PV

Note: See Box 4 for further details on each of the legal bodies mentioned.

1. Introduction

The 2012 Malian crisis was brought to a formal conclusion, at least temporarily, with the signing of a peace agreement on 15 May 2015 between the Malian government and the Plateforme (a coalition of armed groups that is comparatively close to the government), followed by its signing on 20 June 2015 by the Coordination of Azawad Movements (another coalition of armed groups).[1] However difficult it was to negotiate the agreement and however much its general orientation as well as its various provisions can be criticised,[2] its conclusion represents only the start of a much more complex process of implementation. The poor track record of many of the predecessors of the current agreement hangs as the sword of Damocles over a good number of its provisions, which feature a remarkable similarity to past efforts and suggest a lack of creativity and political resistance to alternative solutions, or both.[3] The agreement also draws attention to two important observations that greatly influence Mali's 'state of justice'.

To start with, the fact that the negotiations largely took place in Algiers (with earlier involvement from Burkina Faso and other countries) can be considered symbolic for the strong centripetal regional forces with which Mali interacts. For example, the Sahelian drugs trade, terrorism and the overthrow of the Libyan regime have created difficult-to-manage spillover effects and greater opportunities for pursuing private political and financial gain at public expense. This, in turn, has further undermined both state and customary authority structures in an environment that was already characterised by significant levels of impunity and corruption prior to the 2012 crisis.[4] In this equation, the Malian state is perceived by many as lethargic or negligent at best, and its judiciary as a pathway towards individual enrichment or large-scale corruption.[5]

Moreover, the fact that the agreement is only the latest in a longer line demonstrates how Mali has remained stuck in a cyclical pattern of peace and conflict between its north and south since independence. This adds greatly to the magnitude of the development challenges that the country continues to face in its still recent process of post-colonial statebuilding (see Box 1 below).[6] Given that only 25 years have passed since Mali initiated its transition from dictatorship to a more inclusive democracy and a more equal society, it is no great surprise that it has not been able to either transcend personalised power politics or overcome critical socio-economic cleavages. A major consequence of this state of affairs is, however, that Mali's 'social contract' requires significant progress before it can

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[1] International Crisis Group (2015); Boutellis (2015).
[2] For example, several analysts have observed that the agreement has a strong focus on security, stability and restoration of the status-quo-ante that does not reflect the demand of many ordinary Malians for political change and, in particular, better and more delivery of essential social and public services (International Crisis Group, 2015; Chauzal, 2015; Clingendael, 2015).
[3] Lecocq (2010); International Crisis Group (2015).
[4] For more in-depth analysis of the interaction between regional and domestic processes and actors in the Sahel: Lecocq et al. (2013); Smits et al. (2013); Lacher (2012, 2013); Briscoe (2014).
[5] For example: Coulibaly (2014); Briscoe (2014).
[6] See: Lecocq (2010); Boeke and Tisseron (2014); Chauzal and Van Damme (2015). General works on the challenges of statebuilding include: OECD (2011); World Bank (2011).

express an agreement between those governed and those governing on how power should be used and resources distributed – an agreement that would be perceived as just, representative and effective.

In this context, Mali's justice system – and in particular its penal chain – represents one of the core mechanisms that could help increase the country's resilience against harmful regional influences and improve the terms of the country's social contract by virtue of organising the adjudication of disputes arising from the clash between the rights and duties of Mali's citizens and state on a fair, transparent and effective basis. It is from this social contract perspective that the report analyses the organisation and performance of the penal chain in Mali. The aim is to provide programmatic advice on how the country's penal chain could be strengthened in ways that would enable it to act as a unifying element in Mali's development by holding state and citizens accountable to the same standards of conduct.

Produced at the request of the International Development Law Organization (IDLO) in an independent manner, the report inevitably has had to accept a number of starting points already in place. This concerns, in particular, the choice of the Dutch Embassy in Bamako to focus its engagement, including the IDLO-implemented programme it will finance, on northern Malian localities on the grounds that the 2012 crisis makes improvement of the penal chain in these places more urgent.[7] While this seems a reasonable assumption, it was not verified for this report. In addition, the same embassy also made it clear that the programme's lifespan would amount to approximately five years.

As to the report's structure, Section 2 starts by examining the role and relevance of Mali's 'customary justice' actors in criminal cases.[8] While this may not seem to be an obvious starting point, it reflects Malian reality where the state penal process is neither overly relevant nor accessible to most Malians. The section's objective is to outline how Mali's 'customary justice' systems function in respect of criminal justice, how they relate to the state's penal process and what the social relevance of the state's criminal justice system is. Section 3 offers a basic outline of how the state penal process operates and an analysis of its critical performance challenges. Next, Section 4 examines the state of thinking and practice in international development programming, with a view to extracting relevant insights for justice programming in Mali. Finally, Section 5 offers concrete building blocks for a development programme that seeks to strengthen Mali's penal chain. It outlines, in sequence, the possible objectives, strategic and operational approaches, organisational structure and monitoring mechanisms that could be considered.

The aim of the report is not to prescribe a programme, but to provide elements for getting to one in close collaboration with key Malian justice stakeholders. Hence, the report offers substantiated ideas for further deliberation without providing a blueprint for action. We recognise that it joins an impressive array of existing analyses and initiatives that seek to improve the Malian justice sector and which offer complementary and, at times, different, points of view.[9]

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[7] For some perspectives on this question: Lankhorst (2013); Allegrozzi and Ford (2013); Whitehouse (undated).
[8] 'Customary justice' actors are put in quotation marks throughout this report to reflect the fact that such actors are not necessarily legal specialists and may combine multiple governance roles, including in the area of justice.
[9] For one of the more recent efforts: Ministry of Justice of Mali (2014).

2. The role and relevance of 'customary justice' actors in criminal cases

This section aims to demonstrate that 'customary justice' providers fulfil important roles in the reality of criminal justice provision in Mali. It echoes the broader insight that 'customary justice' actors tend to be more relevant than their state counterparts in many – if not most – fragile settings.[10] To this end, it discusses how the wide range of Mali's 'customary justice' actors deal with criminal cases that come to their attention. This section also explores the consequences of the blurred lines between civil and criminal cases where litigants turn to have their disputes resolved, in the context of highly popular 'customary justice' systems and low confidence in the state's penal process.

The penal process in social perspective

Mali's formal legal system is based on the French system, introduced into the territory while it was under French colonial rule. Although Mali has been an independent nation since 1960, its current constitution was not enacted until 1992 after the coup that led to the establishment of the country's Third Republic and first democratically elected government. Some changes have been made over time to make the legal system a better match to the reality of Malian life, but in general it is still largely blueprinted on the French system.[11]

The official language of Mali is French, but only approximately one-third of the population, who are described as educated elites, speak it.[12] Mali's five working languages and 14 national languages, not to mention its hundreds of dialects, find no place in the penal process. The criminal justice system also lacks a firm presence outside of the large cities and in the north, where the recent 2012 Islamist insurgency led those state actors who were present to evacuate, and also led to the destruction of much of the already limited criminal justice-related infrastructure. These problems are not easily rectified, as Mali ranks as one of the world's 25 poorest nations.[13]

Malians have a general distrust of the state justice system.[14] The penal process is, for example, infested with high levels of corruption, to the point that many interviewees asserted that it would be unlikely for a case to unfold without interference of some sort.[15] It was explicitly posited by two interviewees that the main element feeding this corruption is the high level of illiteracy among those trying to use the justice system because it requires them to use an intermediary to navigate the system, and these intermediaries can easily abuse them.[16] Other reasons provided for distrust of the state justice system included: 1) that it was imported from the French colonisers; 2) that there is a large gap between the

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[10] See for example: Isser (2011) and Harper (2011).
[11] Miles (undated); Malejacq (undated).
[12] Countries and Their Cultures, *Malians* (online; consulted 21/4/15); Author's interview (3/25/15); Author's interview (28/3/15 D).
[13] BBC, *Mali country profile – Overview* (2015) (online; consulted 21/4/15)
[14] Author's interview (27/3/15 B); Author's interview (1/4/15 C)
[15] Author's interview (27/3/15 D); Author's interview (1/4/15 B)
[16] Author's interview (25/3/15 C); Author's interview (30/3/15 A); Bengaly (2015).

state system and the customary rules that have been in place for centuries; and, 3) especially for those living in rural areas, that there is a lack of knowledge of procedures, rights and laws.[17]

In addition to this distrust, Malians face significant practical obstacles in accessing the state justice system. For example, there are not enough courts and tribunals to ensure accessibility to the rural populations in particular, who may need to travel tens or hundreds of miles to reach a court. Furthermore, the fees needed to navigate the justice system are out of reach for a country where the average person lives on US$2 a day, and where the mandated legal aid system has not yet been implemented in most areas.[18]

Box 1: Selected indicators that frame the penal process in a socio-economic perspective

Poverty level
Around 86% of Mali's population of about 17 million live in multidimensional poverty, with 77% earning less than US$2 a day (2015). This suggests that the state justice system is financially out of reach for two-thirds or more of the Malian population unless effective and simple mechanisms for legal financial aid are introduced nationwide.

Population spread
Ninety percent of Mali's population live in the southern one-third of the country (2014). In contrast, only 10% live in the remaining two-thirds, which is considered the north. Of this 10%, 90% live along the Niger River. This suggests that if access to justice is a priority in terms of volume, efforts need to focus on the south and perhaps the northern Niger bend. In addition, about 60% of the Malian population is rural while around 40% is urban (2013). This suggests that the courts of the state justice system are out of reach for about half the population because the cost and time associated with visiting them are prohibitive. It also suggests that, at the moment, 'customary justice' providers most likely service well over half the population.

Literacy rate
A literacy rate of 33.4% suggests that efforts at raising awareness among Malians of their rights, duties and the legal process would need to be made in oral forms over the next decade or more. More specifically, given negligible internet penetration rates (2.7% in 2013) and low penetration rates for written media (between 5% and 11% read a daily or weekly newspaper), efforts would have to be made in person, by mobile phone (close to 100% coverage) or by radio broadcast (70% listen to radio at least once a week).

Sources: CIA World Fact Book; World Bank Database; Internetworldstats.com; BuddeCommm; CommsMEA (all consulted 8/3/15); ABA (2012); UNDP Development Report (2014); OECD (2014); Maliweb.net (consulted 29/4/15).

This box is reproduced from: Van Veen, E., D. Goff and T. Van Damme, *Beyond dichotomy: Recognizing and reconciling legal pluralism in Mali*, The Hague, Clingendael Conflict Research Unit, 2015.

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[17] Author's interview (25/3/15 B); Author's interview (25/3/15 C); Author's interview (1/4/15 C); Author's interview (2/4/15 D); Author's interview (27/3/15 C); Author's interview (27/3/15 D); Author's interview (28/3/15 C); Author's interview (28/3/15 D).
[18] ABA (2012).

Largely for these reasons, 'customary justice' providers are still sought out to resolve both civil and criminal disputes, and multiple interviewees, including state justice providers, acknowledged the continuing role of 'customary justice' providers in criminal cases. Therefore, this analysis of the Malian penal process will include both state and 'customary justice' systems, and also address the implications of their combined role for programming.

What penal chain-related roles and functions do customary actors carry out?

As alluded to above, justice in Mali is best characterised as 'legal pluralism', meaning that several legal systems exist in parallel that deal with both civil and criminal cases.[19] Of these systems, the state justice system represents only one and it is by no means the most relevant. In fact, it is estimated that about 80% of family and land conflicts in poor and rural communities in Mali are handled by 'customary justice' systems.[20]

The customary systems are popular because they are easily accessible to the average Malian.[21] Specifically, they are: convenient, with all of the parties located near to each other; cheaper, as no court fees or travel costs are required; and familiar, as the mediators involved in conflict settlements are usually known by the community, speak their language, and share the same culture and religion. Customary systems are more active in areas where the state does not have a presence. In those areas, the chief of the village is the only real authority and everything will go through him; cases are not brought to the formal justice system because there is a sense that it does not exist.[22]

Despite their popularity, Mali's customary judicial systems face challenges that are common to many such systems.[23] For example, some aspects of customary law and its enforcement are incompatible with the rights conferred upon each Malian under the constitution. This can include customs of marriage, such as in the Buwa community, where a man normally abducts the girl/woman he wants to marry.[24] Also, the lower status of women in the Malian family and community affects their ability to negotiate on an equal footing with their legal adversaries, especially their husbands. Notably in rural areas, women and children have no recognised status at all, and therefore are extremely vulnerable in these processes.[25]

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[19] The different legal systems that make up legal pluralism in Mali should, however, not be regarded as entirely separate. They link and interact, irrespective of formal laws and official positions. As a consequence, it is useful to examine their points of interaction in addition to the individual characteristics of each system. See: Isser (2011).
[20] Social Films: Delivery of Justice in Mali (online: consulted 08/03/15); HiiL (2014).
[21] Land disputes are the most common sources of tension between Mali's different socio-professional categories (fishers, farmers, breeders, etc) and communities. Conflicts between farmers and breeders often persist even though they have been subject to a peace agreement based on legal and regulatory texts. It is therefore necessary to involve traditional legitimacy in the resolution of these conflicts. At local level, there are several mechanisms that generally bring synergies between traditional, religious and administrative authorities. This happens through social mediation, the search for consensus, consultation and conciliation.
[22] Author's interview (1/4/15 C);
[23] See for example: Isser (2011).
[24] Dakouo, Koné and Sanogo (2009).
[25] Davis (2014).

'Customary justice' also suffers from the same corruption and politicisation that takes away from the legitimacy and authority of state courts, albeit to a lesser extent.[26] 'Customary justice' proceedings are generally only carried out orally, and there is no accountability or codification, so these actors can change precedents as they go.[27] Finally, the enforcement of customary 'judgments' depends, in large part, on the willingness of the parties to carry them out.[28] However, because the main actors in the informal systems have such a high level of authority within the community, there is a certain moral pressure on the parties to respect agreements sanctioned by informal institutions. If a party reneges, he or she is considered to be 'recalcitrant' and is 'looked down on' by society.[29] Nevertheless, agreements are not always respected, and past disputes frequently resurface. It is important to note that respect for informal authorities is declining as Malian society modernises, something that is especially true in urban areas where 'concepts of family and cultural relationships have less and less value'.[30]

Box 2: Various providers of 'customary justice' in Mali

Family elders
As the basic building block of Malian society, the family represents the first level for resolving disputes, especially for those with a close connection to their family. Conflicts are generally mediated at the initiative of the head of the family, who is normally the eldest male in the extended family, or upon the request of another family member.

Religious leaders
Religious institutions help resolve disputes between members of the congregation. When a conflict occurs, the parties are called before a committee of elders – responsible for overseeing the institution's activities in the community – and the committee attempts to mediate the dispute. In the north of Mali, a Cadi usually settles disputes, for example between married couples by explaining the rights and duties laid out by Islam with regard to married life as a way to reconcile them.

Traditional communicators
Traditional communicators, known as griots in the south, are individuals invested by tradition and custom with the responsibility of recording and communicating the tradition and history of a family or community. Although the role of traditional communicators varies across communities, they can be involved in mediating conflicts.

Local government actors
Neighbourhood, village and fraction heads are given authority by law to mediate civil or commercial disputes among citizens. Conflicts are usually referred to these authorities when they cannot be resolved within the family or when they threaten the stability of the community.

Sources: Dakouo, Koné and Sanogo (2009); ABA (2012); Author's interview (28/3/15 C). This box is reproduced from: Van Veen et al. (2015), *op.cit.*

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[26] *Ibid.*
[27] Author's interview (1/4/15 D).
[28] Author's interview (30/3/15 B); Author's interview (1/4/15 C); Author's interview (2/4/15 D); Author's interview 28/3/15 B).
[29] Author's interview (30/3/15 BL); Author's interview (28/3/15 B).
[30] ABA (2012); Feiertag (2008); Author's interview (28/3/15 A).

A challenge of a different nature lies in the observation that there are many different types of 'customary justice' providers in Mali (Box 2 above describes the most common ones). There is significant variation by region, ethnicity, religion and family that seems to be poorly researched and understood. As these actors are different and do not necessarily use a common customary or legal basis for their judgments, the situation is one of true legal pluralism in which legal outcomes can vary considerably, and precedence and jurisprudence are not obvious. People in dispute may also come from different customary traditions and may therefore need to choose a third customary tradition to resolve their dispute in order to place both of them on neutral ground.

The relevance of 'customary justice' providers points to an obvious need to link state providers of justice with customary providers of justice in any effort aiming to extend and improve the quality of justice available in Mali in the short term, i.e., the next decades. However, in addition to the challenges inherent in Mali's state and customary systems as they currently operate, there are two further challenges to creating such a link: a lack of recognition by administrative authorities of decisions taken by religious and customary authorities, and a low appreciation of customary and religious rules by administrative authorities. During the research conducted for this report, it was striking to observe the intense discussions that took place between different representatives of the state justice system about the value and role of 'customary justice' providers. Two groups emerged, which could roughly be described as 'legal conservatives', who would point to the texts of the criminal code to support their case that there is little to no role for 'customary justice' providers in the penal process, and 'legal realists', who would pragmatically acknowledge the gap between the reality of legal practice and the text of the law. This suggests that creating greater appreciation of 'customary justice' providers by state judicial personnel, and greater trust among customary providers of state judicial personnel, are likely to be conditions without which efforts at improving much-needed links will falter.

Box 3. The state of criminal justice in the northern regions of Mali

During the 2012 crisis, much of the (limited) state justice infrastructure in northern Mali was destroyed – for example courts, police stations, detention centres and prisons – and has yet to be replaced. National justice actors have very little presence outside of city centres, and judicial and penal officials do not, for the most part, operate in those areas.[31] In consequence, traditional chiefs or religious leaders play important roles in dispute resolution in these regions, including in criminal matters.[32] They have largely been tolerated by the Malian state and a pragmatic *modus vivendi* has generally developed where state and 'customary justice' actors co-exist.[33] One of the leading traditional justice figures in the north is the Cadi, whose decisions in practice can be accepted by a judge if they meet certain minimum standards and do not conflict with positive law.[34] This practice has not been formalised, however, as the 'black' populations in the north, who were used as slaves by the Arab and

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[31] United Nations Development Programme (online: consulted 9/3/15); Groupe URD 17/4/14 (online: consulted 9/3/15),p. 43; Author's interview (27/3/15 B, who told us that there were no lawyers in Gao or Timbuktu); Author's interview (30/3/15 A, who told us that the buildings are there but the magistrates are not).

[32] Author's interview (27/3/15 B); Author's interview 1/4/15 D); Author's interview (28/3/15 B); Groupe URD (2014).

[33] Author's interview (27/3/15 B); Author's interview 1/4/15 D).

[34] Author's interview (27/3/15 B).

Tuareg populations, might not trust a Cadi, who is a religious authority to these lighter-skinned populations, to judge them fairly.[35]

The absence of the state in part explains the emergence of Sharia law in parts of the north. What is described as the 'harsh' application of Sharia law has become at least a semi-regular occurrence since the Islamist takeover in the spring of 2012, including in Gao and Anguelhok.[36] Trials are often rudimentary, consisting of a dozen or so jihadists sitting in a circle and pronouncing a judgment. The hearing, judgment and sentence are usually carried out on the same day in closed session.[37] The jihadists have apparently been able to impose Sharia law with very little infrastructure, as they attempted to sell the criminal court building in Gao and used a hotel room in Timbuktu as a courtroom.[38] The implementation of Sharia law has greatly curtailed the rights of women, i.e., restriction of movement, economic activity, clothing.[39]

It is important to note that the Sharia law brought to the northern regions by the insurgents is not in line with the Malian Sharia law still being practised by 'customary justice' providers, which has been adapted to Malian local realities.[40] For example, a paramilitary deputy from Gao in exile in Bamako reported that the 'imported-Sharia' is the justice of the insurgents, not the people of Mali, and that the people of Gao have protested amputations several times and halted them on one occasion, which led to amputations being carried out in secret.

Since the expulsion of insurgent groups from the main towns of the north in 2013, the residents of Gao and Timbuktu have been calling for a quick return of officials to reinstate basic services, as the towns are in 'complete chaos'.[41] As of September 2014, Gao had a prosecutor but no functioning court,[42] although paramilitary police have set up headquarters in a former clinic there. They detain people in makeshift cells for up to four days, and send terrorist suspects to appear before judges in Bamako or Sevare. Furthermore, as of April 2013 the government of Kidal was still working out of Bamako.

While traditional justice methods themselves are unlikely to be sufficient to address the justice and security needs of those in the north, reinvigoration of the state justice system needs to proceed with caution and on the basis of a healthy dose of realism as to what is feasible. Wholesale re-introduction of its discriminatory and corrupt practices from before the crisis are obviously better avoided. The trust of the local population will need to be slowly restored and for the foreseeable future the state is unlikely to have the ability to carry out the decentralised system that exists on paper. This also points to a need to create better synergies between customary and state providers of justice. That could be backed up by a gradual expansion of state presence that would include measures such as requiring civil servants assigned to the northern regions to live in the areas to which they are assigned (instead of allowing them to relocate to regional capitals), and to have a knowledge of local languages, customs and realities.[43]

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[35] Author's interview (26/3/15); Author's interview (25/3/15 A).
[36] New York Times, 27/12/12 (online: consulted 9/3/15).
[37] See for example: Sissaka (2014).
[38] New York Times, 27/12/12 (online: consulted 9/3/15); Spiegel International, 29/10/2012 (online: consulted 18/6/15).
[39] Spiegel International, 29/10/12 (online: consulted 18/6/15).
[40] Author's interview (30/3/15 A); Author's interview (30/3/15 B); *New York Times*, 1/2/13 (online: consulted 17/6/15)
[41] IRIN News, 22/3/2013 (online: 9/3/15).
[42] Dutch Embassy Bamako (2014), *Aide-memoire des atelier regionaux sur le renforcement de la chaine penale au Mali*, unpublished.
[43] Author's interview, (27/3/15 B); Author's interview (27/3/15 D); Author's interview (2/4/15 D).

Where does the penal chain begin?

In Mali, the basis of a criminal action rarely starts with the victim approaching the state system. Indeed, a 2009 survey of 1,000 Malian citizens found that only 10% of them would contact the police in the case of a crime;[44] in a 2010 survey, 65% of Malians stated that they were dissatisfied or highly dissatisfied with the management of the police and gendarmerie; and 66% of all of those who responded were dissatisfied with the justice system.[45] In addition to these perceptions, Malians are also likely to avoid the court system for more socio-cultural reasons because bringing a case to court is seen as declaring war on the other party. Moreover, inefficiencies in the court system mean the case could take years, with possible episodes of violence taking place between the parties during this time[46] and, finally, there is mistrust because of well-known corruption in the state system.[47] In general, bringing someone to the state justice system is not well received, and is underscored by the Malian adoption of the French saying that 'A bad arrangement is better than a good trial.'[48]

As a result, although no two criminal cases will be the same, when a crime takes place the parties are likely to first try to resolve it within their families and communities, and will see the state justice system as a last resort.[49] For example, one interviewee whose husband allegedly attempted to murder her when she threatened to leave him first approached the witnesses to her wedding for help; they then sent her and her husband for meditation with an Imam. It was only after that failed, that she went to the criminal justice system to seek a resolution for the crimes that her husband reportedly committed against her.[50]

'Customary justice' providers handle both civil and criminal matters, with a blurred line existing between the two.[51] For example, a 'customary justice' provider may consider domestic abuse or property theft to be civil matters.[52] This same blurriness exists when trying to define the role of customary actors in relation to criminal justice. Interviewees, including 'customary justice' providers themselves, described their role as one of social or private mediation.[53] Some also expressed the opinion that these actors

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[44] Freedom House, 2011 (online: consulted 8/3/15).
[45] Freedom House, 2011 (online: consulted 8/3/15).
[46] Author's interview (27/3/15 A); Author's interview (30/3/15 A).
[47] Author's interview (27/3/15 A); Author's interview (30/3/15 A); Author's interview (30/3/15 B); Author's interview (31/3/15 A); Author's interview (1/4/15 C); Author's interview (2/4/15 C); Author's interview (2/4/15 D); Author's interview (27/3/15 D); Author's interview (28/3/15 A).
[48] Notably, this saying was coined during the emergence of state justice systems in Europe, when people preferred to use private mediation through religious or community leaders or paid professional mediators. This mirrors the current early stage of development of the Malian system where people also are turning to the same types of private mediators to circumvent a state system that is not yet functioning at a level sufficient to make it the preferred option for conflict resolution Ruff (2001); Author's interview (30/3/15 A).
[49] Author's interview (27/3/15 C); Author's interview (28/3/15 A); Author's interview 28/3/15 B); Author's interview (28/3/15 D); Author's interview (30/3/15 B); Author's interview (31/3/15 B); Author's interview (1/4/15 A); Author's interview (1/4/15 B); Author's interview (1/4/15 C); Author's Interview 2/4/15 C); See also HiiL (2014), which suggests that the majority of Malians rely on their family to resolve their justice needs.
[50] Author's interview (1/4/15 B).
[51] Author's interview (30/3/15 B); Author's interview (1/4/15 A); Author's interview (28/3/15 B); Author's interview (2/4/15 C).
[52] Author's interview (27/3/15); Author's interview (30/3/15 B); HiiL (2014).
[53] Author's interview (1/4/15 A); Author's interview (1/4/15 B); Author's interview (2/4/15 D); Author's interview (26/3/15).

could be utilised within the state criminal justice system as assessors or mediators, but that they should not be empowered to play a primary role outside of it.[54] In contrast, others expressed the view that 'customary justice' providers are de facto acting as the state in criminal justice matters, especially in areas that lack a state presence,[55] with some arguing that the role of these actors in penal matters should be enlarged or made more official.[56]

Furthermore, there is a great deal of diversity among 'customary justice' providers in determining where their criminal jurisdiction lies. For example, one 'customary justice' provider saw himself as being able to fully handle criminal justice matters;[57] another stated that once a conflict reaches a certain level of violence, it must be referred to the state;[58] and a third stated he would handle matters upon request unless the state had already become involved.[59] Yet another described how, if he hears about a matter that has already gone to the police, he would intervene at that point to try to resolve the dispute.[60] There was also an example given of a mayor in one of the outer regions who tried to stop a murder trial from going ahead so that he could handle the matter privately under his authority as a traditional leader.[61] Amidst all of this is the state criminal justice system, whose representatives, when interviewed, were not able to uniformly assert that the state has a monopoly on resolving criminal disputes.

Implications for programming

While it may be tempting to pretend that, at the least, the penal process is firmly nested within the state's legal system as its unique preserve and is firmly run by state representatives and professionals, this is not the reality of how justice is actually provided in Mali.

As a result of the existing legal pluralism, it is, in fact, unclear where the penal process in Mali begins. A key task for any programming effort in this area is therefore to identify and map the distinctions between state and customary systems on a locality-by-locality basis, with a focus on understanding why it is that several systems exist concurrently and how they can best be supported to work together – instead of trying to bring one into the other on terms that are not its own. While it is necessary to bridge the gap between the use of customary and state judicial penal practices and systems to increase legal transparency, uniformity and enforcements of rights, that would have to be negotiated rather than enforced if it is to actually improve the quality and scope of justice that most Malians have access to.

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[54] Author's interview (25/3/15 A); Author's interview (2/4/15 D); Author's interview (25/3/15 C).
[55] Author's interview (28/3/15 A); Author's interview (1/4/15 C).
[56] Author's interview (1/4/15 D); Author's interview (28/3/15 C); Author's interview (11/3/15); HiiL (2014).
[57] Author's interview (28/3/15 B).
[58] Author's interview (1/4/15 A).
[59] Author's interview (30/3/15 B.)
[60] Author's interview (28/3/15 C).
[61] Author's interview (26/3/15).

3. Analysis of the organisation and performance of the state's penal process

The aim of this section is to provide a brief overview of the organisation of, and relations between, the most important actors in the state's penal process. It also identifies and discusses the performance challenges that they face. The section focuses on critical challenges rather than providing an exhaustive catalogue, for reasons of focus and priority setting.

Performance challenges at the core of the penal process

Criminal justice is an important aspect of Mali's formal justice system because it represents an area that is meant to have a significant symbolic function in terms of maintaining the standards of fairness and equity with which the law is applied to behaviour that society considers wrong and harmful, irrespective of an individual's position or status. It also has an important practical function in terms of preventing disputes from festering, righting wrongs that have been committed, and preventing serial offences. It is, in a way, society's defence against its own excesses. However, it is safe to observe that the formal penal process in Mali, as expressed in its constitution and laws, is severely defunct. The state justice system can be characterised by a daunting array of interconnected problems, of which the most important are a lack of judicial independence, chronic corruption, a quantitative as well as qualitative shortage of both staff and material resources, and insufficient connections with 'customary justice' actors who are much more relevant to the average Malian than the state judicial system.[62] These problems have the combined effect of massively reducing access to the state justice system and the fairness of justice received through it, and of severely limiting the ability of that system to deal with its own challenges. With the exception of the issue of links with 'customary justice' actors (see above), these matters are discussed in greater detail below.

Box 4: Organisation of Mali's state justice system

Justices of the peace (Justices de paix à compétence etendue – JPCE)
Mali's JPCEs combine the functions of judge, prosecutor and investigator in an effort to make state-provided justice available in more rural areas. They have been widely criticised for concentrating too much power in one pair of hands. Predictably, appeals are few. JPCEs are currently being phased out.

Courts of first instance (Tribunaux d'instance – TI)
TIs are meant to replace the JPCE. They have a separate judge, examining magistrate and prosecutor.

Courts of first instance (Tribunaux de premiere instance – TPI)
Divided into ordinary or specialised courts, TPIs examine cases through the use of a sole judge, an examining magistrate and a prosecutor. TPIs have jurisdiction over first-instance civil cases, appeals where the value fails to meet a certain threshold, and minor infractions and misdemeanours. They are also being phased out.

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[62] For a more in-depth analysis of these issues, except for links with 'customary justice' providers: Moulaye, Diabaté and Doumbia (2007); ABA (2012); De Vries, Otis and Feiertag (2014).

Superior Courts (Tribunaux de grande instance – TGI)

Also divided into ordinary or specialised courts, TGIs are meant to replace TPIs, the difference being that TGIs will decide cases in panels of three judges, rather than through a sole judge.

Specialised courts (TPI/TGI) include:

Administrative Courts (Tribunaux administratifs – TA)

TAs have jurisdiction over administrative matters, specifically cases regarding local abuses of administrative power (including appeal), as well as cases contesting the results of local elections. TAs are made up of administrative judges, with a president, government commissioners and clerks. They are situated in Bamako, Kayes and Mopti, with jurisdictions corresponding to those of the Courts of Appeal.

Labour Courts (Tribunaux du travail – TT)

TTs have jurisdiction over individual disputes arising in the course of work, interpretation of collective labour agreements and disputes relating to the application of the Social Insurance Code or related to apprenticeship or qualification. Proceedings before TTs are free.

Commercial Courts (Tribunaux de commerce – TC)

TCs have jurisdiction in disputes relating to changes and transactions between traders within the meaning of Article 3 of the Commercial Code and disputes relating to commercial transactions between natural as well as legal persons, including bankruptcies, legal settlements and liquidations of property. TCs deal in first and last instance with cases of which the value does not 1,000,000 CFA. In cases where the value exceeds that amount, TCs act only in first instance.

Courts for Children (Tribunaux pour enfants – TE)

TEs are competent to deal with offences and misdemeanours committed by minors. It should be noted that the age of criminal responsibility in Mali is 18 years. There is a juvenile judge in the capital of each administrative region.

Military courts (Tribunaux militaires – TM)

TMs rule on offences particular to the military in relation to its chain of command (for example desertion), as well as on common crimes committed by military staff in a framework related to their duties. TMs are based at the courts of appeal of Kayes, Mopti and Bamako and were established by law no. 95042 of 20 April 1995 ('Code de Justice Militaire en République du Mali').

Courts of appeal (Cours d'appel – CA)

Disputed decisions at the trial level can be brought to three CAs, which are located in Bamako, Kayes, and Mopti. Appellate court judges review both the law and the facts again, and sit in a three-judge panel. At the appellate level, there are also criminal courts (cour d'assizes) with sole jurisdiction over felonies. These are located in Bamako, Segou and elsewhere. The criminal courts are presided over by a three-judge panel drawn from the courts of appeal, as well as a jury of four citizens.

Administrative courts of appeal (Cours administratives d'appel – CAA)

CAAs are administrative courts of higher rank. They consider appeals against judgments handed down by administrative courts and some specialised courts.

The Supreme Court (Cour suprême)
The main duty is of the Cour suprême is to hear appeals from the lower courts through its judicial section. In the judicial section, the Supreme Court is meant to look only at whether the law is applied correctly, not the facts. However, it has been observed that in practice the judges do carry out a third-level review of the facts. Only the Cour suprême has the competency to hear appeals from the criminal courts.

The Constitutional Court (Cour constitutionelle)
This court is charged with balancing the branches of government by upholding the constitutionality of laws, guaranteeing the fundamental laws of individual and public liberties, regulating the functioning of institutions and the activity of Public Powers, and arbitrating conflicts between state institutions.

The High Court of Justice (Haute cour de justice)
Members of the Haute cour de justice are chosen by the National Assembly. It tries cases of high treason, crimes committed in the capacity of exercising state functions, or of complicity in a conspiracy contrary to national security. However, in practice, this court is seen as a weak institution that has not fulfilled its mandate.

Note: The Malian government launched a major restructuring of the judiciary in 2011 in which, for example, JPCEs would be replaced by TIs and TPIs by TGIs. In total, the reform of the judicial map of Mali aims to create 17 TGIs, 41 TIs, 6 TAs, 6 TCs, 11 TTs, 53 TEs, 6 CAs and 6 CAAs. This restructuring is not yet complete, in part because of the extremely modest amount from the national budget that has been allocated to justice. The result is co-existence of an old and new state justice system.

Sources: Constitution of Mali; Moulaye, Daibaté and Doubia (2007); Feiertag (2008); ABA (2012); Weiss et al. (2014); Authors' interview on 20/2/15; Réseau Francophone de Diffusion du Droit, online at: http://www.rf2d.org/informations-generales-mali (accessed 21 October 2015).

A lack of judicial independence

On paper, Malian judges have a legal status that guarantees the independence necessary for the exercise of their judicial function.[63] More precisely, the Malian Constitution of 1992 made the judiciary fully independent and conferred the function of 'guardian of the independence of the judiciary' upon the country's President in a bid to harness the powers of this office to the defence of the quality of state-provided justice in Mali.[64] In reality, however, the executive branch of the Malian government has significant power over the judiciary in spite of such provisions. Executive influence is mostly ex-ante in nature, i.e., through its ability to decide on the organisation of the judiciary and on judicial appointments. For example, the Ministry of Justice controls the budget of the judiciary as well as the careers of its professionals.[65] In particular, the executive has significant powers of appointment in relation to positions in the highest organs of the Malian judiciary, namely the Supreme Court, the Superior Council of the Magistracy and the Constitutional Court. This suggests that the executive is, on the whole,

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[63] With the formal exception of parquet judges, with whom the Minister of Justice maintains hierarchical relationships that enable direct interference of the executive in the criminal chain.
[64] The business anti-corruption portal, Mali country profile (online: consulted 6/3/15).
[65] Wikileaks, 16/10/09 (online: consulted 6/3/15).

ensured of favourable legal proceedings and rulings if and when desired, which largely obviates the need for overt executive intervention during legal proceedings.

Specifically, members of the Supreme Court are appointed by a decree of the Council of Ministers, which is presided over by the President. The president and vice-president of the Supreme Court are named directly by the President, in conformity with the recommendation of the Superior Council of the Magistracy (CSM). However, the CSM is also easily controlled by the executive, as its chair is the President, its vice-chair the Minister of Justice and eight more of its members are officials (effectively appointed by the executive), while the Minister of Justice, as noted before, exercises significant influence over the 13 judges who make up the remainder of its 23-strong membership.[66] While the composition of the CSM is not exceptional compared with other francophone countries (including France itself), in a neo-patrimonial context it means that nominations of judges, designation of their posts and disciplinary procedures will tend to be undertaken on the basis not of (de)merit, but of loyalty and personal relations.[67] Finally, of the nine members who make up the Constitutional Court, the President chooses three directly while the CSM – informally controlled by the executive – chooses another three.[68] This arrangement provides the executive with more or less direct control over the CSM and indirect control over both the Supreme and the Constitutional Courts.[69]

Chronic corruption

Many Malians reportedly view the judicial system as one of the most corrupt government institutions.[70] This observation was echoed by a leaked report from the United States Embassy in Bamako in 2009, which stated that 'the judicial system is highly corrupt, with under-the-table payoffs an accepted manner of influencing the outcome of a case'.[71] By way of real-life illustration, a victim who reported her husband to the police for allegedly trying to kill her (after having found no recourse through the customary system), opined that he, being from a wealthy family, was able to pay off the police and the court of appeal to his advantage. In her view, this ultimately led to his acquittal despite there being overwhelming evidence to the contrary. She also described how at every step of the process, she was discouraged from proceeding.[72] In general, corruption is attributed to the low salaries of judges, as compared to private attorneys, and to the social pressure exerted on judges to help family and friends.[73]

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[66] *Ibid.*; Bengaly (2015), *op. cit.;* Moulaye et al. (2007), *op. cit.*; Personal interview, Goff, D., The Hague, 20 February 2015.
[67] Malian Constitution, Title VIII, Art. 84; Personal interview, Goff, D., The Hague, 20 February 2015; Personal interview, Goff, D., Bamako, 31 March 2015.
[68] Malian Constitution, Title IX, Art. 91.
[69] For the exact rendering of the formal rules stipulating the composition of these three institutions of law see: Malian Constitution, Title III, Articles 39 and 47; Présidence de la République Mali, *Loi organique no. 3-033* du 07 Octobre 2003, fixant l'organisation, la composition, les attributions et le fonctionnement du conseil supérieur de la Magistrature, Bamako. This paragraph is largely taken from: Van Veen et al. (2015), *op.cit.*
[70] For example: Freedom House (2011) (online: consulted 8/3/2015); Afrobarometer (2013); Bengaly (2015).
[71] WikiLeaks (2009).
[72] Author's interview (1/4/15 B).
[73] See for example Afrobarometer (2013). The minimum monthly salary for a judge is US$67 (ABA, 2012). According to one interviewee, the national judicial reform programme (PRODEJ-I) included an initiative to increase the salary of judges in a bid to reduce corruption; it was, however, not successful (author's interview (27/3/15 D).

When the state justice system was still present in the north, it was also seen as corrupted, with lawyers asking for a 'judge fee' as part of their payment.[74]

In addition, the justice system, and its penal process in particular, fails entirely to prevent and punish abuse of public office. The obvious consequence is that it does not serve as an effective deterrent against corruption by high-level officials. Even when such cases are clearly identified, they largely go unpunished. For example, the Office of the Auditor General (OAG), an independent agency created in 2004 to monitor public spending, uncovered US$100 million in embezzled funds in 2011 and presented its findings to the President, the Prime Minister and the President of the National Assembly. The President subsequently referred 100 cases cited in government audits to the Ministry of Justice for prosecution. Of those 100 cases, it appears that only a small number of officials have been arrested and gaoled, while the majority have seen no legal action.[75] Although limited restitution of embezzled funds occasionally occurs when large-scale corruption is discovered, it is not unusual for this to happen 'under the table' without transparency or prosecution.[76] This contributes to maintaining a culture of impunity in which public office is routinely used for private gain and in which this is, in fact, considered the norm.[77]

Tasked with addressing such excesses in the judiciary, the Superior Council of the Magistracy (CSM – discussed above) has been criticised for not doing more to prosecute or professionally sanction corrupt judges.[78] It is also criticised for lack of transparency in its disciplining of judicial magistrates, as its decisions are not made public, and for the fact that only the Minister of Justice can bring proceedings against a judge. On a more positive note, the government is considering changing the composition of the CSM and its procedures in order to make judicial discipline more transparent, and to allow for better oversight by civil society.[79] There are also indications that, since the 2012 crisis, the Ministry of Justice has been doing more to prosecute corrupt judges. For example, in December 2013, six judges and officers were charged with forgery, fraud and extortion, and it was announced in the news that cases against other 'unscrupulous' judges were being investigated. President Keita, who was said to have launched this investigation, stated earlier in the same week that he had referred around 100 cases of corruption and financial crimes to the courts.[80] However, corruption remains a major issue in the Malian judicial system. This is in no small part a result of Malian judges facing insufficient controls or sanctions

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[74] Author's interview (30/3/15 A).
[75] US Department of State (2014) (online: consulted 7/3/15).
[76] Author's interview (27/3/15 C).
[77] On this matter see also: Briscoe (2014); De Vries, Otis and Feiertag (2014). To be fair, this is also a problem for even more advanced criminal justice systems. See: New York Times, 19/2/15 (online: consulted 8/3/15). Investigation of the US justice system found that high-level employees of corporations suspected of financial crimes are rarely prosecuted.
[78] One interviewee stated that the prevailing view among members of this body is that you do not discipline your friends or equals. In consequence, it takes little recourse to sanctions or does not implement them (Author's interview (2/4/15 D). On the ingrained influence of social relations and networks on corruption: Bengaly (2015).
[79] ABA (2012).
[80] News 24, 12/12/2013 (online: consulted 7/3/15).

on their actions.[81] This is deeply problematic given the power they wield over the wellbeing, property and lives of litigants.

Quantitative and qualitative shortages of staff and material resources

Finally, Mali's justice system faces significant qualitative and quantitative shortages in terms of personnel, finances and facilities.[82] This problem extends well beyond the confines of the state-run part of the penal process to include the private and not-for-profit functions associated with the provision of justice, such as, for example, attorneys and paralegals. It is difficult to avoid generating a litany of shortages under this heading – let alone a prioritisation of how these shortages should be tackled. A few examples will nevertheless illustrate the material challenges that the state's judicial system faces in the provision of justice:

- In 2008 Mali had 630 judges for a population of about 13 million.[83] This extremely low number of judges is to a great extent responsible for ensuring that many judicial cases proceed very slowly. While the Malian government is aware of these issues, and intends to improve the institutional capacities and human resources, as discussed further below, there is a long way ahead.[84]

- Those accused of a crime are likely to need the help of an attorney, but those are in very short supply. According to a 2014 Ministry of Justice report, there were 335 lawyers in Mali at that time.[85] This can be contrasted to a 2011 study undertaken by the American Bar Association, which found that there were only 270 lawyers at that time, and most were located in Bamako. As of 2014, Mopti, which has a population of 2 million, has less than 10 lawyers.[86] Most rural areas do not have any lawyers, as there is very little monetary incentive to set up a legal practice in such places.

- Legal assistance offices that are meant in part to provide lawyers for indigent defendants in criminal cases have so far been set up only in the first instance courts of the Kayes region. This is despite the fact that the basis in Malian law for such offices was created in 2001 and they are meant to be present at each court of appeal, trial court and justice of the peace.[87]

To compensate for high rates of illiteracy and the lack of knowledge of legal rights, lawyers and legal aid offices, a range of civil society groups have trained individuals in communities to serve as

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[81] Menocal (2015) notes that the combination of a large degree of professional discretion with defunct controls is a major incentive for corruption. See also Bengaly (2015) for a more detailed treatment of this matter and a number of suggestions for improvement.

[82] It is this point in particular that was emphasised in a series of workshops conducted between 1-12 September 2014 by the Dutch Foreign Ministry in the regions of Ségou, Mopti, Gao and Timbuktu in respect of the penal chain ('Aide-memoire des atelier regionaux sur le renforcement de la chaine penale au Mali', unpublished), as well as during the stakeholder workshop in Mopti that was conducted in the course of the research for this report (see Annex 1: Methodology).

[83] Réseau Francophone de diffusion du droit (online: consulted 8/3/15).

[84] ABA (2012).

[85] Ministry of Justice of Mali (2014).

[86] Oxfam Novib, 10/2/2014 (online: consulted 8/3/2015); ABA (2012).

[87] Oxfam Novib, 10/2/14 (online: consulted 8/3/15); ABA (2012).

paralegals.[88] As of 2015 there were 123 community-based paralegals working in seven out of eight regions in Mali.[89] While these services are popular for divorce or land disputes,[90] and there is an indication that donors wish to intensify and extend this project,[91] a recent justice survey by the Hague Institute for the Internationalisation of Law (HiiL, 2014) reflected percentage numbers in the low single digits as to how often paralegals were sought to assist with justice problems. It is unclear as to what the cause for that could be, but it would need further investigation through, for example, focus groups, before any programming is extended.

While the range of performance challenges discussed above has been publicly recognised by the Malian government since at least 2000 (when a 10-year programme for reform of the justice sector (PRODEJ) was launched to address them, and later extended from 2010-2014 under the name PRODEJ II), it is questionable whether this top-down approach to reform has yielded much. In fact, some have found that it is being used as vehicle to attract donor funds that are then diverted to private use.[92] PRODEJ has also been criticised as being slow and non-impactful.[93] Moreover, a joint study carried out by the Center for International Legal Cooperation (CILC) and the Netherlands Helsinki Committee (NHC) in 2013-2014 found that at three different points of evaluation of the justice system – in 2001, 2007 and 2014 – the nature of the problems and the conclusions drawn were consistently similar in nature. These findings not only suggest that the major problems plaguing the state judicial system discussed above persist, they also point to entrenched resistance against change among Mali's political and judicial elites and/or the inability of more change-oriented individuals to instigate reform from within.[94] This observation also suggests that the problems in the state justice sector pre-date the 2012 crisis by a long stretch.

This brief analysis of three core problems that characterise Mali's state-run penal process generates a real dilemma from a programming point of view. On the one hand, addressing any of these issues without also addressing the others is in all likelihood akin to pouring water in a bucket with three holes in it of which only one is plugged. On the other hand, no programme is likely to have the scope, resources or political leverage to address all of these issues comprehensively. A useful approach might therefore be to deal with these issues holistically, but in a limited area. This could, for example, take the form of one or several pilots. While this raises challenges of its own, it makes the problems discussed

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[88] Danish Institute for Human Rights (2014) (online: consulted 7/3/15) ; Oxfam, 5/2/14 (online: consulted 7/3/15) ; Oxfam, 10/2/14 (online: consulted 7/3/15) ; CPNC Mali (online: consulted 7/3/15).

[89] Danish Embassy in Bamako (2014) (online: consulted 8/3/15).

[90] Oxfam, 5/2/2014 (online: consulted 7/3/15).

[91] Danish Embassy in Bamako (2014).

[92] Feiertag (2008); De Vries, Otis and Feiertag (2014); Author's interview on 10/3/15.

[93] Wing (2008).

[94] For instance, the Constitutional Court elected Manassa Danioko as President on 2 February 2015. She was a member of the Constitutional Court prior to this and is considered to be deserving of this promotion. When she was serving as Chairman of the 1st District Court in Bamako, Danioko was suspended and removed as a judge in 1988 at the personal request of Moussa Traore (then president) for being too firm and too honest. She is also well known as the general prosecutor investigating Moussa Traore for 'blood crimes' after he was deposed. The democratic regime reinstated her as a judge in 1991, and she is credited with initiating the PRODEJ project described earlier above and with writing a incisive note on the status of the Malian judiciary. See Mali Actu, 2/3/15 (online: consulted 6/3/15); Constitutional Court of Mali, 28/2/15 (online: consulted 6/3/015).

above more manageable in scale without losing sight of their interrelation. This matter is further discussed below.

By way of brief summary of Sections 2 and 3 so far, Table 1 reflects the challenges that customary and state justice actors respectively face when dealing with criminal cases.

Table 1: Major challenges to a fairer and more effective penal process

State justice actors	'Customary justice' actors
A lack of independence	Certain incompatibilities with constitutional rights
Chronic and widespread corruption	Corruption, although to a lesser extent than in the state system
A quantitative and qualitative shortage of staff and material resources	Challenge of enforcement of judgments
Few to no state justice institutions exist in certain areas, especially in the north	The low social status of women disadvantages their legal position
Insufficient connections with 'customary justice' systems	Insufficient connections with the state justice system
Perpetuation of conservative, patriarchal and local elite values and views, although to a lesser extent than in the customary system	Perpetuation of conservative, patriarchal and local elite values and views

Sources: Moulaye, Diabaté and Doumbia (2007); ABA (2012); De Vries, Otis and Feiertag (2014); Bengaly (2015).

Performance challenges at the front- and back-end of the penal process

Mali's criminal justice system logically extends beyond its judicial core to include the judicial police at its front end, and its prison system at its back end. Mali has not only national police and a gendarmerie (amounting to militarised police), but also judicial police (police judiciaire). The latter are tasked specifically with reporting violations of criminal law, gathering evidence, tracking down suspects and supporting investigating authorities once a case is opened. While the judicial police are directed by the public prosecutor in support of specific cases, they fall hierarchically under the Ministry of the Interior. This creates both challenges of tasking (i.e., does the prosecutor or do ministry officials have primacy when resources are scarce and priorities diverge) and opportunities for interference. The judicial police can be thought of either as a status for certain officials, with an associated bundle of rights and duties, or as an organisation in itself. The former view allows for a focus on individuals who might be part of different organisations, for example mayors, senior officers of the national police and gendarmerie as well as certain officials not directly part of the police force but who have been granted the status of 'judicial police' for the purposes of supervision and enforcement of specific tasks (e.g., foresters), and are therefore able to operate on the basis of the authority granted in Mali's Penal Code.[95] Such

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[95] Malian Penal Code (2001); US Department of State (undated), online (consulted 9/3/15).

individuals represent the face of criminal justice in Mali and will, in many cases, be the entry point for those seeking redress. The latter view enables a focus on the structural characteristics of the organisation of the front-end of criminal justice in Mali, which is composed of five services, namely the judicial investigation brigade, the vice squad, drugs enforcement, an international component, and technical and scientific police units.

Analysis of the judicial police suggests three key problems, one of which is largely associated with the status of the judicial police, while the other two are associated more with the judicial police as institution:

- Judicial police officers have wide ranging powers under Malian law and it appears that these powers are regularly abused, by judicial police *either* stepping into the shoes of judges by rendering verdicts directly (the case of Adam Kamissoko suggests this happens at the highest levels),[96] *or* keeping suspects in prolonged periods of pre-trial detention (up to several years) without any review of the case by a judge or court.[97]

- Judicial police officers may be illiterate, do not always understand how the judicial system works,[98] and are insufficiently trained to apply due process in criminal investigations. This results frequently in a statement (procès-verbal) being of such poor quality that neither the prosecutor nor the investigating judge can use it to process the case it is meant to support. In turn, this leads to faulty evidence, backlogs and, in the worst case, poor judgments.[99]

- Judicial police officers lack the means to do their jobs effectively and litigants often disregard them completely by, for example, hiring a taxi and bringing a suspect to gaol on their own account.[100] The judicial police also lack the capacity to carry out investigations through wire-tapping and home searches.[101]

Once an investigation by the judicial police is completed, the prosecutor decides whether to drop the matter, send it to penal mediation, or refer it to the competent court. Article 52 of Code of Criminal Procedure provides for the possibility of penal mediation except for cases of sexual offence, damage to public property and felonies. This is another area that could be a useful entry point for 'customary justice' providers to engage with the state penal chain, as any mediation agreement reached must be approved by the court.[102]

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[96] The current director of the judicial police, Ami Kane, ordered that Adam Kamissoko (a prominent traditional communicator) be placed in custody at the vice squad on 27 February 2015 on the basis of a phone call he had made to Tomani Kouyaté, a well-known singer, in which insults aimed at him were apparently uttered. The accused was not allowed to contact his family or his lawyer. The director of the judicial police subsequently judged the infraction herself and sentenced the accused without referring the case to a judge. This predictably led to a public, media-led outcry, which, in this case, ensured swift liberation. Maliweb.net (undated), online here and here (consulted 9/3/15).
[97] This is a common problem in many developing countries: Haugen and Boutros (2014).
[98] Author's interview (2/4/15 A).
[99] De Vries, Otis and Feiertag (2014).
[100] Author's interview (27/3/15 B).
[101] Author's interview (1/4/15 C).
[102] Author's interview (2/4/15 D).

If an allegation is at the level of a felony, the case is transferred to an examining magistrate, who then completes the investigation. The prosecutor can refer minor infractions and misdemeanours to an examining magistrate, or can transfer minor infractions directly to a police court (TP) and misdemeanours directly to the courts of first instance (TI or TGI). Victims themselves can initiate a public action either by bringing the case to a competent court or by filing a case directly with the examining magistrate. For cases referred to the examining magistrate, once the investigation is complete, the case can be dropped for lack of evidence or transferred to the appropriate court.[103] Notably, like the judicial police, examining magistrates also lack the capabilities, time and resources needed to conduct effective investigations.[104]

According to law, minor infractions and misdemeanours can be dealt with through the justices of the peace (JPCE) and the courts of first instance (TI or TGI). If a judgment is then contested it can be appealed at the courts of appeal, followed by a final appeal at the supreme court. Felonies can only be handled in the first instance by the courts of assizes, with only one level of appeal possible to the supreme court.[105] It appears, however, that in practice JPCEs, TI/TGIs and the courts of appeal also handle felonies.[106]

If parties are not satisfied with the judge's ruling, they can try to have it overturned by having a customary authority speak to the judge on their behalf.[107] Customary authorities also may intervene on their own volition to ensure that judges are carrying out their duties correctly.[108] These procedures do not exist in positive law, but only in practice.

According to Articles 260-263 of the penal code, judges at the courts of assize are able to appoint assessors to advise them on their rulings. These assessors are nominated once a year by the magistrates and must be approved by the general prosecutor. Criteria include being over 30 years of age, and being able to read and write in French. Magistrates often choose customary leaders as assessors to enable themselves to make decisions that comport with local realities.[109] If a criminal case is assigned to a customary leader for penal mediation, a protocol is then written that summarises his judgment, which is sent to the judge, who then decides whether to enforce the decision or not.[110] This system has been described as 'inevitable' for the northern regions where judges are assigned to cover vast expanses of territory inhabited by nomadic groups without necessarily being aware of the cultural complexities involved in criminal cases.[111]

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[103] ABA (2012). For jurisdictions with only a justice of the peace (JPCE), there would presumably not need to be referral mechanism as they act as the prosecutor, investigator and judge.
[104] Author's interview (1/4/15 C).
[105] Feiertag, S. (2008); ABA (2012).
[106] Author's interview (1/4/15 B).
[107] Author's interview (30/3/15 B).
[108] Author's interview (1/4/15 A); Author's interview (28/3/15 C).
[109] Author's interview (1/4/15 C); Author's interview (1/4/15 D); Author's interview (2/4/15 D).
[110] Author's interview (2/4/15 D).
[111] Author's interview (1/4/15 D).

Turning to the prison's system as the back-end of the criminal process, a key observation is that Mali's prisons are dangerously overcrowded, as a brief comparison of supply and demand illustrates. Prior to the crisis, there were 59 prisons in Mali (of which 14, or 24%, were destroyed by the conflict) with an official capacity of about 3,000 inmates.[112] However, Mali had over 6,000 people actually incarcerated in 2010 – meaning the occupancy level exceeded 200%.[113] It should be noted that this is an average. For example, in 2008 the central prison in Bamako held 1,700 prisoners against a 500-person occupancy limit and this number increased steadily to over 2,000 in 2013 (including well over 1,000 pre-trial detainees) and 2,500 in 2014 (a 500% occupancy rate).[114] As of 2013, around 50% of all prisoners were pre-trial detainees,[115] and this number has risen to 57-60% in 2015.[116] This is in part due to the ability of overburdened judges to continuously – and legally – extend the period of preventive detention and because there is a fear that if people are freed before their charges are dealt with they will simply disappear and not return.[117] As of 2003, significant numbers of individuals were reported as having waited in prison for 10 years for a judgment in their case.[118]

Neither the problems nor the reasons for such overcrowding are unique. Mali's prison challenges are similar to those faced by other West African countries – for example, Senegal, Burkina Faso, and Guinea.[119] The reasons for this state of affairs revolve around the poor quality of the work of the judicial police (as noted above), a lack of staff and resources, a sizeable backlog, and a punitive approach to criminal justice that makes little use of alternative sentencing for non-violent offenders.[120] More specifically, the general administration of the prison system is woefully inadequate, with poor recordkeeping and no specific ombudsman for prisoners to submit complaints to.[121] In relation to the north, one interviewee stated that the overcrowded prisons are due to the mentality of new prosecutors in the region, who place people under arrest for any reason and then leave them in gaol for months.[122]

The practical result is that prison conditions are poor, despite some attempts at improvement. For example, in 1993-1994, Parliament doubled the food budget for prisons, which allowed for prisoners in Bamako to be fed three times a day and prisoners elsewhere to be fed twice a day. Afterwards, however, there were still days when prisoners were not fed at all due to mismanagement.[123] This does not seem to have changed, as in 2013 it was reported that prison food was not always provided and when it was

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[112] Réseau Francophone de diffusion du droit; UN Department of Peacekeeping Operations, 2014 (online: consulted 7/3/15). There are also two detention centers which only hold female prisoners.
[113] International Center for Prison Studies, Mali (online: consulted 7/3/15).
[114] US Department of State, 2013 (online: consulted 7/3/15); UN DPKO (2014).
[115] US Department of State, 2013.
[116] Author's interview (27/3/15 B).
[117] Author's interview (27/3/15 B); Author's interview (31/3/15 A).
[118] Best, Khan, Nocella and McLaren (2011), *The Global Industrial Complex: Systems of Domination*, Lexington Books: Lanham.
[119] Freedom House, 2014 (online: consulted 7/3/2015); UN Office of the High Commissioner for Human Rights, 27/10/14 (online: consulted 6/3/15).
[120] US Department of State, 2013 (online: consulted 6/3/15); US Department of State, 2013 (online: consulted 7/3/15); Freedom House (2011); Author's interview (27/3/15 B, stating that a law exists to divert people from prisons, but most magistrates do not know how to use it).
[121] US Department of State, 2013 (online: consulted 6/3/15).
[122] Author's interview (26/3/15).
[123] Dankwa (1998).

it is lacking in both quantity and quality.[124] Furthermore, although one interviewee from the penal service asserted that there were no major health problems in prisons,[125] in 2014 there was, in fact, a widespread scabies outbreak affecting over 2,600 detainees in the prisons of Sikasso, Kati and Bamako.[126]

Efforts at monitoring, quality assurance and audit in the course of some years have not generated a significant level of improvement. For example, the National Commission for Human Rights, which is an independent entity within the Ministry of Justice, is charged with visiting prisons to check that conditions are humane. However, despite what appears to be objectively inhumane conditions, in 2013 the Ministry did not make any formal complaints. The Directorate for National Penitentiary Administration is also meant to investigate and monitor prison and detention centre conditions, but it is unclear whether it is effective or even active. Mali also allows independent human rights organisations to monitor its prisons if granted permission by the Minister of Justice. Although requests have been routinely granted, they take at least a week to process, which makes it difficult for these groups to evaluate allegations of abuse.[127]

This state of affairs has several consequences. First, it is no exaggeration to say that the Malian prison system destroys, or significantly reduces the quality of, the lives and prospects of many of its citizens. This negatively affects prisoners' possibilities for reintegration after incarceration. It is also likely to raise the broader social cost of imprisonment to families and communities. Second, it strengthens perceptions of the injustice of the state's legal system, as someone could spend significant time in prison in abysmal conditions without a verdict that can be appealed. In the specific context of the events of 2012 and the role that radical Islamist groups played in the conquest of Mali's north, it should also be recalled that overcrowded prisons in other parts of the world, such as Camp Bucca in Iraq, have generally played a role as incubator for militant movements as their leaders got to know each other intimately within the confines of those prison walls. In short, the state of Mali's prison system might well be creating greater difficulties further down the road.

To close this section, Figure 1 provides a rough overview of Mali´s state-run penal process, the main problems associated with each stage and possible entry points for improvement. It should be noted here that the Malian government launched a major institutional restructuring of the judiciary in 2011 in which, for example, JPCEs would be replaced by TIs and TPIs by TGIs (see Box 4).[128] Figure 1 reflects this new judicial structure. However, the transition towards the new structure remains incomplete. Progress is reportedly concentrated in southern Mali so that in the country's northern regions it is still very much the JPCEs and courts of first instance (TIs) that represent the face of the state's judiciary.[129] In addition, even in the south progress is only gradual because of the insignificant part of the national budget that

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[124] US Department of State, 2013 (online: consulted 6/3/15).
[125] Author's interview (27/3/15 B).
[126] ICRC, 2014 (online: consulted 18/6/15).
[127] *Ibid.*
[128] See for example: Weiss et al. (2014).
[129] Based on email exchanges between the research team and various legal experts in Mali in mid-June 2015.

is allocated to justice.[130] The result is co-existence of an old and new state justice system. This further contributes to the system's already low accessibility and poor performance.

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[130] The part of the national budget allocated to justice dropped from 0.61% in 2008 to 0.44% in 2014 (Ministry of Justice of Mali (2014.

Figure 1: An overview of key elements of the state-run penal process in Mali according to its new judicial structure

MAJOR ISSUES

Shared: a) distance, b) fees, c) corruption, d) shortages of staff and material resources

• Actions often exceed authority • Poor quality of documentation for prosecution	• Justices of the peace (JPCEs) still being phased out • Limited presence and costly	• Extremely limited presence, including where legally mandated	• Factual review by supreme court • Poor performance of high judicial court • Political influence	• Used beyond capacity • Violating human rights • Large-scale destruction of infrastructure

Constitutional court: review constitutionality of laws

Judicial police: arrest and initial investigation	Courts of first instance (TI and TGI): investigation & judgment	Courts of appeal: factual and legal review and judgement*	Supreme court: legal review and final judgment**	Prison

High judicial court: focus on trying cases of public integrity

POTENTIAL ENTRY POINTS FOR PROGRAMMING

• Crime prevention • Higher-quality paperwork • Improved pre-trial detention	• Better links with customary actors • Expand legal aid • Increased fairness of procedures	• Improved infrastructure • Greater political independence	• Composition of the constitutional and supreme courts	• Alternative sentencing • Greater focus on social reintegration

Shared: a) improved infrastructure, b) staff, c) greater oversight and accountability

Implications for programming

The preceding analysis suggests a number of emerging principles for programming that international and national actors who intend to be – or already are – engaged in the Malian justice sector should bear in mind. These principles can be divided into substantive and more process-oriented considerations. They are listed below and further elaborated in Section 4.

Principles of substance

- **Engage and link both state and 'customary justice' actors involved in the penal process.** Access to state justice is limited and will remain so for at least the next decade or more.[131] Customary actors are, despite their many imperfections, suppliers of choice for the vast majority of Malians – in all likelihood also in criminal cases. Greater access to and better quality of criminal justice requires that the several systems of state and 'customary justice' develop and improve workable modalities for interaction that are based on mutual respect and recognition – even when a more present, fairer and accessible state-run penal process remains the ultimate objective.

- **When improving the penal process, prosecute what is feasible**. Cases for prosecution will need to be selected with care on the basis of a political risk and feasibility assessment. While this strategy may maintain the legal impunity currently enjoyed by elites, it has a better chance of improving the justice experience of the average Malian as a way station towards further change. Programmes that seek to strengthen the penal process could, for example, focus on cases that satisfy three criteria: a) they matter to the average Malian; b) their politics are manageable (for example, because they are local); and, c) if left unaddressed, they feature a risk of inciting violence which could be reduced through a correct legal process. This points to, for example, land and family disputes. Cases against elites could also be addressed when the outcome is likely to be determined by the process and not on the accused's connections. In the latter case, it would be better not to move forward at this point as pursuing a case with a predetermined outcome would be a waste of resources that could be better used to pursue cases where a neutral, integrity-based decision-making process is more likely.

- **Raising legal awareness at individual and community level can help reduce corruption in the penal process, as it seeks to create pressure for change from the outside**. High levels of illiteracy, small numbers of French speakers, and a lack of education make it easier for users of the penal process to be taken advantage of. Programmes in the media – radio in particular, given its high penetration rates – can be used to empower Malians with the substantive and procedural knowledge they need to be able to confidently identify and stand up to the corruption they are likely to encounter in the penal process. Such awareness-raising programmes could be jointly implemented by a broad group of actors consisting of the state, media and civil society.

- **Civil society and the media are, in all likelihood, critical change agents.** As there is significant entrenched resistance from governing elites, including from within the justice system, to address the major challenges facing the criminal justice system, change is likely to require a push

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[131] On the basis of historical calculations, the World Bank observed that the fastest 20th century reformers took 27 years to establish control over corruption and 41 years to significantly improve the rule of law (World Bank, 2011).

from the outside. Support for non-governmental organisations (NGOs) and investigative journalism could help to create the pressure for reform that is needed.

Principles of process

- **Take a bottom-up approach**. The track record of central efforts since 1992 to reform Mali's state judiciary is poor. Despite official protestations to the contrary, continued lack of independence, a negligible budget allocation and slowness in addressing widespread corruption all indicate minimal willingness for wholesale top-down reform. This suggests that a bottom-up approach that is locally grounded and made as independent from central guidance as possible may have a better chance of succeeding than trying more of the same.

- **Consider a pilot-based approach.** However necessary, system-wide reform efforts at national scale are hardly feasible at present because of the daunting array of issues discussed above. By way of alternative, programmes should consider engaging in one of two types of pilots. First, 'practical pilots' that improve the access and quality of justice in selected areas around the country. It is important that such pilots can be scaled up flexibly on the basis of results and improved insight resulting from local micro analysis of the penal process. Second, 'political pilots' that seek to remove or address a particular bottleneck in the state's justice system at its centre in Bamako. It is important that pilots of this nature enjoy strong and unified donor engagement and are designed on the basis of the logic of power and interests of Mali's political elites.

- **Conduct more in-depth analysis of the specificities and performance of the penal process in selected pilot areas.** What is currently largely unavailable in open source documentation is in-depth analysis of how various customary systems and the state's judicial system perform and interact at local level. This includes issues such as clarity of jurisdictional boundaries, how the various justice systems function and what legal choices plaintiffs have. As the answers are likely to be area specific, more detailed analysis needs to be conducted at this level to enable a programming set-up that can make a difference in improving access to and the quality of justice in that particular area.

4. International lessons and good practice for programme design

The aim of this section is to discuss critical lessons for programme design in fragile environments, lessons which have emerged from existing international programming experiences and practices. Given the vast range of literature available, the section offers a selective review of major academic, policy and practical works rather than a comprehensive review. It goes beyond justice-oriented programming experiences, as programmes in fragile environments tend to face similar challenges across thematic areas (of course, they also have their own unique issues, these are discussed in Box 4 below).

Reviewing international practice in development programming is a useful endeavour for three reasons. First, it provides a yardstick of globally emerging or established good practice against which the IDLO's intended Malian programme can develop. Second, it allows putting programmatic challenges that seem specific to Mali into an international context. This will make them look less unique and offers the possibility of learning from experiences elsewhere. Third, security and justice programmes have a high rate of failure and highlighting the causes of failure may help avoid it. Together with the preceding section, this review provides building blocks for making programmatic recommendations in Section 3.

The section first discusses the slowly changing international consensus of how developmental change happens and what this means for the results programmes can hope to achieve. Next, it discusses international progress in thinking through principles for development cooperation that are appropriate for fragile settings. This paints the broad policy canvas against which programming takes shape. Finally, it identifies four crucial enablers for security and justice programmes that are emerging from a comparative review of security and justice programmes across the globe.

Re-perceiving the dynamics of developmental change and the nature of results

International programming in fragile states tends to be premised on the assumption – often implicit – that 'radical and synchronised progress with democratisation, economic liberalisation and establishing the rule of law in the short to medium term is both possible and likely to accelerate transitions from fragility to stability'.[132] In short, it departs from a positive narrative with hints of linearity and a strong belief in the possibilities of social engineering. It is slowly percolating through the international community that this belief does not, in fact, reflect the political and social realities of most fragile states.[133] Its corollary, namely that social change is more akin to complexity theory, with numerous relations between interacting agents, feedback loops, permanent disequilibria, windows of opportunity and tipping points – in short, a decidedly non-linear and asynchronous affair – may have gained footholds in the policy discourse but remains far from doing so in most programming.[134]

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[132] Van Lieshout et al. (2010).
[133] For a more in-depth analysis of the issues at stake here: Valters, Van Veen and Denney (2015).
[134] Johnson (2007); Kleinfeld (2015).

In an effort to turn this mental shift of frames and expectations into practical approaches and tools, a growing part of the international community is embracing the term 'theory of change' to denote a reinvigorated process by which they identify, articulate and test the assumptions underpinning the initiatives and/or programmes they support. The professed aim of such efforts is to improve the quality of programming by allowing for critical testing of its assumptions through feedback loops and by making adjustments on the basis of findings and insights that emerge from such loops. While this principle is laudable, there is much confusion about the objective and meaning of theories of change. As to their objective, accountability and learning objectives often work at cross-purposes. As to their meaning, since the term is poorly defined, theories of change easily turn into new labels for already existing ways of working and activities.[135]

A logical consequence of the recognition that programmes need to be subject to permanent reflection and recalibration on the basis of actual experience is that agreeing detailed programme results at the start of programming cycles of three to four years tends to create a 'fake reality'. It reduces the scope for consultation with local stakeholders, the ability to seize windows of opportunity and the resilience to adjust to adverse political circumstances. Programmes are still too often conceived and executed in linear fashion, which is not reflective of the complex nature of social change (as outlined above), the time it takes to build capacity and coalitions, and the effort required to deal with the inevitable opposition that will emerge against any meaningful development programme. Against this backdrop, a number of useful conceptual insights have emerged that point to how programmes should be created with more tolerance for 'fragile messiness', flexibility in how they work towards results and the type of results they should aspire to:

Problem-driven iterative adaptation (PDIA): This term is shorthand for the view that programmatic interventions should address concrete problems that can be tackled in a piecemeal and experiential fashion, as this allows greater scope for learning, scaling and failure. It is based on the observation that more traditional programming (i.e., more linear and top-down, such as through national administrations) tends to result in reforms that are superficial adaptations with the aim of symbolically demonstrating to the international community that the change it desires is happening. However, since such reforms tend to be poorly grounded in contextual realities, lack broad coalitions of supporting change agents (and hence political capital) and are implemented in top-down fashion, the functionality they pretend to enhance typically does not actually improve in reality.[136] In short, PDIA offers a pragmatic, bottom-up philosophy of working on development problems.

Outcome mapping: The central idea of outcome mapping is to let go of the fiction that the activities and outputs of a particular programme can actually be attributed in a measurable manner to broader development impact (impact refers to the broader social effects of programme outputs). Instead, it offers a methodology to measure behavioural changes among local programme partners that can, directly or indirectly, be influenced by the programme. In this approach, outcomes are defined as 'changes in the behaviour, relationship, activities or actions of the people, groups and

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[135] Stein and Valters (2010); Valters (2014).
[136] Andrews (2013). The debate on PDIA is also known as 'Doing Development Differently' or 'Thinking and Working Politically'. See, for example, Duncan Green's blog entry of 28 October 2014 (online: consulted 25/3/15).

organisations with whom a programme works directly'.[137] In short, outcome mapping offers a method for monitoring programme progress and defining programme results that is based on relations.

Complex systems thinking. This set of concepts points to the need for programmatic interventions to let go of linear, progressive and/or input/output-based expectations of results. A key characteristic of complex systems is that they have 'many autonomous actors that have multiple interactions with each other'. In consequence, neither these actors nor their roles can be studied meaningfully in isolation. Agents shape the environment as much as the reverse is the case. This suggests a need for understanding feedback loops (small beginnings can have larger positive effects over time due to existing socio-political mechanisms, or take a negative direction for the same reason), tipping points (moments when developments acquire a self-propelling momentum) and path dependencies (the legacy effects of past developments that influence what represents meaningful change).[138] In short, complex systems thinking suggests that programmes should have modest expectations of well-defined inputs leading to well-defined outputs in short periods of time.

A number of more concrete points can be identified from these conceptual insights that are relevant to the IDLO's intended programme to strengthen the penal process in Mali:

- *Engage iteratively.* Make an iterative process for local problem identification, assessment and resolution, with structured and accepted possibilities for learning and failure, central to the programme.

- *Create new stakeholder coalitions.* Build a broad group of stakeholders beyond immediate target institutions to stimulate long-term change and to ensure that any change which can be realised has a constituency willing to defend it once pushback emerges. As it takes time and resources to build such coalitions without generating immediate results, patience is of the essence. In addition, the programme should feature incentives to stimulate collaboration between key programme partners (e.g., stakeholders advancing joint proposals having a greater chance of obtaining finance).

- *Emphasise learning over accountability.* If the programme has to work on the basis of a theory of change, it should serve the purpose of learning rather than accountability. Accountability in the transactional sense can be ensured by adequate financial and administrative management, while results can be realistically monitored through outcome mapping.

These points are further developed in Section 5 in the form of concrete programme recommendations.

Re-establishing principles for development partnerships in fragile settings

Moving from the nature of social change processes to the practice of development cooperation, a crucial observation is that the international development discourse has gradually shifted from the

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[137] Earl, Carden and Smutylo (2001).
[138] Kleinfeld (2015).

belief that the Millennium Development Goals (MDGs) (2000) offer a universally valid set of development priorities and the Paris Declaration (2005) a universally valid approach to the collaborative practice of development, to an acknowledgement that effective engagement in fragile environments requires different priorities and working methods on the part of international development actors.[139] The international development community has made good conceptual and political progress over the past few years in developing its thinking on what this acknowledgement means for its policies and approaches to fragility. Three markers stand out. First, the OECD's work on peacebuilding and statebuilding has long pointed to the need for a more nuanced conception of the social contract, state-society relations and peacebuilding priorities.[140] Second, the World Bank's 2011 World Development Report brought home some of the ground truths of working in fragile environments in relation to violence, security and justice – one being, for example, that the rule of law is among the toughest areas in which to bring about change and hence typically features the slowest progress.[141] Third, the *New Deal for Engagement in Fragile States* represents the most recent agreement between over 40 fragile and developed countries on the priorities and modalities for development cooperation in fragile environments.[142]

However, it can be stated with confidence that the rate of change in improving the quality of concepts and policies pertaining to fragility and conflict has significantly outpaced the rate of change in improving the quality of programming in these environments. For example, a series of conversations with over 6,000 people on the receiving end of aid across a range of (largely) fragile states echoed – as recently as 2012 – many of the deficiencies in international development practice that have been known for years.[143] In other words, the hard-won insights into the operating realities of fragility are much better reflected in international policy than they are in international programming.

This is partly the result of the vested interests and routine behaviours/procedures of existing development actors (bilateral and multilateral): policy changes are relatively easy to realise while administrative and behavioural changes are much more difficult to accomplish.[144] The crucial message here is that the IDLO's intended programme to help improve the penal chain in Mali will not automatically benefit from the hard-won insights that have been established over the last decades. Making this happen, and ensuring the programme becomes both reflective of such lessons and innovative in how it leverages them in the Malian context, will require a significant effort by both the Dutch Embassy as the programme's funder, the IDLO as its operator and Malian justice institutions as its primary stakeholders.

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[139] For an in-depth discussion of more traditional aid effectiveness-related barriers to the impact of Official Development Assistance: Riddell (2007).

[140] For the main publications under this line of OECD work: http://www.oecd.org/dac/governance-peace/conflictandfragility/sb.htm (consulted 22/4/15).

[141] World Bank (2011).

[142] The 'New Deal' is an initiative of the International Dialogue for Peacebuilding and Statebuilding (IDPS) that was concluded at the Fourth High Level Forum on Aid Effectiveness in 2011 in Busan. The IDPS is a joint endeavor of 40+ Western aid providers (united in the OECD) and fragile states (united in the g7+ grouping). While Mali is not a signatory to the 'New Deal' – the initiative's core political document – the Netherlands is. Since the New Deal is based on significant evidence that has been amassed over time, a series of in-country stakeholder consultations (online: consulted 22/4/15) and two years of diplomatic negotiations, it enjoys broad relevance and validity across fragile environments in general. For an overview of this international diplomatic initiative: http://www.newdeal4peace.org/ (consulted 22/4/15).

[143] Anderson, Brown and Jean (2012); see also Valters, Van Veen and Denney (2015).

[144] Natsios (2010); Andrews (2013); Valters, Van Veen and Denney (2015); Anderson, Brown and Jean (2012).

A particularly thorny matter is how the programme can ensure a continuous and collaborative approach to shaping its own implementation trajectory. In general terms, financial dependencies, administrative 'proceduralization'[145] and accountability demands with respect to funds distort the ability to really engage with local priorities and dynamics and to maintain, at a minimum, a balance between development demand and supply that is necessary for successful programmatic interventions.

The intended programme has made a good start in this regard in the form of a series of workshops with local justice stakeholders in Gao, Mopti, Ségou and Timbuktu (late 2014), and again in Mopti (2015) where participants discussed ways in which the penal process in Mali could be improved in a more bottom-up fashion with Malian justice stakeholders.[146] While some of the workshops did not necessarily benefit from much upfront analysis of local justice problems as experienced by different segments of the population of these localities, and were somewhat skewed towards representation from the state justice system, they nevertheless made a good start in engaging a community of practitioners who could stimulate change. They also raised a number of initial working priorities. Continuing and expanding this process is as necessary as it will be time-consuming. A clear implication for the programme is that it needs to dedicate resources and time from the start to a line of activity that enables continuous deliberation. As programme staff will also need to expand significant effort to get the programme's organisation up and running and deliver against initial working priorities, dedicated managerial attention will be required to realise this.

Helpfully, the aforementioned *New Deal for Engagement in Fragile States* – as the leading international agreement that provides guidance on such issues – offers a number of starting points for putting a permanent process of deliberation and conversation in place. Specifically, it sets out 'new ways of engaging to support inclusive country-led and country-owned transitions out of fragility' – those that are crucial in the context of this programme include:[147]

- conducting a periodic country-led assessment on the causes and features of fragility;
- developing one vision and one plan to transit out of fragility. This vision and plan will be country-owned and -led, developed in consultation with civil society and based on inputs from the fragility assessment. Plans will be flexible so as to address short-, medium- and long-term peacebuilding and statebuilding priorities;
- conducting credible and inclusive processes of political dialogue;
- conducting joint assessments of specific risks and identifying joint mechanisms to reduce and manage such risks, in the realisation that the risks inherent in not engaging during fragile transitions tend to be greater than risks inherent in engaging;
- strengthening the capacity of country systems as the primary channels for development funds and to ensure better anchorage of development efforts.

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[145] Term coined by Anderson, Brown and Jean (2012).
[146] The informal reports of these five meetings give a good impression of the ambiance and direction of discussion (unpublished, in possession of the authors).
[147] The bullet points that follow are largely derived from the FOCUS and TRUST sections of the New Deal for Engagement in Fragile States (2011) (online: consulted 22/4/15). Principles not mentioned here include the need for compacts, monitoring on the basis of the New Deal's Peace- and Statebuilding goals, as well as the timely and transparent provision of aid. These principles are also framed at national level but are more difficult to translate meaningfully to programmatic level.

While these principles are framed at national level to guide the broad set of relationships between a country's development partners and its authorities, it is a fairly straightforward matter to translate them into implications for programming relevant to the IDLO, as is shown in Table 2 below.

Table 2: Application of four key New Deal principles to justice programming in Mali

New Deal principle	Practical application in a programme focused on the penal process in Mali	Background
Jointly conduct a fragility assessment [in Mali: jointly conduct a justice assessment]	• Organise/build local research capacity • Develop a local 'state of justice' baseline (state and customary) for each locality at the start of the programme • Ensure these baselines are discussed by key Malian programme partners in that locality	While the workshops mentioned provided initial working priorities, these are insufficiently grounded locally and will undoubtedly prove to be contested.
Develop one vision and one plan [in Mali: develop a flexible, locality-specific vision and plan for improving the penal process]	• Set up the programme as a general framework with relatively broad categories of activity • Develop a specific vision and improvement plan for each locality that can be implemented on the basis of research results and political realities • Ensure flexibility of funding to act on the basis of locally established plans	The workshops already conducted can be extended and used to develop a shared local understanding of necessary justice improvements. Their range of participants will need to be expanded.
Conduct a process of political dialogue [in Mali: stimulate a permanent dialogue on justice needs with a focus on the penal process]	• Create local fora to discuss the local politics of justice improvements between customary and state providers of justice, as well as citizens. This is likely to need a preceding trust-building effort • Include a parallel track of diplomatic network building and advocacy in Bamako (by the Dutch Embassy with support from the IDLO) as 'part of the programme'	While the workshops provided working priorities, the reasons and dynamics behind them were hardly discussed (e.g., corruption). Some are political and addressing them requires a permanent conversation on what is possible. Inclusivity is important, as the workshops were slightly state dominated.
Jointly assess and manage risks [in Mali: jointly assess and manage risks]	• Work with Malian stakeholders engaged in the programme's governance to develop risk assessment procedures and criteria that the programme will use to determine whether/how to proceed under changed circumstances	Risk management issues have not been discussed so far, but given the level of corruption and interference in the justice sector, incidents are bound to occur. It needs to be clear how these will be dealt with.
Strengthen the capacity of country systems [in Mali: develop a strategy from the	• Gradually embed the programme's organisation and finances at either local or regional level • Engage key Malian decision makers in conversations on what a gradual strategy towards, and crucial conditions for, a	While the national justice architecture currently does not offer a good starting point for hosting the programme's organisation or managing its finances (see Section 1), the

start to anchor the programme's delivery structure in the national justice architecture]	transition from international to national programme management could look like	programme's delivery mechanisms need to be ultimately grounded herein to increase sustainability when the programme completes after five years.

These points are further developed in Section 5 in the form of concrete programme recommendations.

Key enablers for security and justice programmes

Moving from general development cooperation principles and programming challenges to those that pertain specifically to security and justice, it is noteworthy that the prevailing approach to security and justice programming is top down (i.e., working through national administrations, central government and executive agencies), relatively linear and prioritises train, build and equip-type activities.[148] They tend to downplay or ignore the crucial governance dimension of security and justice.[149] It is equally noteworthy that many such programmes have failed to make a lasting difference. While this is, in part, the result of the set of issues that make achieving sustainability a very difficult matter in development more generally,[150] the political sensitivity of the issue area (see Box 4 below), combined with severe deficiencies in international programming approaches, also plays an important role.[151]

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[148] This section largely reflects a forthcoming OECD report that examined nine security and justice programmes actors across four countries (Burundi, Guatemala, Sierra Leone and Timor-Leste), which are supported by seven different development actors. This study looked at how those programmes have sought to help improve the delivery of security and justice in the face of complex programming challenges, how they have tried to overcome such challenges, and whether the approaches they took worked or did not work. Alternative studies that support many of its findings include: Sedra (2010); ADE (2011); Kavanagh and Jones (2011); Porter, Isser and Berg (2013), Independent Commission for Aid Impact (ICAI) (2015).
[149] For a brief overview of the rise and fall of governance as a key component of security and justice programmes: Sedra (2010); Ball (2014).
[150] Riddell (2007).
[151] See for instance: EC (2011); Kavanagh and Jones (2011); OECD (forthcoming); ICAI (2015).

> **Box 5. What makes security and justice programmes different?**
>
> The most important characteristic of the security and justice area that makes it stand out from other developmental programming is that it is exceptionally political. The primary reason is that elites use security and justice institutions as tools for maintaining political and social control, as well as personal status and privilege. Security and justice institutions can be used to pursue interests and enforce decisions – with immediate effect and in ways that result in the loss of life, property or freedom – and this makes them crude but effective levers of governance and social control. Security and justice institutions, if used by elites to maintain their privileged status, tend to serve the few to the detriment of the many. No other area of development in fragile environments is as relevant or closely linked to power dynamics. Political settlements, constitution-building processes and peace agreements – all highly sensitive in their own right – can be undone by force or by law. In consequence, there is typically great resistance to meaningful changes in the governance and accountability of security and justice institutions. The crucial ramification of this characteristic is that security and justice programmes must be able to discern political motives and assess the political feasibility of change on a continuous basis, to learn, influence and adjust in dynamic political environments, and to mobilise high-quality personnel and financial resources.
>
> *Source*: OECD (forthcoming); see also: North, Wallis and Weingast (2009); World Bank (2011).

More precisely, the political nature of security and justice provision creates four specific barriers to programming success that the IDLO's intended programme in Mali is also likely to face:

First, the overlap between the interests of those in power, the general population and development actors might be limited. As a result, time and effort will have to be spent early on to ascertain which issues, if addressed through a programme, are likely to enjoy a measure of support from all three sets of stakeholders. Such consensus is important to success because it creates the resilience that programmes need to overcome adverse events or to capitalise on windows of opportunity. A programme without some support from each of these groups of stakeholders runs the risk of failing as a result of an absence of 'political will', a lack of popular legitimacy, or evaporating domestic support in donor capitals in reaction to 'ugly' events such as human rights violations. None of these groups of stakeholders is a monolithic entity, which means there is room for stakeholder-based influencing strategies. Hence, it is vital for programmes to be interest-sensitive and, at least in part, interest-based.

Second, external development actors will have to work hard to earn the political trust that is vital to programming success. As security and justice institutions represent tools of power, external actors – who often also bring their own security agenda to the table – will not necessarily be trusted to influence change. As a result, they need to earn the trust and confidence of local change agents. To accomplish this, programmes need to excel in relationship-building, be capable of demonstrating principled flexibility in implementing activities and delivering results, and include confidence-building measures (e.g., in the form of dedicated projects) that deliver short-term positive results. The dilemma here is that a trade-off may be involved in building trust with parts of the elite in power (necessary for success) and with parts of the population (necessary for legitimacy).

Third, programmes are likely to progress at a slower speed and deliver more modest results than desired by some (international) stakeholders. Political change in the security and justice area is tough

to achieve. Hence, comparatively more time, efforts and funds are needed to generate the ideas, momentum and sense of urgency that can drive positive change. For example, security and justice programmes will typically require more and better human resources and will need a higher level of tolerance for delay and risk-taking than other programming in fragile contexts.

Fourth, and finally, the consequences of getting support for security and justice programming wrong can be serious. It can directly affect the security of individuals or groups, support state illegitimacy and contribute to instability. This puts a premium on conflict-sensitive approaches to programming. A practical lesson for programmes is that they must feature regular political economy analyses that truly inform programme activities. This will increase their research and human resources cost. While this may appear obvious, a good number of security and justice programmes continues to lack a basic monitoring system. Only a few conducted political economy analyses, although none did so in a regular and systematic way.[152]

The question that matters is, of course, how these barriers can be overcome by security and justice programmes such as the IDLO's intended programme to strengthen the penal chain in Mali. The OECD study (forthcoming) that this section reflects proposes four critical programming enablers as an interdependent and crucial package for ensuring adequate programming quality. The enablers should be understood as necessary but not determinant factors for programming success, i.e., success will be hard to realise without them but they do not guarantee it. They are briefly outlined in Table 3 below.

Table 3: Key enablers for high-quality security and justice programmes

Key programme enabler	What it means	How it can be done
Enable programmes to engage politically on a daily basis	Programmes are able to act quickly in response to broader political developments that have programming implications, and can address political issues that arise in the programming context itself. Creating this ability requires a combination of ongoing political economy analysis, the establishment and maintenance of strong informal relations, decision-making structures that allow for issue escalation, and staff with a sound understanding of both politics and programming.	• Ensuring high-level political support • Building informal networks • Conducting ongoing analysis • Smart staffing of strategic positions
Increase the duration of security and justice programmes to 6-10 years	Programmes have more time to understand the context in which they operate, learn from experience, build relations, define results and work on their sustainability. It does not mean that they have to be fully funded upfront for this period. What is critical is articulating a political commitment to conduct the	• Authorising longer programmes • Designing a series of successive programmes • Putting in place a Memorandum of Understanding

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[152] OECD (forthcoming).

	programme as a partnership for a significant period of time.		
Develop detailed longer-term results as part of the programme	Programmes define only intermediate results at their start and put a process in place to develop longer-term results. Current practice shows that when results are set up front, they are more likely to reflect the views of international actors rather than national stakeholders. A meaningful joint articulation of results often requires a relationship, some capacity and shared experience. It is important to deliver on selected immediate priorities while developing detailed longer-term results.	• Creating a 'theory of change' that can be revisited over time • Agreeing on a programming framework that can be developed over time • Starting small and scaling up	
Ensure programme implementation is adjustable	Programme implementation is not a more or less mechanic sequence of agreed activities, but a dynamic and adjustable process that responds to implementation experiences and broader political developments. It requires programme implementation resources to be organised flexibly. Flexibility can come with higher costs, which will need to be considered acceptable.	• Setting up a flexible/unallocated pool of funds • Conducting joint monitoring • Creating mechanisms that enable staffing flexibility	

Source: OECD (forthcoming).

Section 5 provides more concrete suggestions on how these programme enablers can be implemented practically in the IDLO's intended programme in Mali in the form of concrete recommendations.

Implications for programming

It should be emphasised that the insights discussed in the preceding pages have not found great resonance in actual programming practice because they are difficult to implement. This is the case for three reasons in particular. First, donor tolerance for the risks associated with more innovative approaches has generally remained low despite the obvious costs of continuing business as usual. Second, creating and implementing programmes that have (some of) the above features puts high demands on organisational learning abilities, something that many aid organisations are not well equipped for. Third, the learning curve introduced by such programming will inevitably be confrontational, if only because the organisational values and individual preferences of both funders and implementers will be challenged at some point. However, if the IDLO wishes to create a more innovative programme to engage with the penal chain in Mali, it should consider a different way of programming compared to prevailing international standards – in line with the issues discussed above – and secure agreement from the Dutch Embassy to do so.

5. A programming proposal to strengthen the penal process in Mali

This section outlines building blocks for a programme that could strengthen the penal chain in Mali. The intention is that these building blocks serve as inputs for further work on how such a programme should be designed and implemented by the IDLO (as the programme's intended operational lead), the Dutch Embassy in Bamako (as the programme's funder) and selected Malian justice actors (as the programme's main stakeholders). It explicitly does not seek to provide a programme blueprint, as that would be both impossible (given the limited amount of in-depth field work conducted for the report) and inappropriate (given the lack of involvement of Malian stakeholders in its writing).

However, the section does seek to offer concrete ideas on issues like strategic and operational approaches to the programme that might be considered, general programme objectives, appropriate entry points for concrete activities and monitoring. It is much less detailed on matters like operational programme objectives, suitable projects and financial aspects, as these would need to emerge more organically from the programmatic experience itself.

As a general starting point, the preceding analysis suggests five key premises on which to base programme design and implementation:

1. *In terms of its strategic approach*: To develop a bottom-up, pilot-type programme that commences operations on a limited number of issues in a limited number of 'justice localities' and which could be scaled up as experiences, learning and results permit.

2. *In terms of its objective*: To identify and realise incremental local improvements in the accessibility and quality of criminal justice. Two important conditions must be met to enable such improvements: a) gradually establishing a more fine-grained understanding of the realities of criminal justice provision in the selected localities; and b) ensuring sufficient political buy-in at the level of the Ministry of Justice in Bamako to create and maintain permissive local spaces for experimentation.

3. *In terms of its operational approach*: To introduce a collaborative way of working in which three groups of stakeholders have maximum autonomy to set the operational direction of the programme in each locality within preset strategic boundaries. These groups include: a) local state representatives of the penal process; b) 'customary justice' actors; and c) civil society representatives.

4. *In terms of its entry points*: To start programmatic activities in the form of projects that address a selection of the priorities discussed in the four workshops with Malian justice stakeholders held in Ségou, Mopti (twice), Gao and Timbuktu in 2014-2015. While these priorities do not necessarily reflect issues that are locally shared by those in need of better justice, they do offer a starting point for engagement. It is crucial that their implementation is designed as a learning experience.

5. *In terms of monitoring its progress*: To monitor programme implementation on the basis of a set of development milestones mapped against the programme's lifetime that provide a gauge of internal progress, and on the basis of behavioural changes in the programme's main Malian stakeholders with whom it collaborates and who provide a gauge of programme effects.

Each of these issues is further developed below as a concrete building block for the intended programme.

Strategic approach: Scalable local pilots at different speeds

Several factors in the preceding analysis point to the need to try to improve Mali's criminal justice system through local pilots that could essentially be seen as discrete but linked experiential areas for reform. In particular, the volume of past effort and the limited level of success of top-down reform through the centre of the Malian justice apparatus in Bamako suggest that doing more of the same is unlikely to make a difference.[153] For the time being, barriers to comprehensive reform must be considered too formidable to overcome. To this must be added the impression that joint donor strategising, coordination and action in the justice area are in a poor state, with the consequence that international actors have little leverage in this area, that competing demands are being put to the Ministry of Justice in Bamako and that some features of international programmes overlap.[154] Nevertheless, a more bottom-up, local and pilot based-approach is not without its difficulties:

- *Creating capacity first*: Capacity for effective programme implementation appears to drop as a function of distance from Bamako. This goes equally for the capacity of the state's criminal justice system, local research capacity, international actors and programme implementers. In consequence, a programme that seeks to work on the basis of local pilots will need to expend significant effort in creating more local capacity from the start. Although such capacity should largely be local or regional in nature, it will generate higher overhead costs and require more time than might be anticipated. In particular, capacity will be required to support local justice actors to: agree on priorities, design projects and implement them; build local research capacity that could help identify local justice priorities; and set initial programme activities in motion that would be able to learn from experience.

- *Start slowly and appreciate diversity*: As a result of the preceding observation, it stands to reason that it is advisable to bring the different pilots online in a sequenced manner as a function of their respective speeds and readiness. It is inevitable, perhaps even desirable, that some will be ready before others and that some will move faster than others. This should be considered acceptable without artificial efforts being made to have all of them progress along the same track at the same rate.

- *Organise resources flexibly*: In consequence, resources should be organised in a manner that allows for progress at variable speeds in different justice localities. By resources, we mean

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[153] On this point, see also: Van Veen et al. (2015), *op.cit.*
[154] Author's interview 2/4/15 B; Dutch Embassy Bamako (2015), *État de Droit et Justice: Inventaires des Programmes des Partenaires*; Informal overview (unpublished).

human, financial and organisational resources; in other words, they should be adjustable, pool-able and scalable. For example, while budgets can be allocated to each pilot site for a given year, the overall budget should have a large contingency provision that could be easily mobilised for use should windows of opportunity open or the pace of implementation in a given locality accelerates.

Objective: Incremental improvements that matter locally

It follows logically from the local focus proposed above that the programme's main objective should be to realise incremental *local* improvements in the accessibility and quality of criminal justice. The assumption behind this objective is that local improvements in criminal justice would both directly benefit the population of the localities involved and create nuclei of change constituents that, with continued external support, could gradually increase the pressure for change on the central elements of Mali's justice system in a productive and positive exchange. However, the research conducted suggests that the viability of the assumption is contingent on two factors:

First, a better understanding of local justice priorities must be created. The combination of the diversity of 'customary justice' actors involved in criminal cases with the relative state domination of the aforementioned workshop suggests that a continuous process of deeper micro-analysis at community level is essential. Such analysis should focus on establishing what local justice problems look like, who faces those problems, what consequences they have on the lives of those living in a particular locality, and the strengths and weaknesses of the institutions presently expected to address the problems. The analysis must be conducted by local or regional experts, and perhaps benefit from some international support on methodology. Its result should be a fine-grained map of local justice realities, issues and directions for solutions. Its initial version could serve as the baseline for programmatic activity in a given locality and could also suggest a number of better-anchored over-the-horizon programming objectives for that area. Subsequent iterations could help track programme progress and feed into its monitoring efforts, which are discussed below.

Second, tolerance from the centre must be maintained to use the programme's pilots as experiential areas for reform. In particular, efforts to improve criminal justice at local level will run into a number of issues – most prominently independence challenges (i.e., inappropriate interference with due process), appointments/rotations and budget allocations – that can very nearly only be addressed in Bamako. In consequence, the programme needs the support of a diplomatic advocacy effort – most logically from the Dutch Embassy in Bamako – that is supported by programme analysis as well as change-oriented coalitions of donors and Malian justice stakeholders. While such an effort would not necessarily have to be part of the programme (to keep it manageable), it should be designed in tandem as a complementary track of activity. It could consist of the following activities:

- conducting a strong diplomatic effort to formulate an agenda for dialogue about judicial reform that all relevant donors are willing to push for – building on existing fora and efforts to the extent that they are functioning;

- setting up a platform for exchange and knowledge generation about possibilities for judicial reform that gradually brings relevant state, 'customary justice' and NGO representatives around the same table in Bamako a couple of times per year;

- support for a national centre for judicial analysis, through either an existing research centre or a university, that would also gradually build up research antennae/capacity in the programme pilot areas. This element could also extend to sponsoring faculty research on the implementation of criminal justice reform at local universities.

Operational approach: Local autonomy and collaboration

Using the pilots to create local justice improvements and to stimulate the emergence of new stakeholder coalitions for longer-term change is likely to require a difficult-to-achieve balance between giving each locality sufficient autonomy vis-à-vis central programme management and stimulating cooperation between key justice stakeholders in each locality in the context of such autonomy. The report's earlier analysis suggests that the main actors that need to be involved include:

- high-level *local* representatives of the state judiciary including, at a minimum, the judicial police, the prosecution, the bench and/or justices of the peace (where these still operate);
- representatives of 'customary justice' actors including, at a minimum, local village, community and religious leaders;
- representatives of local NGOs or Bamako-based NGOs with a local presence, as well as defence lawyers (where present);
- local research centres or Bamako-based research centres willing to establish a local presence.

The need for local autonomy versus the need for central programme management could largely be resolved through the organisational design for programme implementation. This was discussed extensively in the Mopti workshop on 30-31 April 2015 (see methodology for more detail) and the brainstorming generated Figure 2 below as a prototype for the programme's management structure. Its design and the associated responsibilities could be further tweaked and fine-tuned of course. Cooperation between a broad range of actors within each locality could be stimulated by a combination of local programme support capacity, teambuilding and funding incentives:

- Local programme support capacity could take the form of a 0.5 or one full-time equivalent support position in each locality, with the Malian justice actor willing to chair the local gathering of key justice stakeholders and tasked with serving as its secretariat (including facilitation of both a substantive agenda and logistics).
- Team building could start at a facilitated kick-off meeting for the programme that would include a social component, and could continue through exchange visits to either other pilot localities that are part of the programme, or other Malian towns.
- Funding incentives could take the form of requiring a minimum of two signatories from the four categories above on any funding proposal (in the style of the Peace Building Fund) and a higher

number of signatories for greater amounts of funding (thresholds should be clearly set in advance).

Figure 2: Possible organisational structure for the programme to ensure maximum local autonomy

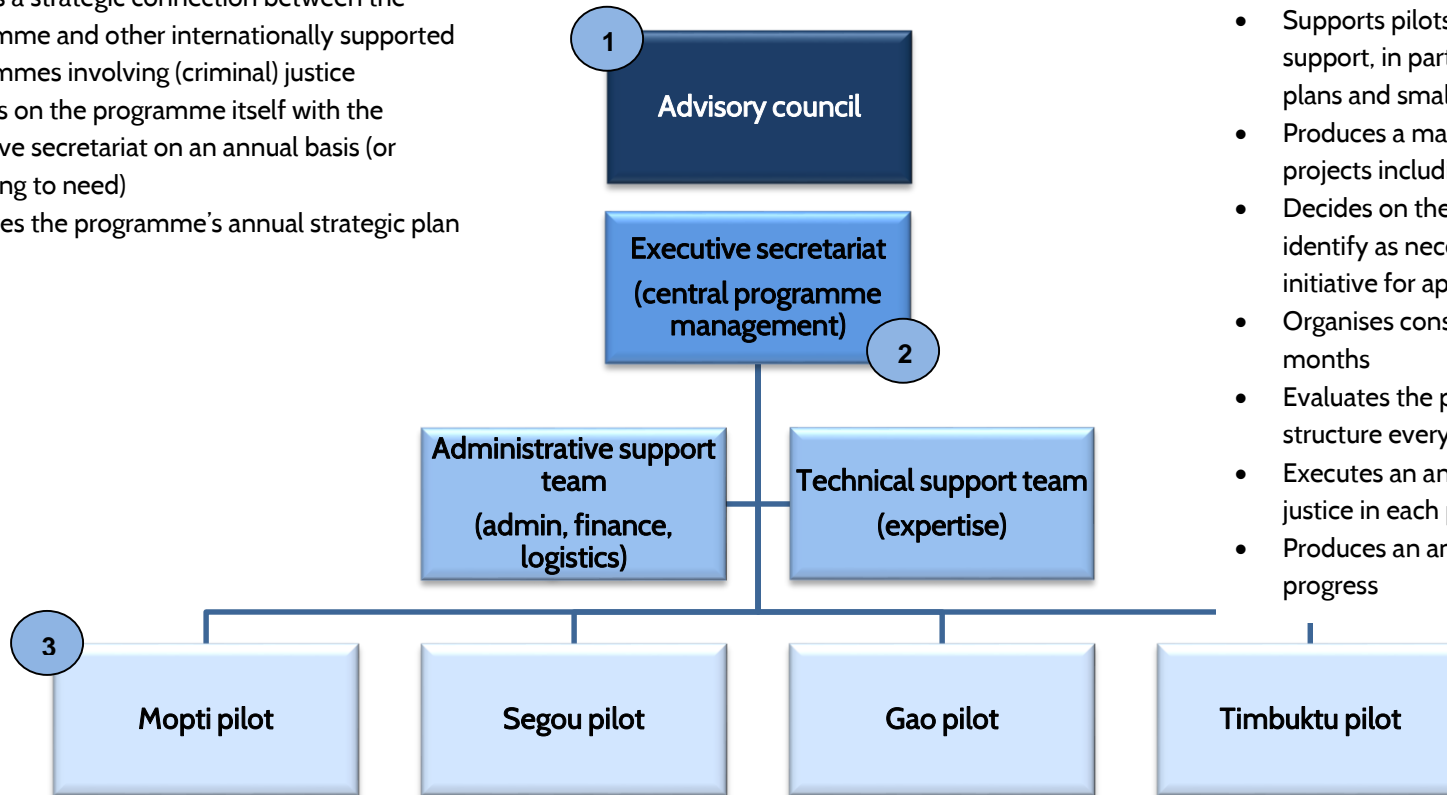**(1) Advisory council: Roles and responsibilities**

- Addresses barriers to initiatives or projects that cannot be overcome at local level
- Ensures a strategic connection between the programme and other internationally supported programmes involving (criminal) justice
- Reflects on the programme itself with the executive secretariat on an annual basis (or according to need)
- Approves the programme's annual strategic plan

(2) Executive secretariat: Roles and responsibilities
Includes both support teams

- Produces the programme's annual strategic plan
- Validates local strategic plans
- Supports pilots with technical and administrative support, in particular with respect to local strategic plans and small-scale activities
- Produces a manual with operating guidelines for projects including financial requirements
- Decides on the methodology for studies that pilots identify as necessary. Proposes studies on its own initiative for approval by pilots
- Organises consultations between pilots every six months
- Evaluates the programme's organisational structure every six months
- Executes an annual study on the state of criminal justice in each pilot
- Produces an annual report on programme progress

(1) Advisory council

Executive secretariat (central programme management) **(2)**

Administrative support team (admin, finance, logistics)   **Technical support team (expertise)**

(3) Mopti pilot   Segou pilot   Gao pilot   Timbuktu pilot

(3) Pilot areas: Roles and responsibilities
Each pilot area is supported by a (part-time) coordinator who represents the executive secretariat

- Identifies local priorities to strengthen the penal process by unanimity. Ensures they are included in a local strategic plan that is designed for a six-month implementation period
- Meets on a monthly basis
- Ensures programme coordination with initiatives by other international partners

- Identifies studies examining specific aspects of the local penal process in support of the local strategic plan
- Approves small-scale activities on the basis of a two-thirds majority and two signatories from different stakeholder categories, using a simple, standard template
- Produces a short progress report every six months (including financial aspects)

Possible entry points: Leveraging the results of the Mopti workshop

Operationalising the programme, identifying local justice priorities on a more inclusive basis, putting the required capacity in place and setting up appropriate funding mechanisms will take time. Meanwhile, the existing momentum for this programme-to-be should not be lost – the series of workshops discussed before has already generated useful starting points that the programme could use for an initial set of initiatives. This set should not be conceived of as a representative set of justice priorities specific to a particular pilot, but rather as an opportunity to develop relations, share experiences and extract lessons while a more detailed local analysis of justice priorities is undertaken and programme structures developed. Hence, it is important that the initial set of activities is kept small, manageable and focused on learning. Specifically, the Mopti workshop of 30-31 April synthesised the priorities discussed at the previous four workshops in two breakout groups and arrived at the suggestions set out in Table 4.

Table 4: Breakout group priorities for improving the penal process across pilot areas

Priorities breakout group 1	Priorities breakout group 2
Provide dedicated training, on-the-job training and education to improve legal skills and competences	Increase capacity building, both initial and continuous, to increase legal skills and competences
Improve the security of officials working in the penal process, as well as of victims and witnesses (particularly in the north)	Address security issues that threaten due process, notably in Gao and Timbuktu
Construct the buildings and infrastructure necessary for processing cases properly	Address the shortage of sufficient and adequate facilities, including court buildings and prisons
Improve the documentation of cases	Address the lack of legal materials available in localities, such as overviews of recent legislation, jurisprudence and commentaries
Address the 'performance crisis', broadly understood as the collection of issues that hinders the correct adjudication of cases	Work to increase the allocation of resources from central funds/budget

Legend: The different shades of blue indicate where convergence exists between the top five priorities identified by each breakout group. Orange indicates partial convergence. Breakout groups consisted of 12-15 participants from all of the intended pilot sites.

Progress monitoring: Markers for programme development and behavioural change

The proposed orientation and management of this programme is fairly complex. In consequence, it would be useful to conceive of monitoring along two different lines, one internal and one external. Internal monitoring serves the purpose of assessing whether the speed with which programme mechanisms necessary for generating outputs come online is sufficiently fast and effective to give the programme a chance of succeeding. External monitoring serves the purpose of establishing –

with the programme's Malian stakeholders – whether the programme is gradually effectuating the change it seeks, and to learn from its successes as well as failures so that the programme can be adjusted during implementation. Ideally, these two monitoring dimensions should be roughly connected to each other, but that can only be done after their basics are agreed and put in place.

In terms of internal monitoring, the report proposes a number of markers for strategic programme development, as reflected in Table 5 below. They are largely based on the operational structure outlined in Figure 2 above, which in turn is mostly a product of the aforementioned Mopti workshop.

Table 5: Internal markers for strategic programme development

2015	2016	2017	2018	2019	2020 (Summer)
Programme staff recruited Initial activities in each pilot up and running First global strategic plan developed First session of the advisory board Local research capacity created	First local strategic plans developed Baselines conducted in each pilot First comprehensive annual report Quick progress review Local research capacity further developed	Design and implementation cycle for local strategic plans fully operational First conversation on institutional anchorage in existing Malian justice/ governance structures Reconsider programme expansion to Kidal as 5th pilot	Start conversation with other donors on post-2020 programme merger possibilities More extensive progress review	Programme institutional anchorage in existing Malian structures ensured Clarity on programme continuation and financial possibilities	To be identified

Note: These markers focus on the pilot-based part of the programme, i.e., they do not include the complementary diplomatic advocacy component proposed above.

In terms of external monitoring, it would seem that the methodology of outcome mapping[155] might be appropriate. This is because the track record of justice reform in Mali in the sense of change beyond training, new policies and new infrastructure is not great. Outcome mapping focuses on understanding behavioural change among key programme stakeholders and offers a useful gauge of changes in behaviour, relations, activities and actions of those with whom the programme would work directly – not of tangible material outputs. It sees these partners as change agents whom it could influence and assumes that positive influence has positive impact further down the line although that is, methodologically, too difficult to measure directly. In consequence, it is a participatory monitoring method, which resonates well with the programme design process to date.

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[155] As described in Earl, Carden and Smutylo (2001).

As outcome mapping is an established monitoring method, its use by this programme would only require a series of simple steps:

- an initial training of selected staff and/or stakeholders in the outcome mapping methodology, for which external expertise would need to be sought (this would take 2-3 days);
- a series of workshops in each pilot to design an outcome map for the programme specific to that particular locality. This workshop could usefully double as another consultative moment in the process of programme design, using both this report and the preceding series of workshops (this would take about 2-3 days each);
- a concluding workshop to design an outcome map for the entire programme (this would take about a day);
- regular monitoring sessions throughout the lifespan of the programme with preceding data collection moments (about one day per session).

While this may seem resource intensive, it should be recalled that many programmes feature inadequate monitoring systems because such systems are added onto the programme as an afterthought rather than as an integral part of its design. Capacity to monitor is often kept at a minimum, which reinforces the tendency to monitor countable outputs. An effort to set up a monitoring system such as outcome mapping would amount to a serious monitoring effort that does, of course, require resources.

6. By way of conclusion

With the aim of developing concrete programmatic building blocks for the IDLO's intended programme to strengthen the penal chain in Mali, this report began by making a case for broadening the understanding of Mali's penal process beyond the confines of the state. It then traversed the main performance challenges that the state-run penal process faces and took stock of international insights into, and practice of, development programme design and implementation. This journey, supplemented by findings that emerged from four workshops with key Malian justice stakeholders in 2014-2015 in Ségou, Mopti (twice), Gao and Timbuktu, has produced a number of useful insights and clear recommendations on how to put a programme in place that could strengthen the penal chain in Mali. These are summarised in Figure 3 below.

Figure 3: Summary of proposed programme building blocks
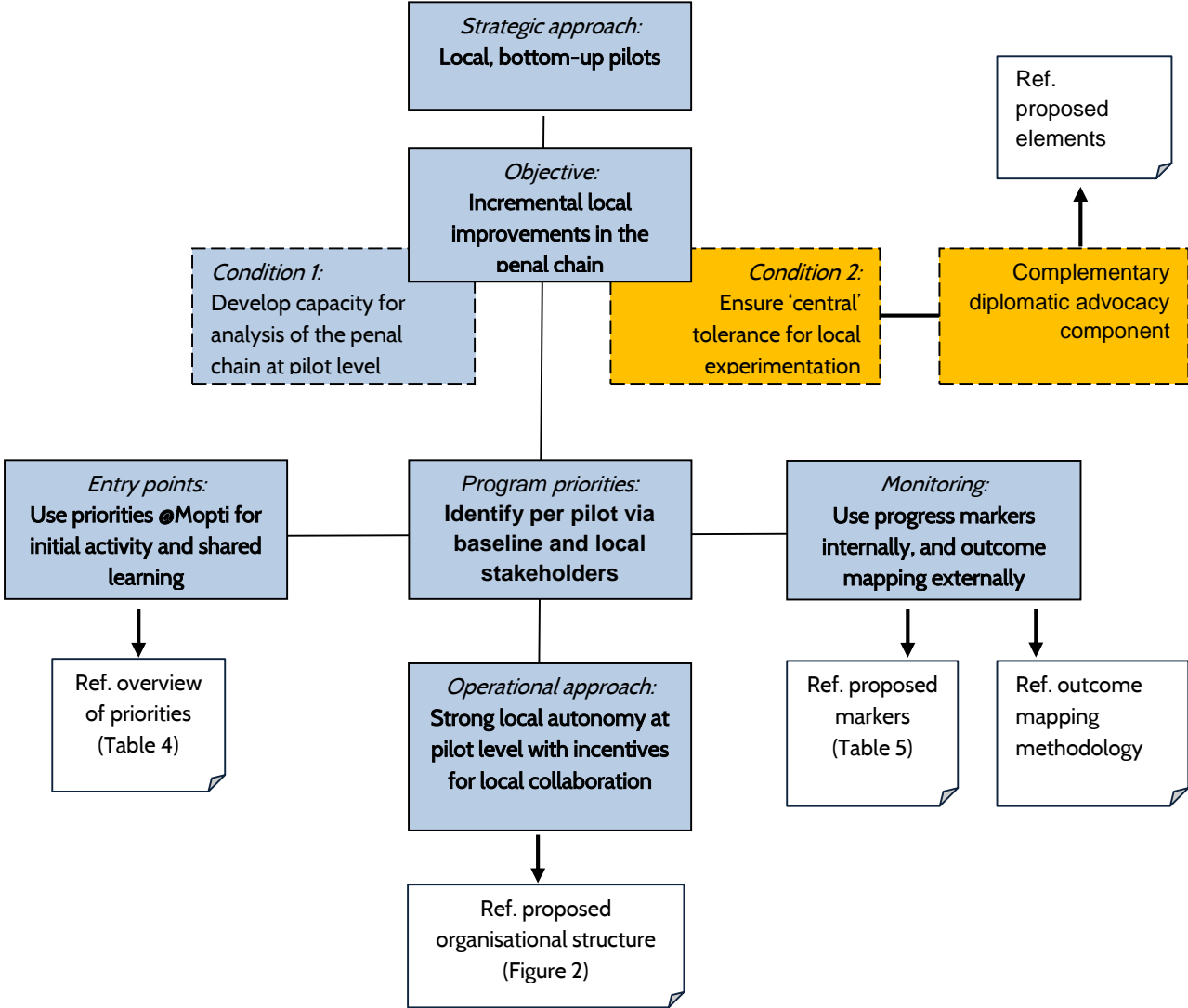
On a final note, it should be emphasised that these building blocks are best seen as elements for follow-up work between the IDLO, the Dutch Embassy and key Malian justice stakeholders. They could ultimately be developed into a full-fledged programme document.

Annex 1: Methodology

This report has been produced at the request of the International Development Law Organization (IDLO) with the aim of serving as an advisory input into its plans to design and implement a programme in Mali that seeks to strengthen the country's penal process. As the report was researched and written on a tight timeline from mid-January to mid-May 2015, it does not provide either historical analysis or a complete overview of all aspects of Mali's penal process. Instead, it focuses on the issues that emerged as the most salient ones. Moreover, the various past and present efforts to improve the Malian justice system have been examined only in terms of the results they have achieved so far, without much by way of deeper inquiry into the challenges or constraints that those efforts undoubtedly encountered. In consequence, the report is best read as a panoramic snapshot of Mali's 'state of criminal justice' at this particular point in time, which it subsequently translates into general considerations and building blocks for programming efforts that seek to strengthen Mali's penal process.

The report's findings are based on a methodology that mixed desk research, in-country expert interviews and a workshop with major stakeholders in Mali's penal chain. Each of these methods is briefly detailed below.

Desk research was carried out between mid-January and mid-March 2015 and covered both French and English academic literature, think tank reports and the occasional policy piece or programme evaluation. Its purpose was to take stock of existing work pertaining to the state of justice in Mali in general, and its penal process in particular. Strikingly, our search demonstrated several significant gaps in the research on justice:

- *Any detailed analysis of the political interests of – and power relations between – Mali's ruling political elites.* Mali's 'poster-child of democracy' status before 2012 presumably obviated the need for such analysis. Such analysis is, however, much needed, as many challenges that Mali's justice system faces are embedded in broader socio-political relations of power and influence. This report has not been able to systematically analyse such issues.

- *A deep understanding of the politics and dynamics of corruption beyond individual payments to ease cases along, obtain favourable judgments, etc.* Interviews gave a strong impression – and some evidence – of systemic corruption by and through Mali's state justice system but it was not possible to fully map these dynamics.

- *A detailed understanding of the state and performance of Mali's many 'customary justice' systems.* One would expect a few anthropological works on this topic, but we have not been able to find them. While it is safe to say that the common denominator of these systems is to resolve disputes on the basis of tradition or religion, this means the report was not able to assess the performance of Mali´s different 'customary justice' systems in detail or provide exhaustive suggestions on how they could support the penal process.

In-country expert interviews were carried out between 24 March and 3 April 2015 in Bamako and served both to explore the gaps outlined above and to test a number of hypotheses developed

during the desk research. The 24 interviews conducted included seven with civil society representatives and/or journalists, eight with representatives of the state justice system, four with 'customary justice' providers, three with members of the international community and two with 'politicians'. Field work in the north was rendered impossible due to the security situation and while it was possible to interview and interact with a number of justice stakeholders from northern Mali, this represents a clear limitation on the report's findings.

Finally, a workshop with 32 key justice stakeholders from Mopti, Ségou, Timbuktu and Gao took place on 30 and 31 March 2015 in the town of Mopti. Participants included state representatives of Mali's penal process, a number of civil society representatives and a few 'customary justice' leaders. It built on and synthesised from earlier workshops in 2014 held in the aforementioned cities. The Mopti workshop's purpose was to develop initial working priorities for a programme to strengthen Mali's penal process, as well as an organisational structure for programme delivery. While state representatives dominated its proceedings and sensitive matters were not discussed in great detail, the workshop represented a valuable input into this report due to its rich exchanges and arguments.

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