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# Foundational Justice: A Strategy for Peace in the Horn of Africa

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## About the Conflict Research Programme

The Conflict Research Programme is a four-year research programme hosted by LSE IDEAS, the university's foreign policy think tank. It is funded by the UK Foreign, Commonwealth and Development Office. Our goal is to understand and analyse the nature of contemporary conflict and to identify international interventions that 'work' in the sense of reducing violence or contributing more broadly to the security of individuals and communities who experience conflict.

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## Summary

This memo identifies the concept and practice of *foundational justice* as a response to violent conflict and transactional politics in the Horn of Africa, based on Conflict Research Programme (CRP) research. It argues that international peacebuilders and scholars should learn from and robustly support legal and civic activism during protracted conflicts, including efforts to combat everyday violations, reform justice practices, and challenge impunity for atrocities. It proposes a shift of priorities. Firstly, there is a need to place concerns about justice consistently at the core of peacebuilding programmes and related research agendas. Secondly, there is a need to connect and reorientate approaches based on rule of law and transitional justice that typically concentrate on institutions at the national level and reproduce a state-building logic either explicitly or implicitly. Foundational justice is concerned with advancing more flexible, networked, and negotiated approaches driven 'from below.'

Institutional and technocratic approaches to justice at the level of the state, generally supported by international organisations within the frames of transitional justice or rule of law programming, are liable to be undermined or co-opted in a region where: (i) the state is violently contested and not only domestic but also regional and international actors are implicated in conflicts; (ii) networked, patronage

politics and violent 'political marketplace' logics prevail over institutional and bureaucratic politics; (iii) statutory law has colonial/imperial origins and has proven a serviceable instrument of bargaining, violence, and repression; (iv) plural legal authorities, forums and laws apply, since custom and religion constitute powerful sources of legitimacy; and (v) there is a wide gap between law on paper and law in practice.<sup>1</sup> In this context, we argue that justice should be pursued and measured at the level of social practices and relations, and deeply informed by local expertise.

The concept of foundational justice derives from observations of activist practices in conflict-affected settings that merit greater reinforcement and solidarity.<sup>2</sup> It refers to the cumulative power of legal and civic initiatives, strategic litigation, and efforts to harness the law to combat injustices, pursued in any judicial or political forum, at a local, national, or international level in war-torn and 'fragile' states. Sporadic and vernacular justice practices and struggles are always there to be found but tend to be underestimated because policymakers and scholars lean towards overarching critiques, formal institutionalized solutions, and external expertise. They may be missed when they are driven by *ad hoc* assemblages of lawyers, journalists, teachers, or representatives of ethnic communities, rather than more visible NGO-based civil society or social movements.<sup>3</sup> They may also be undermined when international actors intervene in plural and

<sup>1</sup> This synthesis of the existing conditions derives from Conflict Research Programme findings and other relevant sources. For instance, see John Markakis, Günther Schlee, and John Young's argument that the nation-state does 'not describe what we see' in the Horn, and its pursuit has been 'the root cause of many evils.' *The Nation State: A Wrong Model for the Horn of Africa*, Edition Open Access, Max Planck Research Library for the History and Development of Knowledge Studies 14, p170; p17.

<sup>2</sup> See Ibreck, R., 2019, *South Sudan's Injustice System: Law and Activism on the Frontline*, London: Zed Books.

<sup>3</sup> The concept of civiness is more relevant in these settings than conventional notions of civil society. See Kaldor, M. 2019, *The Phenomenon of Civiness and Researching its Advancement*, 22 May, <https://blogs.lse.ac.uk/crp/2019/05/22/kaldor-civiness/>. External demands, political pressure and the threat of violence makes it exceptionally challenging to effect change, but political transformation has historically been driven by non-violent action from below in this region. See de Waal, A. and Ibreck, R., 2013. Hybrid social movements in Africa. *Journal of Contemporary African Studies*, 31(2), pp.303-324.

inconsistent ways in conflict settings,<sup>4</sup> cling to unimplementable models and ideals,<sup>5</sup> and concentrate efforts and funds predominantly on formalised peace processes.

The first step to supporting foundational justice is to acknowledge the importance of local agency and non-violent justice claims. External scepticism compounds marginalisation, especially when support and attention is concentrated elsewhere.<sup>6</sup> International interveners and analysts are trapped within peacebuilding frames that direct resources and attention towards violent actors – they not only fail to attend to and foster civil politics, but sometimes even reduce its currency.<sup>7</sup> External actors take notice when movements emerge to create unstoppable pressure for regime change, as they did in Sudan in 2019, but they

overlook precedents<sup>8</sup> and do not do enough to support civic agency in the aftermath.<sup>9</sup> International organisations have supported some relevant and productive activities;<sup>10</sup> but they need to give justice much greater priority, acting continuously with respect for struggles at the margins.

The Horn of Africa is at a critical juncture: reports of human rights violations, electoral violence, and mass atrocities have escalated in some countries<sup>11</sup> and persisted in others as political and military leaders continue to frustrate peace processes and political transitions. In recent years, people have mobilised and protested non-violently, pursuing justice claims in a multiplicity of forums, innovating in the realm of non-violent politics under harsh conditions. At the same time, governments in the region have

4 For instance, by selling arms to repressive regimes and training their militaries: Holden, P. et al, 2017. *Indefensible: seven myths that sustain the global arms trade*. London: Zed Books. And by violating international humanitarian law: Amnesty International, 2019. *USA/Somalia: Shroud of secrecy around civilian deaths masks possible war crimes*, 20 March, <https://www.amnesty.org/en/latest/news/2019/03/usa-somalia-shroud-of-secrecy-around-civilian-deaths-masks-possible-war-crimes/>.

5 See Pospisil, J., 2019. *Peace in political unsettlement: Beyond solving conflict*. Cham, Switzerland: Palgrave Macmillan. As Pospisil observes, peace processes never actually conform to the liberal ideal; sequencing is in any case a 'messy interplay... dictated by opportunity,' commonly providing a 'formalised political unsettlement.' (pp.8-9). Nevertheless, non-specific references to the need for inclusion and accountability in a peace agreement are useful – they may not be implementable within the formal mechanisms of the agreement, but they can serve as policy hooks for pragmatic and progressive action at some unspecified point in the future by actors, such as civil society, that may not be specified in the document.

6 An observation on journalistic response to the coronavirus pandemic holds true more broadly; external accounts of crisis in Africa: 'understate the agency of affected communities and overstate the contribution of foreign interventions.' Nyabola, N. *Africa Is Not Waiting to Be Saved From the Coronavirus*, <https://www.thenation.com/article/world/coronavirus-colonialism-africa/>.

7 See Srinivasan, S. 2021, *When Peace Kills Politics International Intervention and Unending Wars in the Sudans*, London: Hurst & Company.

8 Sudan's non-violent revolution in 2018 had deep roots. See for instance De Waal, A., 2013. Sudan's elusive democratization: civic mobilization, provincial rebellion and chameleon dictatorships. *Journal of Contemporary African Studies*, 31(2), pp.213-234.

9 Women and young people who drove the revolution need solidarity. See Abbas, R. 2021, 'Democracy Means Building and Connecting People as well as Institutions: Lessons from Sudan,' 12 March, *African Arguments* <https://africanarguments.org/2021/03/democracy-means-building-and-connecting-people-as-well-as-institutions-lessons-from-sudan/>.

10 For instance, in South Sudan, the European Union and the British Council have supported some grassroots justice work, as have several NGOs including PACT, Justice Africa, and Nonviolent Peaceforce, see Ibreck 2019.

11 We use this term to refer to the countries that are members of the Intergovernmental Authority for Development (IGAD). Notably, violence has escalated in Ethiopia; the war and atrocities in Tigray especially constitute a major humanitarian crisis and a wider threat to the region. See for instance, Brown, W. 2021, 'Massacres, rapes and starvation: Breaking through the blackout to expose Tigray's 'crimes against humanity',' *The Telegraph*, 15 May, <https://www.telegraph.co.uk/global-health/terror-and-security/six-months-of-ethiopias-shadow-war/>.

become ever more adept at surveilling and suppressing civil society and protesters.<sup>12</sup> Worryingly, international aid budgets which had provided some opportunities for civil society are now shrinking and risk being further diverted towards security sector and military spending.<sup>13</sup> At the same time, threats to peace and welfare are persistent and escalating,<sup>14</sup> providing stark evidence that security sector reform programmes typically fail. In this context, the possibilities for peace depend largely upon valuing and fostering non-violent struggles for justice.

The argument for foundational justice is underpinned by 'systems-thinking'.<sup>15</sup> The aim is to tip the balance towards non-violent politics in a highly complex and volatile political context. It proposes that international and regional policymakers step back from linear, institutional, and top-down approaches to justice interventions, and instead invest in 'ecosystems for justice'.<sup>16</sup> This means putting material and political resources into public goods including education and legal empowerment tools (such as paralegalism) to enhance the social capital, negotiating the power of civic activists and citizens. It means providing safe spaces and resources for interactions and networking by plural legal and judicial actors at local, national, and regional levels.

It also entails developing strategies to consolidate existing justice efforts. Among other things, international peacebuilders should encourage and value 'small wins' by legal and civic actors in conflict settings – documenting and publicising achievements and good precedents; helping to connect and amplify their activities and achievements.<sup>17</sup> In the short term, this approach may make micro-contributions to elements of welfare, accountability, and rights for individuals and groups. In the long term, it promises to contribute to the socialisation of progressive norms and their translation into practice, catalysing legal and political transformation.

Our five key recommendations are:

1. **Support civil society to engage with and press for transparent, accountable, and human rights-responsive justice and security institutions:** The success of any reforms in the justice and security sectors depends upon civilian knowledge, pressure, accountability, and oversight, along with coalitions for change that link civil society, civilian politicians, and reform-minded members of the security<sup>18</sup> or justice institutions themselves. Local

<sup>12</sup> See for instance, Human Rights Council, Detailed findings of the Commission on Human Rights in South Sudan, A/HRC/46/CRP.2, 18 February 2021. Human Rights Watch, *Uganda: End Enforced Disappearances of Opponents: Investigate Abuses; Release Those in Arbitrary Detention*, 11 March, <https://www.hrw.org/news/2021/03/11/uganda-end-enforced-disappearances-opponents>.

<sup>13</sup> For instance, there have long been tensions between international commitments to human rights and the security priorities of 'migration governance' and counter-terror in the region. Lutz Oette, Mohamed Abdelsalam Babiker, Migration Control à la Khartoum: EU External Engagement and Human Rights Protection in the Horn of Africa, *Refugee Survey Quarterly*, Volume 36, Issue 4, December 2017, pp. 64–89. There are risks associated with new financial structures that will allow the EU to fund African military operations directly, instead of through the African Union, see International Crisis Group, *How to Spend It: New EU Funding for African Peace and Security*, 14 January 2021, <https://www.crisisgroup.org/africa/african-union-regional-bodies/297-how-spend-it-new-eu-funding-african-peace-and-security>.

<sup>14</sup> Climate change and the Covid pandemic are also exacerbating the 'intertwined crises', Council of the European Union, 2021, *The Horn of Africa: a geo-strategic priority for the EU*, 10 May, pp.2-3. <https://www.consilium.europa.eu/media/49533/st08135-en21.pdf>.

<sup>15</sup> See Pospisil (2019. pp.42-43) for relevant insights on complexity.

<sup>16</sup> We thank Iavor Rangelov for this concept.

<sup>17</sup> For an account of this theory of change applied in a different context, see: Termeer, C. J. A. M., & Metze, T. A. P. (2019). More than peanuts: Transformation towards a circular economy through a small-wins governance framework. *Journal of Cleaner Production*, 240, 118272.

<sup>18</sup> Detzner, S. 2019, Security Sector Reform in Sudan and South Sudan: Incubating Progress, Conflict

actors such as community paralegals and representatives of women's groups especially merit support – they have the cultural knowledge, legitimacy, and patience to develop and drive agendas for normative change. International actors can foster ecosystems for justice by providing economic and educational resources and creating spaces for local and regional networking and knowledge-exchange.

2. **Focus on justice practices:**

State-focused and institutional approaches will not suffice in a region where plural authorities govern and where customary and religious laws mechanisms are widely used and legitimate. Plural judicial actors, including judges, chiefs, and Sharia judges, must be consulted and engaged with in dialogues about reforms to legal practices. Rather than 'capacity-building' or top-down legal reforms, such interactions should be directed towards information-sharing, building connections, and negotiating changes in practice. Women and young people have the most to gain from normative and legal changes, given that they are subject to inequality and discrimination, so it is especially important to include them and reinforce their negotiating power in justice reform dialogues and processes.

3. **Document and publicize claims for justice:**

This can be done in various forums, including local, national, regional, and international courts. Monitoring courts is a means not only to identify good precedents but also encourage them. Media campaigns and community-based education can

help spread awareness. It is essential to learn from justice claims, even when they fail.

4. **Consistently uphold the principle of accountability for atrocity crimes and human rights violations across the region:**

Mechanisms and timings must remain flexible. Justice for atrocity crimes does not need to be linked to a successful political transition. The demand for an end to impunity for political elites asserts an important principle, even if the immediate goals of obtaining justice outcomes are frustrated. Leaving justice off the agenda in selective cases (as both regional and international organisations have done in Somalia) undermines human rights norms and principles that have evolved and acquired legitimacy at the continental level.<sup>19</sup> Support for timely investigations and documentation by human rights activists, and local and international lawyers is essential to lay the groundwork for future justice claims.

5. **Adjust evaluations of justice programmes:**

Micro-level or singular actions by legal professionals or community-based activists are challenging to support and 'scale-up.' Their results cannot be captured with short-term measures of impact, since norms, relations, and practices change slowly over long periods of time. Funders must also anticipate that political elites will resist justice claims and reforms. Participatory methodologies for researching and building the evidence base for justice interventions – that are sensitive to context and more realistic in terms of timeframes for positive results – will be needed.

Research Programme Memo, 10 December, <https://www.lse.ac.uk/ideas/Assets/Documents/Conflict-Research-Programme/crp-memos/SSR-Sudans-Incubating-Progress-final.pdf>.

<sup>19</sup> On the African Union, see: Odinkalu, C.A. (2015) International Criminal Justice, Peace and Reconciliation in Africa: Re-imagining an Agenda Beyond the ICC. *Africa Development*, 40(2), pp.257-290.

## Defining Foundational Justice

The concept of *foundational justice* is derived from the study of courts, legal practices, and civic struggles in conflict-affected countries in the Horn of Africa. It offers a distinctive analysis of the relations between law and conflict and argues for new approaches to policy formulation and measurement.<sup>20</sup> Foundational justice encapsulates three core insights:

1. Law is part of the problem of conflict and repression in the Horn of Africa. Laws and legal instruments are deployed as tools of power and control by political and military elites. Material reward, threats of violence, and patronage or kinship networks (the trifecta of cash, coercion, and connections) generally trump the impartial functioning of laws and regulations. Discrimination against women and young people is rife. Counteracting the instrumental and repressive use of law is therefore essential to conflict transformation.
2. Justice claims and efforts by legal and civic activists to promote and protect vulnerable people, reform dysfunctions in the justice system, and end impunity for political elites constitute principled challenges to the transactional basis of political power, even when they fail.

3. Progress towards justice (and peace) rests upon cultivating shared *norm-institutions*<sup>21</sup> and strengthening civil networks and movements to counteract militarism and monetised patronage. Legal empowerment strategies and plural initiatives to claim justice by civil means in courts, dialogues, and agreements will contribute to setting precedents, harmonizing law, and embedding justice in practice.

The concept of foundational justice builds upon previous formulations of the 'justice dilemma' after atrocities.<sup>22</sup> It is related to the dominant framework of transitional justice in that it describes efforts to invigorate justice endeavours in response to systemic or gross human rights violations and atrocity crimes. Like transitional justice, it embraces judicial and non-judicial measures, including prosecutions, truth-telling, reparations, reform, and memorialisation. Similarly, the concept is linked to rule of law interventions in that it is concerned with improvements in the justice system and the socialisation of human rights norms.<sup>23</sup> However, the concept diverges from both these existing international policy frameworks in that it questions their assumptions about the primacy of institutions and nation-states and the prospects of linear pathways towards liberal democracy.

Transitional justice has its roots in state actors in countries transitioning from

<sup>20</sup> It builds on and relates to previous Conflict Research Programme work on concepts of civiness and theories of change in the political marketplace, see: de Waal, A., Sarkar, A., Detzner, S. and Spatz, B. *A Theory of Change for Violent Political Marketplaces*, Conflict Research Programme Memo, 19 February 2020, especially pp. 7-8.

<https://www.lse.ac.uk/ideas/Assets/Documents/Conflict-Research-Programme/crp-memos/PMF-TOC-Feb-2020.pdf>.

<sup>21</sup> A 'norm institution' is a pattern of behaviour or custom, such as in the 'the institution of marriage' as opposed to a 'formal institution' organisation administering some aspect of public affairs.

<sup>22</sup> Rangelov, I. and Teitel, R., 2014. Transitional Justice. In Kaldor, M. and Rangelov, I. (eds) *The Handbook of Global Security Policy*, UK: John Wiley & Sons, pp.338-352.

<sup>23</sup> See McAuliffe, P., 2013. *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship*. London: Routledge. As McAuliffe argues, the gap between the rule of law and transitional justice debates and programmes needs to be bridged: 'transitional justice has not paid the requisite attention to the institutions, culture and norms that need to be fostered in a justice system in transition.' However, we diverge from McAuliffe on the argument that the reconstruction of the state justice sector is 'foundational' (p.288). Rather, we emphasise the strengthening civic agency aimed at forging or reinforcing accountability relations between people and the plural public authorities that govern in conflict settings in the Horn.

dictatorships to democracies, and from more recent applications promoted by international actors and civil societies in countries still at war, or in the 'grey zone' between conflict and peace, repressive and democratic rule.<sup>24</sup> The model of transitional justice has increasingly become normative and prescriptive – conventionally offering a toolkit of time-bound internationally-funded institutional responses to an anticipated political transition or 'distant' and lengthy proceedings in international courts.<sup>25</sup> In contrast, foundational justice is *descriptive*, based upon identifying and valuing existent and emergent practices in conflict settings. It is concerned with supporting the societal norms and agendas for justice in turbulent contexts and regions in which the state is fragmented and institutionalised governance has yet to emerge. It describes timely, practical, and negotiated responses on the ground. It is informed by our research in conflict settings but also by wider evidence that legal empowerment programmes work.<sup>26</sup>

Foundational justice is also related to concepts of 'transformative justice' which are usefully minimal and process-focused, namely: 'Transitional justice is about unleashing transformative dynamics, not about creating transformation all by itself.'<sup>27</sup> Transformative justice recognises some of the limits on transitional justice and proposes more holistic and comprehensive mechanisms founded in socio-economic realities, which could address the roots of conflict. It encompasses different paradigms: peacebuilding (making it emancipatory, not top-down), reconciliation (making it a more all-embracing set of processes), and restorative justice (incorporating social and economic rights,

and the human-rights based approach to development; making compensation and restitution into sustainable/emancipatory development). Indeed, some transitional justice policies have already incorporated many of these insights, notably the African Union Transitional Justice Policy (2019) which insists on attention to 'the particular context and cultural nuances of affected societies, as well as the gender, generational, ethnocultural, socio-economic and development dimensions of both peace and justice.'<sup>28</sup>

Yet, while agendas for change must be holistic and grounded at the local level, they must also be feasible and resonate at a higher political level, nationally and internationally. Where there is no effective political transition – only a persistently dysfunctional and turbulent political system – we cannot expect to find systematic efforts to engage with the structural origins of conflict and/or the political economy sustaining conflict. In contrast, foundational justice refers to both *tangible and observed justice claims* and (occasional) justice gains that have arisen despite the exceptionally harsh conflict circumstances. It also encompasses those that stretch across the multiplicity of transnational actors implicated in violence and governance in conflict settings in the Horn of Africa. It values diffuse, organic, and sporadic justice claims at multiple levels. Its prescription is not for international actors to design these instrumentally, but to foster enabling environments, value achievements when they arise; and link them conceptually and practically. It does not forgo the principle that those 'most responsible' for atrocities should be held criminally accountable, but it does not predetermine the timing or

24 Nassar S. and Rangelov, I., 2020, *Documentation of Human Rights Violations and Transitional Justice in Syria: Gaps and Ways to Address Them*, Conflict Research Programme, LSE.

25 This despite the fact that it was originally coined to describe processes underway in states undergoing democratic transitions.

26 For instance, see Maru, V. and Gauri, V. eds., 2018. *Community Paralegals and the Pursuit of Justice*. Cambridge: Cambridge University Press.

27 Gready, P. and Robins, S., 2014. From transitional to transformative justice: A new agenda for practice. *International Journal of Transitional Justice*, 8(3), pp.339-361, p. 355.

28 African Union, 2019, *Transitional Justice Policy*, December, pp.4-5. [https://au.int/sites/default/files/documents/36541-doc-au\\_tj\\_policy\\_eng\\_web.pdf](https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf).

forum, nor does it link justice to a political transition. Instead, it anticipates that as and when demands for prosecutions are asserted by affected people they should be robustly supported, and that the struggle to bring political elites to account is itself meaningful in forging accountability relations and building constituencies for justice.

Finally, both transitional (and transformative) justice and the wider array of interventions under the heading of 'rule of law' tend to operate under an either explicit or implicit methodological nationalism. They suppose a centralised statebuilding logic, and nascent or eventual functional institutions – despite the fact that what we might call 'actually existing' transitional justice policies and mechanisms are being implemented in contexts characterised by ongoing disorder, violent conflict, and legal pluralism.<sup>29</sup> When war is a social condition, and violence and lawfare are routine tools of governance, we should not envisage trade-offs between peace and justice in a peace deal, since without interventions to halt the authoritarian and arbitrary use of legal instruments there can be no peace. It is also problematic to reify the state. In these systems, various political authorities command legitimacy, power is in constant

negotiation, the state is fragmented, and networks matter more than institutions. Political marketplace politics plays out at subnational and regional levels, and therefore so too might more legitimate and accountable political complexes.<sup>30</sup>

Constraining violence and securing rights and justice in contexts of fragmentation and fragility requires acting beyond the state. It requires negotiation and networking; for instance, political entrepreneurs engaged in violence may also share or cultivate interests in counteracting certain excesses of violence;<sup>31</sup> and institutions implicated in violence may also host some people of integrity. Foundational justice does not make normative judgements about which political actors or forums might initiate or yield progress towards justice. Rather, foundational justice is concerned with promoting 'norm-institutions'<sup>32</sup> and therefore diverges from statist assumptions about the political order, its jurisdictions, laws, actors, and institutions, leaving open the possibilities for regionalised or localised legal and governance arrangements, and acknowledging the salience of local customary and religious mechanisms. It is defined by practical efforts to address injustices in context and restore and promote just relationships.<sup>33</sup>

29 Legal and judicial pluralism is a characteristic of the region; in most countries justice is delivered by 'informal', customary institutions. See DefendDefenders, 2019. *On the Legal Frontline: Lawyers and Paralegals and Human Rights Defenders in the East and Horn of Africa*, <https://defenddefenders.org/on-the-legal-frontline-lawyers-and-paralegals-as-human-rights-defenders-in-the-east-and-horn-of-africa/>. This applies even in the most developed countries in the region. In Ethiopia 'village elders are the most frequently used third party for resolving disputes.' Hiil, 2020, *Justice Needs and Satisfaction in Ethiopia: Legal problems in daily life*. [https://www.hiil.org/wp-content/uploads/2019/09/JNS\\_Ethiopa\\_2020-1.pdf](https://www.hiil.org/wp-content/uploads/2019/09/JNS_Ethiopa_2020-1.pdf).

30 This point is informed by the extensive literature analysing governance in conflict settings including work on 'political marketplaces': de Waal, A., 2015. *The Real Politics of the Horn of Africa: Money, War and the Business of Power*, Cambridge: Polity Press; 'negotiated states' Hagmann, T. and Péclard, D., 2010. Negotiating statehood: dynamics of power and domination in Africa. *Development and Change*, 41(4), pp.539-562; 'hybrid political orders' Boege, V., Brown, M.A. and Clements, K.P., 2009. Hybrid political orders, not fragile states. *Peace Review*, 21(1), pp.13-21 and 'global liberal governance' Duffield, M., 2002. Social reconstruction and the radicalization of development: aid as a relation of global liberal governance. *Development and change*, 33(5), pp. 1049-1071.

31 Schouten, P., 2021. *Violence and fragmentation in Congo's political marketplace*. Conflict Research Programme, London School of Economics and Political Science, London, UK, pp. 34-35.

32 See: de Waal, A., 2020. 'No End State: Exploring vocabularies of political disorder,' Somerville MA, World Peace Foundation, Occasional Paper no. 26, October.

33 Interpreting justice in particular situations, incorporating participation and dialogue with the affected people and prioritising social relations over rules is included in many local 'customary' 'restorative' traditions.

Foundational justice is a pragmatic, situated approach attuned to addressing the multifaceted persistent 'wicked' problem of systemic injustices for which top-down linear policymaking and implementation processes are ill-suited.<sup>34</sup> It places expedient actions by legal and civic activists in conflict settings or the diaspora at the centre, envisaging problem-solving approaches and plural agile responses to specific injustices rather than prescribing all-encompassing programmes.<sup>35</sup> It recognises the duality of law as both a hegemonic force and a potential tool of emancipation<sup>36</sup> by those using non-violent methods to seek restraints on arbitrary power, gender equality, land rights, and a host of other human rights in conflict settings.<sup>37</sup> It starts with and learns from what is possible and practical on the ground, cultivating norms and practices at the societal level as well as through courts, and valuing local expertise.<sup>38</sup> It refers to demands for and advances towards justice across the spectrum of civil and political as well as social and economic rights, including to respond to gravest violations of rights, sexual and gender-based violence, and atrocity crimes in conflict settings.

We anticipate its utility in identifying and fostering justice practices – considered broadly – that can tangibly improve protection and redress in the most difficult places.

### **'Lawfare', systemic injustice, and the limits of peacebuilding**

Legal and judicial institutions constitute an essential service that is foundational to any social and political order; they entail commitments to forms of civic authority, non-violence, and peaceful dispute resolution. Despite this, in the Horn of Africa they are also routinely used as instruments of repression, and they foment grievances. Countries in this region have records of impunity dating back at a minimum to the colonial (or in the case of Ethiopia, imperial) period. Their justice mechanisms come in multiple forms, including all sorts of statutory, customary, and religious courts, and many of these have often been manifestly dysfunctional and implicated in direct or indirect forms of

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It is also envisaged in feminist relational theory of justice which emphasises goals of 'meaningful accountability' and 'just relationships.' Llewellyn, J.J., 2012. Integrating peace, justice and development in a relational approach to peacebuilding. *Ethics and Social Welfare*, 6(3), pp.290-302.

<sup>34</sup> A wicked problem is defined by incomplete and contradictory knowledge; by the relevance of many people and opinions to solving it; by economic challenges; by cultural complexities; and by its interconnectedness with other problems. See: [https://www.wickedproblems.com/1\\_wicked\\_problems.php](https://www.wickedproblems.com/1_wicked_problems.php). See also: Termeer, C. J. A. M., & Metze, T. A. P., 2019. op.cit.

<sup>35</sup> Indeed, there is previous support for the value of problem-solving approaches in this sector. For instance, an evaluation of Department for International Development (DfID) security and justice programmes called for a 'focus on finding solutions to specific problems, rather than achieving across-the-board improvements in S&J institutions,' (p.15) and also identifies the strengths of national NGOs and paralegals as partners in community justice while raising questions about programmes to 'build capacity that might be misused' for instance by focusing on police reform (p.22). Independent Commission for Aid Impact, Review of UK Development Assistance for Security and Justice, Report 42 – March 2015. Also note substantial relevant literature on rule of law which also evaluate the impacts of coalition-building, although typically state-centric in assumptions and focus. See for instance: Desai, D. and Woolcock, M., 2012. The Politics of Rule of Law Systems in Developmental States: 'Political Settlements' as a Basis for Promoting Effective Justice Institutions for Marginalized Groups. *Effective States and Inclusive Development Research Centre Working Paper No. 08*, July.

<sup>36</sup> This duality is frequently highlighted by socio-legal theorists, even in the most challenging cases. See for instance: Erakat, N., 2019. *Justice for Some: Law and the Question of Palestine*, Stanford, California: Stanford University Press. As Leebaw puts it: 'While law can be a tool for regulating violence and exposing abuses of power, law is also utilized to obfuscate and legitimate abuses of power.' Leebaw, B., 2008. The irreconcilable goals of transitional justice. *Human Rights Quarterly*, 30(1), 95-118, p.97.

<sup>37</sup> The regional human rights framework underpins our analysis and would guide identification and evaluation, including the African Charter of Human and Peoples' Rights, the Maputo Protocol.

<sup>38</sup> This contrasts with international approaches which have 'objectified Africa... in an enterprise in which it ought to have significant agency,' as Odinkalu (2015, p.260) observes.

violence. Moreover, political entrepreneurs have become adept in the 'game of the rules',<sup>39</sup> exploiting their knowledge of multiple concepts of rights, law, and justice, and using them strategically to either fuel divisive identity politics or repress societies, resulting in legal manoeuvres and dysfunctions that vary not only between countries but also within them. International interventions in this complex terrain generally lean towards strengthening state institutions, but are otherwise highly inconsistent, as the following brief illustrations suggest.

An extreme case of law being used as an instrument of control and repression is the Ethiopian government's 'law enforcement operation' in Tigray, characterised by indiscriminate shelling that hits schools, hospitals, and markets in urban areas and other mass violence targeted against civilians. Ethiopian authorities insisted they were not fighting a war but suppressing an illegal organisation, described as a 'junta' and proscribed as terrorists,<sup>40</sup> invoking law as a justification for combatting political opposition and cover for starvation crimes.<sup>41</sup> In response, the United Nations Office of the High Commissioner for Human Rights has focused its efforts at the level of the state, promising a joint investigation with

the Ethiopian Human Rights Commission towards a 'credible accountability process.'<sup>42</sup> This bureaucratic approach is not viewed as credible within Tigray and is likely to meet with opposition, and valuable evidence and testimony risks being lost. In the meantime, it has been left mainly to international journalists and human rights organisations to gather evidence on atrocities with little attention so far to the actual or potential contributions of regionalised and localised civic coalitions for justice.<sup>43</sup>

In Somalia, the institutions of formal justice have proven to be deeply corrupt. In most places, 'government courts remain subject to high levels of corruption and manipulation, are slow, limited by poor security and a lack of enforcement capacity.'<sup>44</sup> Nevertheless, regional and international policymakers have backed the Somali government and collaborated in efforts to militarily crush its opponents, notably Al-Shabaab. They have generally framed the conflict through a counter-terror lens, paying little heed to demands for justice.<sup>45</sup> Indeed, the Somali government has offered amnesties to Al-Shabaab defectors, despite protests from civil society.<sup>46</sup> In contrast, Al-Shabaab has leveraged the corruption and injustices among political elites linked to the state to mobilise support.

39 De Herdt, T. & Olivier de Sardan J.P. (eds), 2015. *Real Governance and Practical Norms in Sub-Saharan Africa: The Game of the Rules*. London: Routledge.

40 Human Rights Watch, Ethiopia: Unlawful Shelling of Tigray Urban Areas, February 2021, <https://www.hrw.org/news/2021/02/11/ethiopia-unlawful-shelling-tigray-urban-areas>.

41 See: World Peace Foundation, *Starving Tigray: How Armed Conflict and Mass Atrocities Have Destroyed an Ethiopian Region's Economy and Food System and Are Threatening Famine*, April 2021.

42 See United Nations Human Rights Council, Joint Press Statement, <https://www.ohchr.org/EN/HR-Bodies/HRC/Pages/NewsDetail.aspx?NewsID=26949&LangID=E>.

43 See for instance: Reuters Investigates, 2021, *River of Blood: How ethnic killings exploded from an Ethiopian Town*, 7 June, <https://www.reuters.com/investigates/special-report/ethiopia-conflict-expulsions/>. Note for instance the activism of African women calling for the establishment of a female peacekeeping force <https://www.sdgforall.net/index.php/goal-5/1551-african-women-stress-the-need-for-a-horn-of-africa-peace-initiative>.

44 Majid, N. and Abdirahman, K., 2021. *The Kismayo Bubble - Justice and Security in Jubbaland*, *Conflict Research Programme Research Memo*, 26 March, p.1 [http://eprints.lse.ac.uk/109317/2/The\\_kismayo\\_bubble\\_updated.pdf](http://eprints.lse.ac.uk/109317/2/The_kismayo_bubble_updated.pdf).

45 Felbab-Brown, V., 2018. *The Limits of Punishment: Transitional Justice and Violent Extremism, Somalia Case Study*, May, UNU-CPR Centre for Policy Research. p. 9.

46 Ibid, p.15.

It has built forms of order and legitimacy around functional Sharia courts – such that while the legal code that they implement is often regressive and punishments may be harsh, they have proven to be a 'credible actor in the provision of justice'<sup>47</sup> are valued for their 'swift, effective, and, crucially, non-corrupt and fair rulings.'<sup>48</sup>

In South Sudan, statutory law has predominantly consisted of control mechanisms used by those in power. The police, the judiciary, and national security entities have been deeply entangled with conflict and help to explain its persistence – although these actors are neglected in peace negotiations and agreements.<sup>49</sup> At the everyday level, customary courts have played vital roles in dispute mediation and addressing some forms of criminality at local levels (see below). However, they function mainly to regulate societies since they cannot generally hold political elites accountable for violence or abuses of the law, and they also perpetuate ethnic and gender differences and inequalities. In this case, international organisations have amassed evidence of violations of probable war crimes and crimes against humanity and exposed an 'entrenched culture of impunity' at the root of the conflict.<sup>50</sup> International actors have supported transitional justice agendas, yet they have simultaneously pursued rule of law programmes along separate trajectories, at the risk of strengthening state security instruments in violent kleptocracies.

Across the Horn of Africa, international policymakers have already made some productive investments, for instance in community-justice programmes and human rights documentation. But these are typically under-resourced and counteracted by the enduring emphasis on formal institutional justice procedures that risk reproducing the problems of law as control. In some countries they have given their backing to transitional justice agendas. But while steps to bring to account political leaders responsible for atrocities in Sudan, Ethiopia, and South Sudan under the rubric of transitional justice processes are to be welcomed, experience suggests that they will fail if they are reduced to institutionalised and technical processes. The political effects of international transitional justice policies may be complex and contradictory, as powerfully illustrated by selective and technocratic transitional justice processes in Uganda<sup>51</sup> and the backlash against the International Criminal Court (ICC) in Kenya.<sup>52</sup> The problem is not simply that transitional justice is an externally-driven agenda; it is also that even when civic actors and victims have pushed it forward in conflict settings its implementation is invariably top-down. Moreover, it is fraught with risks and delays as its proponents are up against strong political resistance, often from states that have themselves been strengthened by international support.

In general, institutions for law and security are essential for citizens to realise their rights and be protected, but they can

47 Majid and Abdirahman, 2021. p.1.

48 Felbab-Brown, 2018. pp.7-8.

49 See Ibreck 2019, chapter two. See also: Nantulya, C. K. 2021, Will South Sudan Rein in its Notorious National Security Service: The NSS has become a feared agency and a vital tool in the government's campaign of silencing dissent, *Human Rights Watch*, 6 May, <https://www.hrw.org/news/2021/05/06/will-south-sudan-rein-its-notorious-national-security-service>.

50 The African Union Commission of Inquiry on South Sudan (AU Col), Final Report, Addis Ababa, 15 October 2014, <https://www.peaceau.org/uploads/auciss.final.report.pdf>, pp.210-220.

51 See Macdonald, A., 2019. 'Somehow This Whole Process Became So Artificial': Exploring the Transitional Justice Implementation Gap in Uganda. *International Journal of Transitional Justice*, 13(2), pp.225-248.

52 Note that a dynamic Kenyan civil society were effective in getting justice on the agenda, but disconnected from the grassroots, the case demonstrated the limits of 'reliance on international norms', Hansen, T.O. and Sriram, C.L., 2015. Fighting for justice (and survival): Kenyan civil society accountability strategies and their enemies. *International Journal of Transitional Justice*, 9(3), pp.407-427, p.427.

also be harnessed for political violence. International donors that engage in programming in this area should bear both elements in mind. Institutional support to security services and formal justice structures is easy to programme and its outputs are straightforward to measure. But such assistance can be used in support of authoritarian agendas. Support to grassroots efforts to hold these institutions accountable, on the contrary, is more difficult to programme and its results may be hard to measure, especially over short time periods. Nevertheless, creative ways must be found to support emergent struggles and justice practices.

### **'Law from below': Justice claims in conflict settings**

CRP research over the past five years shows that legal and civic activists, many legal and judicial authorities, and even some government officials are striving to make justice systems work and have innovated and set precedents in conflict-affected settings.<sup>53</sup> Their strivings occasionally produce 'small wins' (usually imperfect and impermanent) at local, national, and regional levels. We conclude that these various practices of non-violent justice, rights, and accountability-seeking are entry points for transforming violent conflict,<sup>54</sup> as the following examples help to illustrate.

In the case of Somalia, Majid and Abdirahman identify a 'bubble' of functional, legitimate courts in Kismayo established in 2018. Based on hundreds of court observations and interviews, they established that cases were progressing efficiently and at a low cost in the hands of locally-respected judges. The revived district courts coordinated well with an elders committee and local sheikhs practicing Islamic law, bringing a coherence to the provision of justice. Notably, people from various clan backgrounds were able to access the courts and expressed satisfaction with their processes and decisions. The authors attributed these developments partly to increased intelligence and security capacity under President Ahmad Madoobe of Jubbaland, with his first-hand knowledge of the Islamic Courts Union and Al-Shabaab courts, and one of his associates who influenced the justice reforms. It turned out that providing credible everyday justice mechanisms required judges who are 'impartial, competent and committed', whose knowledge of the local context and reputation mattered more than their legal expertise. While the courts did not conform to international human rights standards, they were important contributions to everyday justice and deterrent against criminality and the threat of Al-Shabaab in a highly unstable context.<sup>55</sup> Yet, the gains were clearly fragile and only made visible through monitoring and documentation.

In the Somali region of Ethiopia, Hagmann identifies long-term struggles for justice

<sup>53</sup> This is based on observations of courts in Somalia and South Sudan but also on wider evidence, for instance HiiL (2020, p. 6-7) reports that 40% of Ethiopians face legal problems and 80% of them take some form of legal action. South Sudan Law Society which undertook a survey of 1,525 individuals in 11 locations between October 2014 and April 2015 and found strong support for criminal accountability and prosecutions, Deng, D.K, Lopez, B., Pritchard, M. and Ng, L.C., 2015. *Search for a New Beginning: Perceptions of Truth, Justice, Reconciliation and Healing in South Sudan*, June, South Sudan Law Society <https://www.undp.org/content/dam/south-sudan/library/Rule%20of%20Law/Perception%20Survey%20Report%20Transitional%20Justice%20Reconciliation%20and%20Healing%20-.pdf>.

<sup>54</sup> At issue in South Sudan for instance, is the need to challenge not only impunity but the problem of 'the culture of revenge or private retribution' in Akech, J.G., 2020. Rethinking Transitional Justice in South Sudan: Critical Perspectives on Justice and Reconciliation. *International Journal of Transitional Justice*, 14(3), pp.585-595, p.589. Nevertheless, we note that ordinary people have also sought and demanded justice for all manner of crimes; they face repeated disappointments and long odds against success in individual cases but have often respected decisions even when they go against them.

<sup>55</sup> See Majid and Abdirahman, 2021, p.8

at the sub-national level, within Somali region.<sup>56</sup> It was the arrest by the federal state of former president Abdi 'Iley' and the appointment of the new regional president, that opened the way for transitional justice agendas in 2018. Yet, the aspirations and efforts for justice also rested upon the work of local groups to document violations and press for accountability. Among these, the Ogaden Human Rights Committee (OHRC) built up an archive of reports of thousands of extra-judicial killings, rapes, and forced disappearances between 1995 and mid-2007. Former prisoners in the notorious Jigjiga Central Prison spoke out about torture and lobbied for justice compensation and rehabilitation.<sup>57</sup> Additionally, a lawyer (and presidential advisor) was pursuing an initiative to create a truth, justice, and reconciliation commission within the regional government administration.

As Hagmann argues, peace in Ethiopia's Somali region is contingent both on efforts to address the legacies of mass violence and on legal and judicial reforms to establish an independent judiciary and accountable public authorities. But priorities and decisions about the mechanisms, timings, and processes must be determined within the region. The existing customary Somali conflict resolution mechanisms, *xeer* ('contract' between clan units) and blood compensation, should be engaged in these processes, but they are not in

themselves sufficient to deal with the range of violations or perpetrators.<sup>58</sup> In this context, there is a 'dire need to put in place safeguards against the repetition of abuses of civilians' but there is no federal framework for accountability and little imminent prospect for a 'meaningful transitional justice process.'<sup>59</sup> However, there are multiple initiatives towards justice taking place within the region or at local levels that demand support.<sup>60</sup>

In the case of South Sudan, we identify a wealth of evidence that civic and legal activists have responded to violence and discrimination in courts in real time during the conflict, with limited resources. Some have taken on cases of abuses of power, land grabbing, cattle raiding, rape (including in rare instances by government officials, militaries, or the police), corruption, or domestic violence. Some have contributed to forms of humanitarian action, working to identify and negotiate the release of people who have been arbitrarily detained. Others have tried to work within the institutions of justice to make them function in the face of repression by the government or sought to effect change in statutory laws or in customary systems that discriminate against women and young men. In some cases, they have been successful, winning prosecutions, setting legal precedents, negotiating solutions, or promoting legal and practical reforms.<sup>61</sup>

<sup>56</sup> Hagmann, T., 2020. *Fast politics, slow justice: Ethiopia's Somali region two years after Abdi Iley*, Conflict Research Programme, Briefing Paper, 11 September. Criminal charges brought against former president of Somali region Abdi 'Iley' and 46 individuals in 2019 for massacres in 2018 had not progressed.

<sup>57</sup> The new president had a 'personal stake in holding the police accountable' (ibid, p.2) and this, combined with the pressure from local and international human rights organisations, led to the closure of the prison and the prosecutions of a former prison head. Audrey Kawire Wabwire and Felix Horne, 2019. Interview: Inside what was Ethiopia's Jail Ogaden, 10 July, Human Rights Watch <https://www.hrw.org/news/2019/07/10/interview-inside-what-was-ethiopias-jail-ogaden>.

<sup>58</sup> There is evidence of war crimes and crimes against humanity, unlawful detentions and killings, torture, rape, displacement, communal conflicts, and even ongoing environmental destruction, and the range of perpetrators therefore include commanders in the Ethiopian National Defence Forces, and federal security and intelligence officers, regional officials, local actors, and even international corporations, among others. Hagmann, 2020, pp. 1-2.

<sup>59</sup> Ibid. This concern is only reinforced by increasing instability and violence in Ethiopia since. See for instance, Al Jazeera, Over 100 killed in clashes in Ethiopia's Afar, Somali regions, 4 July 2021, <https://www.aljazeera.com/news/2021/4/7/dozens-killed-in-clashes-in-ethiopias-afar-somali-regions>.

<sup>60</sup> Hagmann, 2020, p. 9.

<sup>61</sup> See Ibreck, 2019.

In addition, chiefs and their courts play important roles in mediating local disputes while providing a 'catch-all social service' responding to all manner of social distress and deprivation. On one hand, the courts are functional for political elites, they are patriarchal, enforce laws that contravene basic rights, and reproduce hierarchies of gender and age. But on the other, they routinely undertake activities that are indispensable for social survival and dignity. As Newton *et al.* show, chiefs' courts have taken on the responsibility for encouraging and adjudicating claims for food made by poor people against their better-off relatives in times of hardship. They operate according to a general social norm of preventing the poor from starving and focus on implementing specific obligations from wealthier individuals to their poorer kin. These so-called 'hunger courts' respond to famine conditions by insisting on the shared moral imperative at community level to provide basic sustenance to people, to prevent them from starving.<sup>62</sup>

South Sudanese activists have also pressed for transitional justice mechanisms, contributing to the inclusion of a Hybrid Court, Commission for Truth Reconciliation and Healing and Compensation and Reparation

Authority in the 2018 peace agreement.<sup>63</sup> While authorities continue to slow-walk the institutions, lawyers and civil society groups are laying the groundwork for justice. South Sudan's Transitional Justice Working Group is working to inform and consult citizens and craft agendas towards justice, and calling for a 'nationwide civic engagement process' to inform and engage people in the process.<sup>64</sup> The Terrain Hotel trial set a precedent in prosecuting military actors for rape.<sup>65</sup> South Sudanese lawyers have also brought a series of precedent-setting challenges to the South Sudanese government in the East African Court of Justice.<sup>66</sup> Even the actions of international actors look set to be tested in the courts.<sup>67</sup>

Claims for justice such as those identified in CRP research tend not to be seen as significant for peacebuilding by scholars and international policymakers. This is partly because they take vernacular forms, or are episodic and dispersed. But it is also because rights-related cases in conflict settings rarely succeed – and even when they do, the changes they engender are gradual, uneven, and fundamentally uncertain. Women asserting their rights are silenced or repudiated; community land claims against

62 Newton, C., Mawien, B., Madut, C., Gray E. and Pendle, N., 2021, *Chiefs' courts, hunger, and improving humanitarian programming in South Sudan*. Conflict Research Programme, London School of Economics and Political Science.

63 A recent blog argues that the South Sudanese people want 'forgiveness, reconciliation and healing.' Abraham Diing Akoi, 2021, 'The Hybrid court could be a recipe for further conflict', Africa at LSE blog; South Sudan's leaders have made similar arguments, see: Salva Kiir and Riek Machar, South Sudan Needs Truth, Not Trials' Opinion, *The New York Times*, 7 June 2016. Yet there is much evidence illustrating support for criminal accountability. See Deng et al. 2015 (op. cit) and the findings of the national dialogue for instance: Republic of South Sudan National Dialogue Steering Committee, Sub-committee For Eastern Equatoria, 2018 *Grassroots consultations final report details for Eastern Equatoria*, December, [www.ssnationaldialogue.org](http://www.ssnationaldialogue.org), p.12.

64 The working group comprises key civil society organisations, transitional justice experts, and members of women's groups and faith-based organisations. Transitional Justice Working Group: Building a Foundation for Justice in South Sudan *An Agenda for the Revitalized Transitional Government of National Unity* (R-TGONU) January 2021.

65 McCrone, F. 'War Crimes and Punishment: The Terrain Compound Attack and Military Accountability in South Sudan, 2016-18,' Small Arms Survey, Human Security Baseline Assessment, Briefing Paper, August 2019. <http://www.smallarmssurveysudan.org/fileadmin/docs/briefing-papers/HSBA-BP-Terrain.pdf>

66 Business & Human Rights Resource Centre, 2018, Lundin Energy Lawsuit, (re complicity in war crimes in Sudan). 18 October. <https://www.business-humanrights.org/en/latest-news/lundin-petroleum-lawsuit-re-complicity-war-crimes-sudan/>.

67 Rickard, C. 'Sacking of 14 judges by South Sudan President unconstitutional: East African Court of Justice,' *African Lii*, 28 July 2020. <https://africanlii.org/article/20200728/sacking-14-judges-south-sudan-president-unconstitutional%3A-east-african-court>.

those who have disposed them are dismissed; claims against men in uniform rarely prevail.<sup>68</sup> In contrast, a foundational justice framework treats it as significant that activists assert the norms, even when they do not win their cases. The act of making the claim is equally important as the existence of an institution in which such a claim can be made.

## Conclusions and Recommendations

This analysis suggests that rather than asking how to design justice processes for aspirational institutionalised systems, it is essential to ask in practical terms how citizens and civil society have pursued and achieved justice in settings of persistent conflict and turbulence, and how their efforts might be supported and advanced. Such an approach subverts the assumption that delivering justice depends principally on *building the capacities of the state*, rather, it suggests that of critical importance is *building relations between citizens and the plural public authorities that are actually governing*.

Our *theory of foundational justice* is as follows. In a context where formal institutions remain weak or co-opted, and where a transition to institutionalised democracy is a distant prospect, progress towards justice is nonetheless possible, through small wins. Consistent justice claims and principled struggles to promote 'law from below' represent normative challenges to the logic of the political marketplace, and to the militarised and mercenary values, transactional practices, gender inequalities and ethnic divisions that sustain it.<sup>69</sup> Over time, small wins can build up networks and constituencies for justice and can consolidate norm institutions that promote accountability and non-violent political practices.<sup>70</sup> Many of these small wins are acts of resistance: opposing injustices, perhaps

with little success other than symbolically affirming a principle. Such actions constitute expressions of agency and build normative foundations for peace.

It is admittedly difficult to design metrics for measuring progress towards foundational justice through small wins. Current evaluation methods and matrices are designed on the supposition of functional formal institutions and expect results within the timeline of a single project cycle. Foundational justice requires greater patience because normative change needs longer to achieve outcomes. In some cases, it consists in preparing the ground for changes that may occur decades into the future. Rather than specifying precisely what such an evaluation metric would look like, we pose this as a challenge for research and policy, and in the interim propose a framework for research and action.

A starting point is identifying, connecting, publicising, and building upon existing initiatives and achievements. Researchers should delve into legal pluralism and the legitimacy of customary and religious laws and norms; but they should also investigate efforts to reform and progress justice through non-state forums (avoiding trying simply to elucidate their rules and treating cultures as if they were static). They should attend to the innovative ways in which lawyers and activists from the Horn of Africa are pursuing strategic litigation in a multiplicity of courts, local, national, regional, and international. They should study local agency and the pragmatic and contextual approaches practiced by local lawyers, paralegals, women's groups, to identify incremental gains and the challenges of pursuing cases, even when there is a vanishingly low prospect of winning.

Our *generic recommendations* to international partners are as follows. Development partners have acquired considerable experience

<sup>68</sup> See DefendDefenders 2019, for further examples of both successes and challenges across the region.

<sup>69</sup> See de Waal, A. 2016, Introduction to the Political Marketplace for Policymakers, JSRP Policy Brief 1 March. <https://www.lse.ac.uk/ideas/Assets/Documents/Conflict-Research-Programme/policy-reports/JSRP-Brief-1.pdf>.

<sup>70</sup> This closely relates to the concept of 'civicness' identified in other CRP research, see Kaldor 2019, op. cit.

in justice programming, including both conventional support to governmental institutions and smaller scale assistance to the NGO sector and activists and – occasionally – to informal justice institutions and legal and civic activists. The latter tend to be underestimated. In future, they should be treated as pivotal in a theory of change for how progressive changes can occur in turbulent political systems in which state-building and democratic transition remain elusive. International assistance to state-focused security and justice institutions should include components of support for non-state actors, including lawyers and paralegals to undertake monitoring and engagement. More generally, internationals should support legal empowerment, strategic litigation, networking of legal professionals and activists, and other 'law from below' activities – materially and politically. This kind of justice programming is an inexpensive long-term investment in progressive legal and normative change.



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