A Model of Transitional Justice for Somalia

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Abstract

This article proposes a model of transitional justice for Somalia. The author argues for a conceptual framework that intertwines peace and justice, the latter defined broadly as including both retributive and restorative goals. With consideration to the unique characteristics of Somalia, the author proposes a model that combines the use of the traditional Xeer system with the creation of an ad hoc tribunal. In doing so, the author makes a comparative analysis with the Gacaca system in Rwanda, and the ad hoc tribunals for Rwanda and the former Yugoslavia, while also making reference to her field research in Somalia.

"This is the most lawless war of our generation. All wars of aggression lack legitimacy, but no conflict in recent memory has witnessed such mounting layers of illegality as the current one in Somalia. Violations of the UN charter and of international humanitarian law are regrettably commonplace in our age, and they abound in the carnage that the world is allowing to unfold in Mogadishu, but this war has in addition explicitly violated two UN security council resolutions."
—Salim Lone, The Guardian, April 28, 2007.

Introduction

This article proposes a model of transitional justice for Somalia. While the current mandate of the African Union Mission for Somalia (AMISOM) does not include justice and accountability, these issues are fundamental to the achievement of a durable peace. Though recognizing the differences and peculiarities of every conflict and therefore the necessity to adopt an *ad hoc* approach to address accountability, this article will cite examples from previous conflicts to illustrate the situation in Somalia.

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The article begins by explaining the peace versus justice debate that often aris-es in and after conflicts, followed by a description of a failed state. This information will have an important role in determining which kind of justice mechanisms will best align with Somali culture and address the characteristics of the conflict itself. Subsequently, this article proposes a transitional justice model to deal with the issue of justice and accountability in Somalia through an analytical explanation of possible mechanisms for justice.

In proposing a model of transitional justice for Somalia, it is important to note that the process of achieving justice faces many challenges. The model proposed might not be the best model; but it is arguably the best model possible under the circumstances. The model is based on a combination of two mechanisms that can bring both retributive and restorative justice: an *ad hoc* tribunal and the use of the *Xeer* ("law, rule, regulation" in Somali), the informal justice system. Given that plenty of literature is available regarding the *ad hoc* tribunals (both in their international and hybrid form), only the main characteristics and issues related to this transitional justice system will be discussed. Thus, the analysis will focus on the *Xeer* system, using both the limited literature available and primary data collected during field research in Jowhar and surrounding areas, in the Middle Shabelle Region of Somalia.[1]

For the first time since 1995 when the United Nations Operation in Somalia II (UNOSOM II) left the country, international attention and interest in Somalia has grown, mainly due to the possible security threat that could result from the country's supposed links with al- Qaeda.[2] This interest has the potential to galvanize action and investment in resources to promote justice, accountability, and peacebuilding in a country that has been living in chaos and without a functioning government for sixteen years. To better understand these issues, it is first necessary to examine the prevailing dichotomy between peace and justice.

Peace and Justice

In situations of conflict where war crimes, crimes against humanity, and other hu-man rights violations are committed, the dichotomy of peace versus justice presents numerous challenges. Can peace be achieved without justice? Should a peace agree-ment be signed before issues of accountability are addressed? Can justice contribute to the achievement of peace? How is justice defined and what are its goals?

At times, the rights of victims become subject to negotiations. For example, some experts argue that to negotiate peace, it is necessary to sit at the table with the perpetrators of violence. According to this perspective, achieving peace and justice at the same time is incompatible: the prosecution of leaders in court cannot occur during the negotiation of a peace agreement.[3] Yet, others maintain that justice is of-ten necessary to reach a sustainable and durable peace, and that a peace agreement negotiated in the absence of some form of justice can bring only short-term results.[4] As Justice Goldstone stresses, "lasting and effective 'peace' cannot and should not be equated with 'making peace,'"[5] by which he implies that peace can be obtained by signing a peace agreement even if justice is not addressed. According to the propo-nents of justice as a means to reach peace, the goals of justice and peace are inher-ently linked and mutually reinforcing.

When addressing the relationship between peace and justice, it is necessary to define the concept of justice. This article refers to justice not only as an outcome,

but also as the goals, focus, and mechanisms employed to seek it. When exploring the role of justice in achieving durable peace, the concept of justice must be broad. It must include both retributive as well as restorative justice as both serve different purposes.[6]

Retributive versus Restorative Justice

International tribunals, through punishment and retributive justice mechanisms, mainly pursue accountability.[7] Truth and reconciliation commissions, on the other hand, aim to bring restorative justice through truth-telling, public recognition of the violations, and societal healing from past patterns of violence.

According to pure retributive theory, an imperative to punish exists beyond its deterrent role. Crime is conceived as an offense against the entire society. Therefore, it fo is way, the restorative justice approach mitigates the apparent contradiction of peace versus justice; justice, in this case, is a necessary step to attain peace.

The Current Situation:
Somalia as a "Failed State"

Somalia's population is a rare example of relative homogeneity in Africa; Somalis possess a common language (Somali) and religion (Sunni Muslim) as well as a complex history.

In the nineteenth century, the Somali people were subjected to occupying colonial forces in five different districts in the Horn of Africa: a French protectorate, which is now Djibouti; British Somaliland in the northwest; the Ogaden which was colonized by Ethiopia; the Italian Somalia in the South; and the Northern Frontier District (NFD) under British control in northeastern Kenya.[12] In 1960, Somalia achieved independence from Britain and Italy. Thus, the two colonies and their systems were merged and the state of Somalia was formed.[13]

For the first decade after independence, Somalia's economy was stagnant and highly dependent on foreign aid. A political crisis ensued that compounded economic troubles, when President Shermaarke was assassinated in 1969. The same year, in October, Major General Siad Barre led a military coup and established a military regime.[14]

If justice is perceived – as often happens – as synonymous with punishment, then the full value of exposing the truth as a means to achieve justice and peace is not recognized. On the other hand, if justice is perceived as a broader concept that includes attention to victims' experiences, restorative justice becomes essential.

The following years were highly unstable as three separate armed conflicts took place between 1977 and 1991.[15] The losses and damage from these wars were dramatic and included countless deaths, the destruction of infrastructure, and the displacement of thousands of people both internally and as refugees.[16] The conflicts also reinforced the division of Somali society based along clan lines.

On 27 January 1991, the liberation movements succeeded in forcing Siad Barre out of Mogadishu, and on February 1, the leader of the United Somali Congress, Mohamed Ali Mahdi, declared himself interim president.[17] Yet, the fall of the dictatorship did not bring stability and peace to the country. On the contrary, Somalia descended into an anarchical struggle between clans for resources and political power, resulting in an acute humanitarian crisis characterized by food shortage and insecurity. In 1993, the Security Council authorized a United Nations peacekeeping operation, UNOSOM I, with a mandate to provide humanitarian assistance to a population facing the threat of famine.[18]

While the humanitarian operation met some success, the subsequent military coalitions organized by the United States, UNITAF (Unified Task Force) and UNOSOM II, did not. National reconciliation, disarmament and demobilization and the reestablishment of local and national institutions failed to follow.[19] After a series of violent confrontations between peacekeepers and the warlord, General Mohammed Farah Aideed, in 1995, UNOSOM II left Somalia in a state of anarchy, state collapse and war.[20]

After the withdrawal of UNOSOM II, more than a dozen peace and reconciliation conferences were launched, but none achieved any substantial result. The most ambitious and promising attempt was the 2000 Arta Peace Conference which led to the creation of a Transitional National Government.[21] The Transitional National Government, established in 2004, was based on a power-sharing agreement between the majority and minority clans.[22]

In May 2006, conflict broke out again when a military group called Council of Islamic Courts defeated the warlords in Mogadishu, occupied considerable parts of southern Somalia and attempted to create an Islamic State. Ethiopia, concerned about the spillover effect that the Islamic Courts might have on its borders, launched air strikes against Mogadishu in December 2006. Backed by the Transitional Federal Government, Ethiopia forced the Courts out of the capital. Concerned about possible links between the Courts and al-Qaeda, the United States engaged in a direct attack on the Islamic Courts on 9 January 2007, largely defeating them.[23]

The defeat of the Islamic Courts has not brought peace or stability to Somalia: the country is still in a state of chaos, the TFG does not enjoy popular support, and the attempted reconciliation effort held in Mogadishu between 15 July and 30 August 2007 failed to create substantial agreements.[24] An under-staffed and under-prepared African Union mission is currently deployed, seeking to provide security and bring peace to the country. All the while, Somalia is facing a complex humanitarian emergency characterized by famine and the spread of diseases. Finally, violence increased throughout 2007 and in the first months of 2008.[25]

As the history of Somalia demonstrates, clanship is a central form of political organization and identification for Somali people.[26] In a situation characterized by deep insecurity, clans have guaranteed the support and protection of their members and provided balance and security.[27] Moreover, the government and the most powerful clans have discriminated against and marginalized ethnic minorities with different languages and clan histories, which caused them to be excluded from access to positions of political power.[28]

Since the fall of dictator Siad Barre in 1991, Somalia has been ruled by cha-

os and warlords, and represents one of the starkest contemporary illustrations of a "failed state."[29] The Foreign Policy Magazine, in its *Failed State Index 2007,* ranks Somalia third, after Sudan and Iraq.[30] A failed state exists where formal power structures have collapsed and there is no legitimate authority capable of providing law and order and maintaining a monopoly on the use of force. Failed states are often characterized by internal violence and social conflict. In his concluding remarks at the United Nations Congress on Public International Law in 1995, former U.N. Secretary General Boutros Boutros Ghali described the concept of a failed state as follows:

> A feature of such conflicts is the collapse of state institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of law and order, and general banditry and chaos. Not only are the functions of government suspended, but its assets are destroyed or looted and experienced officials are killed or flee the country. This is rarely the case in inter-state wars.31

The situation in Somalia further deteriorated following the defeat of Islamic Courts and the occupation of Ethiopian troops in December 2006. In response, the Council of the African Union approved the African Union Mission to Somalia (AMISOM) on 19 January 2007. Notably, the mandate does not address accountability and justice.[32] In addition, this African force is weak and faces serious challenges to implementing the mandate. At the time of writing, AMISOM had deployed only 1,800 troops of the 8,000 approved for the mission.

Rationale for Transitional Justice Mechanisms

Insecurity, violence, continuous fights, lack of formal institutions, the failure of more than a dozen of peace and reconciliation conferences since 1995,[33] and the weakness of the African Union forces suggest that achieving peace is not realistic in the near future. However, some evidence indicates that an effort to address justice will itself contribute to reestablishing order and rule of law. It will build confidence in the institutions and systems of the Somali state and will seek to transform the impunity that is pervasive in Somalia today. These elements are fundamental to obtaining a durable peace. The mechanisms of transitional justice, therefore, can and should be implemented without waiting for a peace agreement to be signed. Transitional justice mechanisms should be implemented as soon as a minimum level of security is attained. Unfortunately, these minimal standards of security are still not in place, especially in the areas of Mogadishu, Baidoa, and Kismayo. Among other necessary measures to stabilize the region, humanitarian relief must continue to be distributed and democratic elections have to take place. Plans are underway for the democratic election of a Somali government in 2009.

The current Transitional Federal Government, led by Abdullahi Yusuf Ahmed, is widely perceived to be biased in favor of the Darod people, Mr. Ahmed's clan. Likewise, the police force created after the formation of the government is commonly seen to be biased and corrupt, as well as lacking in essential resources, such as sufficient police cars, well trained police, office supplies and computers.[34] Democratically electing a government and the professionalization of the police force are therefore essential to creating the necessary conditions to pursue justice in Somalia.

Only when these conditions are met and justice is perceived and accepted as legitimate, can justice contribute to the achievement of sustainable peace. Otherwise, the pursuit of justice is destined to be perceived as victor's justice, a situation likely to fuel tensions and hatred which could serve to weaken efforts to bring social healing and sustainable peace.

The Model Proposed: A Hybrid Of Retributive and Restorative Justice Mechanisms

Based on the conditions governing Somalia and the theoretical and practical analysis of the relationship between peace and justice detailed above, an *ad hoc* hybrid model that pursues both retributive and restorative justice is the best possible solution for Somalia. The first mechanism considered for this model is the informal justice system led by the clan elders; the second one is an *ad hoc* tribunal. The former – the *Xeer* system – will serve mainly restorative purposes with some retributive components related to compensation. The *ad hoc* tribunal will serve mainly retributive goals, holding the main perpetrators of the atrocities accountable for the violations they committed.

As much has already been written about *ad hoc* tribunals and other formal, prosecutorial justice models, this article will concentrate mainly on the *Xeer* system. Beyond these two mechanisms, the creation of a truth commission to facilitate truth-telling, collective memory and the acknowledgement of past crimes is recommended. This combination of mechanisms would constitute a best effort to employ justice as a way to support reconciliation among the Somali people.[35]

The *Xeer*

Despite the lack of a functioning government, local structures within Somali society have served to maintain a minimum level of stability, rule of law, and justice. One such structure is the *Xeer*, a dispute settlement mechanism based on clan/family customary law and elements of *Sharia* law, the body of law derived from the Koran and from the teaching and examples of the Prophet Mohammed. The *Xeer* system is still the most commonly used and reinforced justice mechanism. Somalis use *Xeer* to solve perhaps 80-90% of all the controversies involving crimes, especially in rural areas where lack of transportation and tradition prevent people from using other justice mechanisms.[36]

The clan elders, acting as judges, lead *Xeer* processes. In some cases, the clan elders belong to the disputing clans, in other cases they belong to third-party clans.[37] The *Xeer* is an unwritten agreement created bilaterally between two clans. The agreement determines the relationship between clans with regard to resources, family matters, and crimes. Clan members transmit these agreements from generation to generation. Over time, the agreements become precedents and thus form part of customary law.[38] *Xeer* hearings are held in public, usually under a tree within the village or in rural areas. Several types of individuals are excluded from participating: persons with close family relationships with those involved in the controversy, individuals who have a personal grievance against one of the parties, and persons who have already sat in judgment of the same case. Women are not permitted to participate in the discussion and judgment.[39]

The *Xeer* system is associated with the idea of restorative justice. One of its main goals is to reestablish the social order. Victims are compensated through a *Diya* (blood compensation), which consists of either money or livestock.[40] It also serves to deter further crimes, and to reintegrate both victims and perpetrators in their communities.[41] "In the clan justice, the decision is made to stop the violence: the aim is to make peace and set up an agreement," said a male interviewee.

Considering the importance, acceptance and legitimacy that the clan system and customary practices have had throughout Somali history, the traditional *Xeer* system ought to be considered a primary means to bring accountability to the people. Consequently, in assessing the potential effectiveness of transitional justice mechanisms for Somalia, it is important to also look at how such mechanisms have been employed in other conflict situations.

The *Gacaca* courts, for example, have been used in Rwanda since 2002 to pursue justice after the 1994 genocide. In Rwanda, the decision to use the *Gacaca* (which literally means "lawn" or "small grass"), the local mechanism to solve disputes, is due mainly to the high number of people involved in the genocide. It was clear that the domestic courts would take too long and require too many resources. In its traditional form, *Gacaca* courts heard controversies over property, inheritance, personal injuries, and family matters. According to this model, older men would solve the disputes on the lawn. The punishment was not individual but collective: judges had the ability to impose restitutions on the perpetrator's family and even their entire clan.[42]

In 1996, the government adopted a legal framework to address crimes committed during the genocide. It divided offenders into four different categories. Category one included those who planned the genocide, its leaders, notorious masskillers and those who had committed sexual torture. Category two was composed of those who had committed or attempted homicide. Category three was for those who inflicted bodily harm. Finally, category four referred to those who committed crimes against property. The law established that all crimes within categories two through four were to be heard in the *Gacaca* Courts.[43] A law passed in 2001, further clarified that the *Gacaca* program is based on the principle that the offences "were publicly committed before the very eyes of the population, which thus must recount the facts, disclose the truth, and participate in…trying the alleged perpetrators."[44]

In Somalia, like in Rwanda, the number of perpetrators is high and the domestic courts lack financial and human resources to try all cases.[45] Because of the prolonged instability in the country, many judges and educated people have fled. Moreover, many legal codes were literally burnt by the Islamic Courts. As such, there is a general lack of trust in the ability of the national courts to assure a fair and transparent trial.[46]

A series of features that characterize the *Xeer* make the system particularly suitable for Somalia, because of the traditional and cultural issues already explained above. It is also practical: the system is already in place, so no major new structures are needed, such as the construction of courts and the election of judges. Additionally, the financial resources necessary to implement this mechanism are minimal. In that regard, international and hybrid tribunals are less suitable for Somalia because they require significant resources for their creation and their functioning and they are

slow in carrying out trials. For the same reasons, *ad hoc* tribunals can only prosecute a limited number of perpetrators, normally those most responsible for the atrocities, generally referred to as the "big fishes".[47]

Local systems developed according to Somali culture have a better chance of surviving the prevailing chaos. In addition, leveraging the traditional system will serve to legitimize and increase recognition for such local practices. Nonetheless, as further analysis will show, this engagement requires caution and sensitivity to local dynamics.

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In Somalia, as in many other poor countries, the informal justice system has often been the only system accessible to the population. In addition, where formal justice has been an option, it has been used only as a last resource.[48] The justice system in Somalia, in fact, has been dysfunctional for sixteen years. There are two exceptions, the six-month period in which the Islamic Courts were in power, and the current situation in which a poorly administered justice system operates within some cities, amid perceptions that it is biased and ineffective.[49]

The reasons for not utilizing the formal justice system are numerous and critical. Many people mistrust the judicial system and feel intimidated by it. Unequal power relations based on clan and group affiliation as well as ethnicity, especially in case of minority groups, often determine the possibility for a certain group to obtain justice. The formal justice system is often corrupt and biased and it is commonly controlled by the most powerful groups. It therefore lacks legitimacy in the eyes of the wider population. As a Somali woman explained in a recent interview I conducted: "If rape is committed against a girl of a powerful clan, the case is brought to Court; but if the victim does not belong to a powerful clan, the case will be discussed between families."[50] Another stated, "The affiliation to a certain clan gives different access to justice: justice will move much faster if the accusation comes from a powerful clan."[51] Sometimes, people do not utilize the formal system out of fear. "If a crime is committed against a component of a weak clan who has no weapons, the crime is not denounced to the police because people of these clans are afraid of revenge and further violence against them again," explained a member of the Somali police force.

Another benefit of the informal system is accessibility: for people living in rural areas, formal tribunals are largely inaccessible, whereas the informal system is viable given its localized nature.[52] Finally, an advantage of conducting the trials using the *Xeer* structure is the respect it expresses for local culture and traditions. These traditions are based in the practices of the country's nomadic and pastoral populations. The use of a local system of justice enables greater participation by the community, which contributes to a sense of ownership of the process. It permits the process to be

understood, rather than feared; justice is discussed in the local language, according to cultural traditions. This is particularly important in a country like Somalia, where a great part of the population is illiterate and living in isolated areas.[53] The *Xeer's* adherence to tradition and culture increases legitimacy and acceptance among the population. One interviewee, for example, explained: "The advantages [of the *Xeer* system] are the speed of the resolution of the controversy which generally takes only few days and that most times family justice is based on *Sharia* Law, which is the just law."[54]

Beyond its perceived legitimacy, the *Xeer* is more enforceable because social pressure often compels compliance to judgments. The imperative to respect the decisions also derives from a collective recognition of the necessity to avoid an escalation of violence and revenge among clans. Lastly, respect for decisions by members of the communities in question reflects local recognition of the authority of elders in the clan system and of the precedents that constitute customary law.[55]

While the *Xeer* has some compelling advantages for the Somali context, several concerns should nonetheless be considered. First, the *Xeer* system has the potential to reinforce old power structures and perpetuate discrimination against the less powerful clans and minority groups. While the *Xeer* system functions well enough between groups with comparable power, there are questions regarding its value when the controversy involves clans with different levels of power. In such cases, the powerful clan generally does not submit to paying the *Diya* (blood compensation). Consequently, threats to the security of the other clan persist.[56] In practice, weak clans and minorities seldom achieve justice for crimes committed against them, at the informal or formal level.[57] Second, the prohibition against women's participation in *Xeer* justice is deeply problematic. Indeed, women are excluded from all roles in the process, including even participation through witnessing the deliberations. This is the case even when elders decide about a controversy where the woman is the victim, for example in case of rape.[58]

It is thus important to understand the limitations of the *Xeer* system and better define its scope. First, the idea of collective responsibility for a clan to pay the *Diya* contradicts the principle of individual responsibility: in the *Xeer* system, the entire clan participates in compensation to the victims.[59] Second, the *Xeer* system conflicts with the principle of equity, which maintains that cases of similar characteristics should be treated according to consistent standards. The *Xeer*, in contrast, prescribes differing penalties for the same crime, depending on the particularities of each locality and circumstance. Examples are monetary payment or livestock.[60] Another issue relates to the inconsistent recourse to the death penalty. In some cases of rape, in some regions, for example, if a married man rapes a woman, clan elders can decide to follow *Sharia*, and sentence the perpetrator to death.[61]

Conclusions and Recommendations Regarding the *Xeer* System

The analysis described above suggests that the newly elected Somali government should support the implementation of the *Xeer* system as a transitional justice mechanism. This will invest the *Xeer* with the legitimacy derived from not only customary practice, but also from formal authorities. The role of the government should not be intrusive; rather, its role should extend only to the supervision of the process to

ensure that the trials are fair. By including the government, proponents of justice will avoid tensions and will increase the probability of securing governmental support. That said, the above-mentioned weaknesses and deficiencies of the *Xeer* system, which depart from key international principles and standards, should be recognized. As a result, the *Xeer* system should be used primarily to prosecute cases that do not constitute war crimes and crimes against humanity, nor repeat offences. Lastly, the United Nations and other international organizations should make all efforts to avoid intervening in the use of the *Xeer*. Experience has shown that attempting to make a traditional justice mechanism conform with global standards, will likely transform the system itself and, with great probability, compromise its effectiveness.

Despite its shortcomings, changing these aspects of the *Xeer* would transform its very nature. Making radical changes, will risk damaging the concept and practice of the *Xeer* as a tradition for the future. In Rwanda, *Gacaca* has been considerably altered to align as much as possible with international standards. The ability of the system to restore social order and balance has been weakened into a hybrid justice mechanism with Western influences.[62] For example, in its altered form, the system is an official institution of the State linked with its prosecution and detention system, and applies codified State law in place of customary law. In addition, in the revised *Gacaca*, the judges are not the elders anymore, but elected judges of the courts.[63]

As already mentioned, the *Xeer* should not be used in cases of war crimes, crimes against humanity, other inhumane acts or repeat offences. In fact, some of the mechanisms used by the *Xeer* to restore social order and societal cohesion diverge from basic human rights norms. For example, sometimes a girl from a family convicted of a crime is forced to marry a member of the aggrieved clan as compensation. In other cases involving rape, the claimant is obliged to marry the perpetrator to keep her honor and the honor of the family intact.[64] These limitations are significant, and strengthen the argument that the *Xeer* is not suitable to address the most serious crimes involving crimes against humanity and war crimes. At the same time, the *Xeer* system offers a highly viable means for addressing issues such as conflicts around property, land and natural resources. Due to the effectiveness of social pressure in enforcing decisions, in fact, the *Xeer* can guarantee a rapid solution to many controversies.

A non-intrusive role for the democratically elected government will be essential to enforce transparency and fairness. This case will be different from *Gacaca*: while in Rwanda the system has become a state institution, the *Xeer* should remain a local system, with only a minimum but essential supervision from the government. The Dakar declaration adopted on 11 September 1999 after the Seminar on the Right to Fair Trial in Africa, maintains that:

> "it is recognized that traditional courts are capable of playing a role in the achievement of peaceful societies and exercise authority over a significance proportion of the population of African countries. However, these courts also have serious shortcomings, which result in many instances in a denial of fair trial. Traditional courts are not exempt from the provisions of the African Charter relating to fair trial."[65]

In this respect, the government should play a role in correcting some of the weaknesses of the *Xeer* courts in relation to fairness and the application of common stan-

dards, transparency, and publicity. The oral nature of traditional proceedings can be problematic as they do not rely on written rules or clearly identified minimum standards.[66] This requires a minimum level of formalization, such as training the individuals responsible for documenting the trial proceedings and recommendations expressed by the attending public. The government should also encourage uniformity in the treatment of similar controversies, so that weak clans are guaranteed justice.

Another important issue that requires supervision is the degree of inclusiveness in the participation of community members in trials held at the local level. This issue compromised the effectiveness of *Gacaca* and should be considered in the implementation of the *Xeer* as a mechanism of transitional justice. Publicity and participation are key to achieving the goal of social healing and truth-telling.[67]

An *ad hoc* tribunal

The second mechanism that holds potential to bring justice in Somalia is an *ad hoc* tribunal (either international or hybrid). Staffed with both international and national employees, an *ad hoc* hybrid tribunal would be ideal given that it would be located in Somalia. This would keep justice proceedings close to the victims and increase the sense of Somali ownership over the transitional justice process. At the same time, creating a hybrid tribunal requires important preconditions. It necessitates a certain level of security in order to protect witnesses and it requires a government that is perceived to be legitimate. Given the volatile situation in Somalia today, these conditions are not guaranteed. In the case that they are not viable, an *ad hoc* international criminal held outside of, yet in close proximity to, Somalia could be established.

The first goal of the ad hoc tribunal would have to be accountability: to hold perpetrators responsible for their conduct, through public acknowledgement of the criminal responsibility for violations of human rights and humanitarian law.

The first goal of the *ad hoc* tribunal would have to be accountability: to hold perpetrators responsible for their conduct, through public acknowledgement of the criminal responsibility for violations of human rights and humanitarian law.[68] The hearings will be unable to attend to the extensive number of victims and potential claimants. The Government of Rwanda, for example, calculated that it would take two to four centuries to try all the people implicated in the genocide.[69] For this reason, an *ad hoc* tribunal would likely seek to prosecute the leaders of the crimes committed.[70] This would permit public acknowledgment of the crimes while limiting the burden on the international justice system and avoiding major delays in the reconciliation process.[71] In addition to these trials, truly addressing impunity requires that the international community assist in establishing an international mechanism where perpetrators can be tried and punished for their crimes.[72]

A second goal is deterrence, both in Somalia and internationally. Deterrence inhibits other people from committing a certain crime because of the punishment inflicted by perpetrators for the same crime.[73] The effect of deterrence is connected to accountability and impunity; when accountability and impunity are weak, it is difficult for a justice system to have a strong deterrent effect.[74]

Regardless of the type of *ad hoc* tribunal, an important issue to resolve early on is that of temporal jurisdiction, the period of time within which crimes were committed over which a court has jurisdiction. In the case of the *ad hoc* tribunal for Somalia, the temporal jurisdiction of the tribunal should cover the entire duration of the war. Previous examples show that limiting the jurisdiction of an *ad hoc* tribunal to a specific time of the conflict increases the potential that the tribunal could be perceived as biased. This would compromise the legitimacy and popular acceptance of the proceedings and eventual decisions.

One such example is the temporal jurisdiction of the International Criminal Tribunal for Rwanda (ICTR). The ICTR was limited to one year, from 1 January through 31 December 1994.[75] The Government of Rwanda expressed concerns regarding this decision, which was taken by the U.N. Security Council. The Rwandan government argued that the temporal jurisdiction was too restrictive as "the genocide the world witnessed in April 1994 was the result of a long period of planning during which pilot projects for extermination were successfully tested." In addition, an international tribunal "which refuses to consider the causes of the genocide in Rwanda and its planning…cannot be of any use…because it will not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation."[76] Confining the jurisdiction of justice proceedings to such a limited period promises an asymmetric process, with the prosecution of only one of the parties in conflict, and the exclusion or omission of important factors related to the pursuit of justice.[77]

In contrast to the ICTR, the ICTY's temporal jurisdiction is unlimited and ongoing; the Tribunal has the right to try the perpetrators of crimes committed on or after 1 January 1991.[78] The UN Secretary General stressed that 1 January 1991 is a "neutral date, which is not tied to any specific event."[79] The ICTY was created under Chapter VII of the UN Charter while the conflict was still ongoing, with the purpose of setting up a mechanism for the restoration of peace.[80] Justice Goldstone has argued that the creation of the ICTY supported the successful conclusion of the Dayton peace agreement, indicating that the indictment of Mr. Karadzic, a former Bosnian Serb leader, and Mr. Mladic, who was a chief of the Bosnian Serb army, and their consequent isolation, permitted the necessary political space for the peace talks. He further underscores the need for a basic level of good faith, mutual trust and commitment, something difficult to attain when leaders purportedly responsible for the atrocities are directly engaged in negotiations.

In a similar vein, the International Commission of Inquiry on Darfur, created by the Security Council in September 2004, affirms in its final report: "The prosecution by the ICC of persons allegedly responsible for the most serious crimes in Darfur would contribute to the restoration of peace in the region."[81] Both of these perspectives from differing conflict situations hold that the pursuit of justice can become an important force enabling the achievement of peace.

After a protracted conflict where war crimes and crimes against humanity are committed, a mechanism for retributive justice is necessary to ensure that the perpetrators do not go unpunished. The general sentiment among the international community supports this imperative, as reflected in the common conclusion that crimes against humanity affect humanity as a whole. The conflict in Somalia has witnessed atrocious crimes: the targeting of civilians, arbitrary or unlawful deprivation of life, rape and the recruitment of child soldiers, to mention only a few.[82] The creation of an international tribunal to try those responsible for these atrocities would not only fulfill the desire for justice among the Somali people, but it would also reflect the retributive values held among the broader international community.[83]

For the victims, public acknowledgement of what happened is of fundamental importance to the recovery process. Silence about, or denial of past events, in fact, can further traumatize victims, whereas the public acknowledgement provided by the act of that prosecution can contribute to healing and eventually to reconciliation.

Trials and tribunals are also said to enable truth-telling and contribute to a society's healing.[84] For the victims, public acknowledgement of what happened is of fundamental importance to the recovery process. Silence about, or denial of past events, in fact, can further traumatize victims,[85] whereas the public acknowledgement provided by the act of that prosecution can contribute to healing and eventually to reconciliation. Documenting truth represents an important step in maintaining the historical record. Acknowledging and disseminating the facts surrounding a significant crime has an essential role in determining how future generations perceive the conflict and how and who will bear the responsibility for the events, as well as how to ensure that such experiences are not repeated in the future. In this way, acknowledgement of major crimes contributes to the creation of a lasting peace.[86]

Conclusions

This article began by arguing that justice and accountability are essential to reaching sustainable peace in Somalia. Recognizing that a series of conditions must be present to bring about justice, it should be noted that signing a peace agreement is not one of them. Transitional justice mechanisms can contribute to realizing peace in the course of a conflict. Maintaining that justice serves both retributive and restorative goals, this article proposed two mechanisms answering the respective goals: the traditional justice system (*Xeer*) and an *ad hoc* tribunal. The analysis and explanation of the suitability of these two mechanisms for Somalia have been carried out not only by looking at the tradition, culture and conflict of Somalia, but also by conducting a study of mechanisms implemented in other similar conflicts.

Bringing justice to countries where there is not yet peace is extremely challenging. It requires attentive analysis of the conditions, consequences, and risks that each mechanism might imply. This article in no way pretends to propose the best model of justice for Somalia, but rather the most feasible model for a country whose people have not seen justice and peace for sixteen years.

Endnotes

1 Primary data derive from field research conducted by the author from June to August 2007 in the area of Jowhar, in the Middle Shabelle Region of Somalia. The aim of the research was to investigate the functioning of the formal and informal justice systems in the Middle Shabelle Region. After an initial two-week period of community observation, the author conducted semi-structured individual interviews, and focus groups: this methodology allowed speaking with and gathering data from about a hundred individuals. Targeted individuals for the research were local authorities, judges, police personnel, inhabitants of Jowhar and villages in the area, IDPs, community and religious leaders, rural communities, doctors, midwives, international organizations' professionals, NGOs' employees and individuals from civil society organizations.

During the entire collection of data, a female translator accompanied me, translating from Somali to Italian, my native language. INTERSOS, which hosted me, provided with logistical support. INTERSOS is an independent international non-profit humanitarian organization with headquarters in Rome committed to assist the victims of armed conflicts. INTERSOS started its work in Somalia in 1992.

The analysis entailed categorizing data according to issues related to corruption and bias; different treatment according to clanship; general procedures of the formal and informal justice system; gender issues and issues related to crimes' evidence of crimes.

2 ICG, Africa Report No 45, *Somalia: countering terrorism in a failed State,* May 23, 2002, i, http://www.crisisgroup.org/library/documents/report_archive/A400662_23052002.pdf (accessed on November 23, 2007).

3 Cherif Bassiouni, "Searching for peace and achieving justice: the need for accountability", *Law and Contemporary Problems,* Vol. 59, No. 4 (1996):12-13. Richard Goldstone, "Bringing War Criminals to Justice during an Ongoing War", in *Hard Choices: Moral dimensions of Humanitarian Intervention*, ed. Jonathan Moore (Rowman Altamira, 1998), 196-197.

4 Cherif Bassiouni., "Searching for peace and achieving justice: the need for accountability", *supra* note 2, 12-13. Richard Goldstone, "Bringing War Criminals to Justice during an Ongoing War", *supra* note 2, 196-197. Jeremy Sarkin, "The tension between justice and reconciliation in Rwanda: politics, human rights, due process and the role of the *Gacaca* courts in dealing with the Genocide", *Journal of African Law*, 45, 2 (2001), 143.

5 Richard Goldstone, "Bringing War Criminals to Justice during an Ongoing War", *supra* note 2, 200.

6 Richard Goldstone, "Bringing War Criminals to Justice during an Ongoing War", *supra* note 2, 200-204

7 Annette Lyth, *The development of the legal protection against sexual violence in armed conflicts – advantages and disadvantages* (December 2001), 139, http://www.iktk.se/publikationer/rapporter/pdf/development.pdf (accessed on November 22, 2007). Sarkin Jeremy et al., "Too many Questions, too few answers: reconciliation in transitional societies", *Columbia Human Rights Law Review*, n. 661 (2003-2004), 714. Angela Whyte., *Placing blame or finding peace: a qualitative analysis of the legal response to rape as a war crime in the former Yugoslavia* (Ann Arbor: ProQuest, 2005), 102-103.

8 Miriam Aukerman, "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice", *Harvard Human Rights Journal,* Vol. 15 (2002), 53-54.

9 Sarkin Jeremy et al., "Too many Questions, too few answers: reconciliation in transitional societies", *supra* note 6, 692-693. Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2001), 16.

10 Sarkin Jeremy et al., "Too many Questions, too few answers: reconciliation in transitional

societies", *supra* note 6, 685. Erin Daly, "Between Punitive and Reconstructive Justice: the *Gacaca* Courts in Rwanda", *New York University Journal of International Law and Politics*, n.4 (2002), 355, 356. Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, *supra* note 7, 15, 16, 24-31.

11 Sarkin Jeremy et al., "Too many Questions, too few answers: reconciliation in transitional societies", *supra* note 6, p. 692-693.

12 Forced Migration Magazine, FMO, *Country Guide: Somalia*, 3, http://www.forcedmigration.org/guides/fmo016/fmo016.pdf (accessed on November 23, 2007). William Durch, "Introduction into anarchy: humanitarian intervention and state-building in Somalia", in *UN Peacekeeping, American Policy and the Uncivil Wars of the 1990s,* William Durch ed. (Basingstoke & London: Macmillan: 1997), 313.

13 Forced Migration Magazine, FMO, *Country Guide: Somalia*, 3 - 4, http://www.forcedmigration.org/guides/fmo016/fmo016.pdf (accessed on November 23, 2007). William Durch, "Introduction into anarchy: humanitarian intervention and state-building in Somalia", in William Durch ed., *UN Peacekeeping, American Policy and the Uncivil Wars of the 1990s,* 1996, 313.

14 William Durch, "Introduction into anarchy: humanitarian intervention and state-building in Somalia", in William Durch ed., *UN Peacekeeping, American Policy and the Uncivil Wars of the 1990s,* 1996, 311-66, 313. Forced Migration Magazine, FMO, *Country Guide: Somalia*, 4, http://www.forcedmigration.org/guides/fmo016/fmo016.pdf (accessed on November 23, 2007). World Bank, *Conflict in Somalia: Drivers and Dynamics* (January 2005), 9, http://siteresources.worldbank.org/INTSOMALIA/Resources/conflictinsomalia.pdf (accessed on January 24, 2008).

15 The first in 1977-1978, was the war with Ethiopia. Somali rebel fighters attempted to liberate the part of Somalia under Ethiopian control. The second conflict was between the Somali military and the Somali National Movement (SNM) formed by members of the clan Isaac to control the northwest part of Somalia. In 1989 and 1990, different liberation movements based on different clans tried to defeat Siad Barre. World Bank, *Conflict in Somalia: Drivers and Dynamics*, (January 2005), 9-10, http://siteresources.worldbank.org/INTSOMALIA/Resources/conflictinsomalia.pdf (accessed on January 24, 2008). William Durch, "Introduction into anarchy: humanitarian intervention and state-building in Somalia", in William Durch ed., *UN Peacekeeping, American Policy and the Uncivil Wars of the 1990s,* 1996, 311-66, 313-314. Ken Menkhaus, Governance without Government in Somalia, *International Security*, vol. 31, No. 3 (Winter 2006/07), 80.

16 World Bank, *Conflict in Somalia: Drivers and Dynamics,*(January 2005), 9-10, http://siteresources.worldbank.org/INTSOMALIA/Resources/conflictinsomalia.pdf (accessed on January 24, 2008).

17 William Durch, "Introduction into anarchy: humanitarian intervention and state-building in Somalia", in William Durch ed., *UN Peacekeeping, American Policy and the Uncivil Wars of the 1990s,* 1996, 311-66, p. 315.

18 William Durch, "Introduction into anarchy: humanitarian intervention and state-building in Somalia", in William Durch ed., *UN Peacekeeping, American Policy and the Uncivil Wars of the 1990s,* 1996, 315-317. Menkhaus K., Governance without Government in Somalia, International Security, vol. 31, No. 3, Winter 2006/07, 74-106, 81. World Bank, Conflict in Somalia: Drivers and Dynamics, January 2005, 11-12, http://siteresources.worldbank.org/INTSOMALIA/Resources/conflictinsomalia.pdf, accessed on January 24, 2008.

19 William Durch, "Introduction into anarchy: humanitarian intervention and state-building in Somalia", in William Durch ed., *UN Peacekeeping, American Policy and the Uncivil Wars of the 1990s,* 1996, 311-66, pp. 317-320. Ken Menkhaus, Governance without Government in Somalia, International Security, vol. 31, No. 3, Winter 2006/07, 74-106, p. 81. World Bank, Conflict in Somalia: Drivers and Dynamics, January 2005, p. 11-12, http://siteresources.worldbank.org/INTSOMALIA/Resources/conflictinsomalia.pdf, accessed on January 24, 2008.

20 William Durch , "Introduction into anarchy: humanitarian intervention and state-building in Somalia", in William Durch ed., *UN Peacekeeping, American Policy and the Uncivil Wars of the 1990s,* 1996, 311-66, pp. 339-350. Ken Menkhaus, Governance without Government in Somalia, International Security, vol. 31, No. 3, Winter 2006/07, 74-106, p. 81. World Bank, Conflict in Somalia: Drivers and Dynamics, January 2005, p. 11-12, http://siteresources.worldbank.org/INTSOMALIA/Resources/conflictinsomalia.pdf, accessed on January 24, 2008.

21 World Bank, Conflict in Somalia: Drivers and Dynamics, January 2005, p. 13, http://siteresources.worldbank.org/INTSOMALIA/Resources/conflictinsomalia.pdf, accessed on January 24, 2008.

22 Amnesty International, *Urgent Need for effective human rights protection under the new transitional governmen*t, (March 2005), 8, http://www.amnesty.org/en/alfresco_asset/6058eef9-a2ba-11dc-8d74-6f45f39984e5/afr520012005en.pdf (accessed on January 26, 2008). Council of Foreign Relations, *Somalia's Transitional Government*, http://www.cfr.org/publication/12475/ (accessed on January 26, 2008).

23 Infoplease, *Somalia*, http://www.infoplease.com/ipa/A0107979.html (accessed on January 26, 2008). CIA, *Somalia*, https://www.cia.gov/library/publications/the-world-factbook/geos/so.html#People (accessed on January 26, 2008).

24 __, "Somalia: opinions mixed as reconciliation conference winds up", *Reuters AlertNet*, August 30, 2007, http://www.alertnet.org/thenews/newsdesk/IRIN/9cbbf335a22aa2991697f7a078ab3937.htm, (accessed March 4, 2008). Michael Weinstein, "The failure of "reconciliation" and "reconstruction" opens up a political vacuum in Somalia", *PINR*, September 19, 2007, http://www.pinr.com/report.php?ac=view_report&report_id=683&language_id=1, (accessed March 4, 2008). Africa Research Bulletin, *Somalia, Reconciliation Summit*, , August 1-31 2007,17203, http://www.blackwell-synergy.com/action/showPdf?submitPDF=Full+Text+PDF+%2892+KB%29&doi=10.1111%2Fj.1467-825X.2007.01216.x&cookieSet=1 (accessed March 4, 2008).

25 __, "Somalis asked to fight insurgents", *BBC*, Africa section, November 17, 2007, http://news.bbc.co.uk/2/hi/africa/7090225.stm, (accessed March 4, 2008). Gwen Thompkins, "Thousands Flee Growing Violence in Mogadishu", *NPR*, November 12, 2007, http://www.npr.org/templates/story/story.php?storyId=16227374, accessed March 4, 2008. __, Somalia: Mogadishu violence massacring civilians, says local Human Rights Group, *AllAfrica.com*, http://allafrica.com/stories/200801180962.html (accessed March 4, 2008).

26 Forced Migration Magazine, FMO, *Country Guide: Somalia*, 3, http://www.forcedmigration.org/guides/fmo016/fmo016.pdf (accessed November 23, 2007). In 1961 Lewis wrote about the clan system: "the segmented clan system remains the bedrock foundation of the pastoral Somali society and "clannishness" – the primary of clan interests – is its natural divisive reflection on the political level" , Lewis, IM, *A Pastoral Democracy: A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa*, (Oxford University Press, London:1961). World Bank, *Conflict in Somalia: Drivers and Dynamics,* January 2005, 15, http://siteresources.worldbank.org/INTSOMALIA/Resources/conflictinsomalia.pdf (accessed November 20, 2007).

27 Forced Migration Magazine, FMO, *Country Guide: Somalia*, *supra* note 10, 11.

28 Forced Migration Magazine, FMO, *Country Guide: Somalia*, *supra* note 10, 3.

29 Foreign Policy Magazine, *Failed State Index 2007*, http://www.foreignpolicy.com/story/cms.php?story_id=3865&page=7 (accessed November 20, 2007). Andrew Cockburn, "A civilian army of entrepreneurs and expatriates offers hope in this East African nation, bloodied by warring clans", *National Geographic* ,202(1):2002, http://magma.nationalgeographic.com/ngm/0207/feature3/index.html?fs=www7.nationalgeographic.com (accessed November 20, 2007). New Internationalist, *Somalia*, (July 2005), http://newint.org/columns/country/2005/07/01/somalia/ (accessed November 24, 2007). Strategy Page, *Somalia Planet's Foremost Failed State*, http://www.strategypage.com/on_point/20020110.aspx (accessed November 20, 2007).

30 Foreign Policy Magazine, *Failed State Index 2007, supra* note 14. The index was calculated using twelve social, economic, political, and military indicators, more precisely: demographic pressure, Refugees and Displaced Persons, Group Grievance, Human Flight, Uneven Development, Economy, Delegitimization of State, Public Service, Human Rights, Security Apparatus, Factionalized Elites, and External Intervention.

31 Daniel Thurer, "The "failed state" and international law", *International Review of the Red Cross*, 836:1999, http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ6U (accessed November 24, 2007). Boutros Boutros Ghali, UN SG, *Concluding Statement of the United Nations Congress on Public International law: Towards the Twenty-First Century: International Law as a Language for International Relations*, 13-17 March 1995, New York, 9.

32 African Union, *69th meeting of the peace and Security Council,* January 19, 2007, http://www. apanews.net/article.php3?id_article=19420 (accessed November 23, 2007).

33 World Bank, *Conflict in Somalia: Drivers and Dynamics,* January 2005, 13, http://siteresources. worldbank.org/INTSOMALIA/Resources/conflictinsomalia.pdf (accessed January 24, 2008).

34 The perceptions of the population regarding the partiality of the current Government and the Police derive from interviews and focus groups. For example, "This Court [the current one] is biased and helps more the powerful clans and sub-clans. These are the ones in the Court and in the Police", male, July 22, 2007.

35 Before writing this article, all the possible transitional justice mechanisms and their possible applicability to the case of Somalia were analyzed. Therefore, the proposal of this transitional justice model has taken into account all the possible pros and cons of other solutions, specifically the referral of the situation in Somalia to the International Criminal Court, the use of national trials, non-criminal sanctions, amnesty, or the option "Let by-gones be by-gones."

36 Andre Le Sage, *Stateless Justice in Somalia, Formal and Informal Rule of Law initiatives* (Geneva: Center for Humanitarian Dialogue, July 2005), 7, http://www.hdcentre.org/datastore/Justice/ Somalia%20final.pdf (accessed November 25, 2007). Joakim Gundel, *The Predicament of the "Oday",* Danish Refugee Council and Novib-Oxfam, November 2006, iii, 1, http://www. logisticscluster.org/download/?action=downloadFile&ID=398, (accessed November 26, 2007).

37 ICG, Africa Report No 45, *Somalia: countering terrorism in a failed State*, *supra* note 1, 2007. Joakim Gundel, *The Predicament of the "Oday",* Danish Refugee Council and Novib-Oxfam, November 2006, ii, iii, 1, http://www.logisticscluster.org/download/ ?action=downloadFile&ID=398, accessed on November 26, 2007. Le Sage, A., *Stateless Justice in Somalia, Formal and Informal Rule of Law initiatives,* July 2005, p. 36, http://www.hdcentre.org/ datastore/Justice/Somalia%20final.pdf, accessed on November 25, 2007.

38 Andre Le Sage, *Stateless Justice in Somalia, Formal and Informal Rule of Law initiatives, supra* note 20, 14. Joakim Gundel, *The Predicament of the "Oday", supra* note 20, 8.

39 Andre Le Sage, *Stateless Justice in Somalia, Formal and Informal Rule of Law initiatives, supra* note 20, 35.

40 The Danish Immigration Service, *Human Rights, and Security in central and southern Somalia*, January 2004, 28, http://www.somali-jna.org/downloads/HRandSecurity-CentralSouthSomalia2004.pdf (accessed November 27, 2007).

41 UNDP, *Doing Justice, How informal justice systems can contribute,* December 2006, 17. http://www. undp.org/oslocentre/docs07/DoingJusticeEwaWojkowska130307.pdf (accessed November 27, 2007).

42 Lars Waldorf, "Mass Justice for Mass Atrocities: Rethinking Local Justice as Transitional Justice", *Temple Law Review* 79 (1) (2006): 61-62.

43 Lars Waldorf, L, "Mass Justice for Mass Atrocities: Rethinking Local Justice as Transitional Justice", 61-62. Neil Kritz, "Progress and Humility: The Ongoing Search for Post-Conflict Justice", in. *Post Conflict Justice*, Cherif Bassiouni ed., (New York: Transnational Publishers, 2001), 77.

44 Neil Kritz, "Progress and Humility: The Ongoing Search for Post-Conflict Justice", 77.

45 Allison Corey et al., "Retributive Justice: the *Gacaca* Courts in Rwanda", *African Affairs*, 103 (410) (2004): 81. Ariel Meyerstein, "Between Law and Culture: Rwanda's *Gacaca* and Postcolonial Legality", *Law & Society Inquiry*, Vol. 32, Issue 2 (2007):468. Shehana Gomez., *"Restorative Justice Following Mass Atrocities: the case of Rwanda", lawanddevelopment.org,* 2-3, http:// www.lawanddevelopment.org/docs/restorativejustice.pdf (accessed November 25, 2007). Jeremy Sarkin , "The tension between justice and reconciliation in Rwanda: politics, human rights, due process and the role of the *Gacaca* courts in dealing with the Genocide", *Journal of African law*, 45 (2) (2001):157.

46 UNDP, *Doing Justice, How informal justice systems can contribute,* December 2006, p. 19. http://www. undp.org/oslocentre/docs07/DoingJusticeEwaWojkowska130307.pdf, accessed on November 27, 2007. Interview, Jowhar Regional Court, Somalia, July 27, 2007.

47 Erik Mose, "Main Achievements of the ICTR", *Journal of International Criminal Justice*, Vol. 3, No. 4 (2005): 932. Interview with Justice Richard Goldstone for PRAXIS, the Fletcher Journal

of Human Security, March 14, 2007. "When I came to The Hague, the tribunal's credibility was zero. And I had to build it up in order to get funding and money and to recruit staff". Binaifer Nowrojee, *"Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?,* Boston Consortium on Gender, Security and Human Rights, Working Paper No. 105 (2005), 10-11.

48 UNDP, *Doing Justice, How informal justice systems can contribute, supra* note 25, p. 12. For example, in Malawi (80-90%) and Bangladesh (60-70 %) of the controversies are judged with informal mechanisms; in Sierra Leone, about 85% of the population is under the jurisdiction of customary rules according to the Constitution defined as "the rules of law, which, by custom, are applicable to particular communities in Sierra Leone".

49 Andre Le Sage, *Stateless Justice in Somalia, Formal and Informal Rule of Law initiatives, supra* note 20, 12, 14, 30. Interview, male, July 18, 2007. Interview, female, Jowhar, July 18, 2007. Interview, female, Jowhar, July 18, 2007. Interview, female, July 22, 2007. Interview, male, Jowhar, July 22, 2007.

50 Interview, female, June 22, 2007.

51 Interview, female, July 7, 2007.

52 UNDP, *Doing Justice, How informal justice systems can contribute, supra* note 25, 13.

53 UNDP, *Doing Justice, How informal justice systems can contribute, supra* note 25, 16.

54 Interview, male, July 22, 2007. Another interviewee (male, July 22, 2007) supports the same idea: "the *Xeer* system is faster and things can be easily solved".

55 UNDP, *Doing Justice, How informal justice systems can contribute, supra* note 25, 16. Andre Le Sage., *Stateless Justice in Somalia, Formal and Informal Rule of Law initiatives, supra* note 20, p. 36.

56 UNDP, *Doing Justice, How informal justice systems can contribute, supra* note 25, 20.

57 The Danish Immigration Service, *Human Rights and Security in central and southern Somalia*, *supra* note 32, 29-30.

58 The Danish Immigration Service, *Human Rights and Security in central and southern Somalia*, *supra* note 32, 29. Andre Le Sage, *Stateless Justice in Somalia, Formal and Informal Rule of Law initiatives, supra* note 20, 36. UNDP, *Doing Justice, How informal justice systems can contribute, supra* note 25, pp. 21-23. Joakim Gundel, *The Predicament of the "Oday", supra* note 20, 55.

59 UNDP, *Doing Justice, How informal justice systems can contribute, supra* note 25, 21. Joakim Gundel, *The Predicament of the "Oday", supra* note 20, iii, 9. The Danish Immigration Service, *Human Rights and Security in central and southern Somalia*, *supra* note 32, 28. Andre Le Sage, *Stateless Justice in Somalia, Formal and Informal Rule of Law initiatives, supra* note 20, 38.

60 UNDP, *Doing Justice, How informal justice systems can contribute, supra* note 25, 20. The Danish Immigration Service, *Human Rights and Security in central and southern Somalia*, *supra* note 32, 29.

61 Joakim Gundel, *The Predicament of the "Oday", supra* note 20, 55-56.

62 Shehana Gomez, *Restorative Justice Following Mass Atrocities: the case of Rwanda, supra* note 24, 12-13. Lars Waldorf, Mass Justice for Mass Atrocities: Rethinking Local Justice as Transitional Justice", 2006, 65-66.

63 Lars Waldorf, Mass Justice for Mass Atrocities: Rethinking Local Justice as Transitional Justice", 2006, 66.

64 The *Xeer* system, in fact, foresees different types of forced marriages: the practice of *dumal*, which prescribes the forced marriage of a widow to a male relative belonging to the family of the deceased husband; the practice of *higsian*, which maintains that the sister of a deceased wife has to marry the widower. Andre Le Sage., *Stateless Justice in Somalia, Formal and Informal Rule of Law initiatives, supra* note 20, 38. Joakim Gundel, *The Predicament of the "Oday", supra* note 20, 55.

65 Jeremy Sarkin., "The tension between justice and reconciliation in Rwanda: politics, human rights, due process and the role of the *Gacaca* courts in dealing with the Genocide", *supra* note 4, 165.

66 UNDP, *Doing Justice, How informal justice systems can contribute, supra* note 25, 22.

67 Rachel Rinaldo, *Can the Gacaca Courts deliver Justice,* Global Policy Forum*,* April 2004, http://www.globalpolicy.org/intljustice/tribunals/rwanda/2004/0408justice.htm (accessed November 27, 2007).

68 Annette Lyth, *The development of the legal protection against sexual violence in armed conflicts –advantages and disadvantages*, *supra* note 6, p. 139.

69 Jeremy Sarkin et al., "Too many Questions, too few answers: reconciliation in transitional societies", *supra* note 6, 685. Erin Daly, "Between Punitive and Reconstructive Justice: the Gacaca Courts in Rwanda", *supra* note 8, 355, 356.

70 Erik Mose, "Main Achievements of the ICTR"*, supra* note 26, 932.

71 Angela Whyte., *Placing blame or finding peace: a qualitative analysis of the legal response to rape as a war crime in the former Yugoslavia*, *supra* note 6, 104.

72 Annette Lyth, *The development of the legal protection against sexual violence in armed conflicts –advantages and disadvantages*, *supra* note 6, 139. Hannah Pearce, "An examination of the international understanding of political rape and the significance of labeling it torture", *International Journal of Refugee Law*, 14 (4) (2002):558.

73 Annette Lyth, *The development of the legal protection against sexual violence in armed conflicts –advantages and disadvantages*, *supra* note 6, 139. Annette Whyte, *Placing blame or finding peace: a qualitative analysis of the legal response to rape as a war crime in the former Yugoslavia*, *supra* note 6, 102.

74 Annette Whyte, *Placing blame or finding peace: a qualitative analysis of the legal response to rape as a war crime in the former Yugoslavia*, *supra* note 6, 102-103.

75 Maja Kirilova Eriksson, *Reproductive Freedom: in the context of Human Rights and Humanitarian Law* (Martinus Nijhoff Publishers, 2000), 359. Simon Chesterman, "No Justice Without Peace?: International Criminal Law and the Decision to Prosecute", in *Civilians in War*, ed. Simon Chesterman, (2001), 150.

76 Payam Akhavan., "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment", *The American Journal of International Law*, Vol. 90, No. 3. (July 1996): 505.

77 Luc Reydams, "The ICTR Ten Year On: Back to the Nuremberg Paradigm?" *Journal of International Criminal Justice,* 3(4) (2005): 980. Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda: a Lawyers Committee Report on the ICTR and the National Trials,* July 1997, http://www.ciaonet.org/wps/lch11/ (accessed December 1, 2007). Madeline Orri., *The trials of concurrent jurisdiction: the case of Rwanda*, Duke University, October 1997, 353-355, http://64.233.169.104/search?q=cache:DXCJJGsnHhUJ:www.law.duke.edu/shell/cite.pl%3F7%2BDuke%2BJ.%2BComp.%2B%26%2BInt%27l%2BL.%2B349%2Bpdf+temporal+jurisdiction+ICTR+victor%27s+justice&hl=en&ct=clnk&cd=31&gl=us&client=firefox-a (accessed December 1, 2007).

78 Simon Chesterman, "No Justice Without Peace?: International Criminal Law and the Decision to Prosecute", 150. Maja Kirilova Eriksson, *Reproductive Freedom: in the context of Human Rights and Humanitarian Law*, *supra* note 45, 359.

79 Maja Kirilova Eriksson, *Reproductive Freedom: in the context of Human Rights and Humanitarian Law*, *supra* note 45, 359. United Nations, UN Doc S/2504, *Secretary General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the territory of the Former Yugoslavia*, 3 May, 1993.

80 Richard Goldstone, "Bringing War Criminals to Justice during an Ongoing War", *supra* note 2, 196. Maja Kirilova Eriksson, *Reproductive Freedom: in the context of Human Rights and Humanitarian Law*, *supra* note 45, 360.

81 Richard Goldstone, "Bringing War Criminals to Justice during an Ongoing War", *supra* note 2, 205-206. United Nations, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General*, Geneva, January 25, 2005, p.4, http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (accessed November 28, 2007).

82 The Danish Immigration Service, *Human Rights and Security in central and southern Somalia*, *supra* note 32, 15-16.

83 Richard Goldstone, "Bringing War Criminals to Justice during an Ongoing War", *supra* note 2, 205-206.

84 Jeremy Sarkin et al., "Too many Questions, too few answers: reconciliation in transitional societies", *supra* note 6, 714.

85 Binaifer Nowrojee, *Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?*, *supra* note 26, 8.

86 Angela Whyte, *Placing blame or finding peace: a qualitative analysis of the legal response to rape as a war crime in the former Yugoslavia*, *supra* note 6, 105,106 and 107. Binaifer Nowrojee, *Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?, supra* note 26, 9.