Future Possibilities for Transitional Justice in Somalia

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Abstract

Societies emerging from violent civil war and conflict face a dilemma as to what comes first between peace and justice. Practical experiences, however, show that usually peace processes are more prioritized than the issue of justice. Nevertheless, peace processes can be sustainable only if the issues of justice are integrated. The incorporation of justice will resolve the issue of violent crime, crimes against humanity, and gross human rights violations committed throughout the conflict. Somalia, as a country passing through such a phase, needs to facilitate the process of peace and justice cohesively. The way justice is served in a transitional society is known as transitional justice. Transitional justice mechanisms enable transitional societies to address the issue of victims and perpetrators of violent crime. This paper highlights the Somalia conflict from a historical dimension and transitional justice mechanisms that could be applied in Somalia. Methodologically, the paper, solely follows a desk review method.

Introduction

The Somalis are of a homogenous ethnic group who speak the same language and share similar culture and religion. They are found in the land that extends from the present Djibouti up to Northern Kenya, and from East and Southeast Ethiopia to the mainland of present Somalia in the Horn of Africa (Zuin, 2008). They are divided in different patrilineal clans and sub-clans which form the most important social units that play a central role in the social, political and cultural life of the Somali people (Terdman, 2008). Similarly, Islam, as a religion, adhered to by almost 90% of Somalis, has significant influence on Somalian politics. The Somalia conflict is one of the most protracted civil wars in Africa. Ever since the coming of General Mohammed Said Barre to power through coup d'état in 1969, Somalia has not seen a time without violence and turmoil. During this prolonged conflict, countless human lives have been lost, many have been displaced, and the country's infrastructure has been devastated. Numbers of peace negotiations have been conducted in order to maintain the basic stability and continuity of the state of Somalia ever since. On the other hand, the issue of war crimes, crimes against humanity and human rights abuses committed during the course of the conflict had never been afforded equal concern. Transitional justice is as important as peace and reconciliation process; it deals with the issue of the victims of violent crimes as well as those who committed the crimes. Meanwhile, little has been done in bringing the perpetrators of heinous human rights abuses to justice in Somalia. However, the aim of this paper is limited to, possible transitional justice mechanisms that could help to serve justice in the future in Somalia.

The Somalia Conflict and the Humanitarian Crises

Alike many African states, the territory of the Somalis was divided into five different districts claimed by colonialists and its neighbor, Ethiopia. These were a French protectorate, which is now Djibouti; British Somaliland in the northwest; the Ogaden which is a part of Ethiopia at present; the Italian Somalia in the South; and the Northern Frontier District (NFD) under British control in north-eastern Kenya (Zuin, 2008). On July 1, 1960, after a long struggle, Somalis unified the two colonies known as the Somalia Protectorate and Italian Somaliland in the Horn of Africa, creating the "Democratic Republic of Somalia" (Farah, 2008). Regrettably, since independence, Somalia has been embroiled in violent conflict and civil war (Kivimäki, 2001).

In 1969 a notorious military leader, Mohammed Said Barre, took control power through a coup d'état. Soon after, he promoted the modernization of Somalia through a strategy of Scientific Socialism that would generate a Pan-Somali ideology to supersede and possibly replace clan identity (Le Sage, 2005). His expansions and irredentist motives derived him to start an open war on Ethiopia called the "Ogaden War" from 1977 to 1978, named after the area of land that Somalia tried to control, which is located between Somalia and Ethiopia. Shortly after losing the war, a political movement against Barre started in the northern regions. Barre started to dismantle and ban all political parties in the country, suspended the multi-party system and the Constitution and took up a harsh approach against the north of Somalia (Farah, 2008). Because of his severe security measures, including arrests and killings of the Isaac clan that dominated the northern regions of Somalia, now called Somaliland, the area became increasingly hostile.

In 1981, the Somali National Movement (SNM) was formed by members of the Isaac clan. Subsequently, in 1988, civil war broke out. The violence was highly intensified involving major skirmishes between the Somali government and the SNM. It was believed to be the second largest major conflict that occurred in Somalia next to the *Ogaden War*. In the course of the civil conflict, an estimated 50,000 Somalis, mostly members of the Isaac clan, were killed; and 400,000 Somalis were forced to take refuge in neighboring countries, while another 400,000 were internally displaced (Terdman, 2008). On January 27, 1991, the liberation movements succeeded in forcing Siad Barre out of Mogadishu, and on February 1, Mohamed Ali Mahdi declared himself interim President of the provisional government (Durch, 1996). The fall of Barre, however, did not bring about stability and peace to the people of Somalia; instead Somalia was plunged into a power struggle between the clans, resulting in an acute humanitarian crisis characterized by food shortages and insecurity (Zuin, 2008).

Rival warlord, Mohamed Farah Aydiid, split from the interim government and created the Somali National Alliance (SNA). Serious fighting in Mogadishu began in September 1991; and by the end of March 1992, the casualties of the violence were estimated at 14,000 dead and 27,000 wounded. Meanwhile, in the north, the SNM proclaimed independence of Somaliland from mainland Somalia and declared *Shari'ah* law as its legal base. Fighting in mainland Somalia, however, continued unabated. In 1992, the UN was forced to send in a peacekeeping force called UNOSOM in order to restore basic order to the capital, Mogadishu (Adam, 2010). With a unilateral allied decision, the US also sent its marines to Somalia in the name of the United Task Force for Somalia (UNITAF) to support the cause of the UN. Ultimately, both the UN and US were unsuccessful, and they withdrew from Somalia on March 3, 1995.

After countless attempts to rebuild the state of Somalia, the Transitional National Government (TNG) was established in Arta, Djibouti, in 2000. Though recognized by the Organization of African Unity (OAU), the TNG controlled only a few areas in southern Somalia and was unable to take control of the capital, Mogadishu. The TNG was so weak that it could not even protect its own members from assassination (Møller, 2009). In 2004, the move to transform the TNG to a Transitional Federal Government (TFG) through a power-sharing agreement among different major and minority clans succeeded. In October 2004, the Parliament voted and consequently elected Abdullahi Yusuf Ahmed as President. This election and the adoption of the Transitional Federal Charter (TFC) marked the first major move towards actual political stability since the overthrow of Mohamed Siad Barre.

In 2006, another conflict broke out when a military group called the Union of Islamic Courts (UIC) defeated the warlords of Mogadishu, and occupied considerable parts of southern Somalia and attempted to take control of law and order. The UIC declared an Islamic state and tried to implement *Shari'ah* law. Mogadishu saw a considerable level of peace and stability for the first time since civil war had broken out. Governmental institutions, schools and a police force once again tried to operate. However, the UIC was not welcomed by neighboring Ethiopia; concerned about the Islamic Court gaining support and momentum in Mogadishu as an Islamist movement. Under the pretext of self-defense, Ethiopia launched an attack against Mogadishu in December 2006 and forcibly expelled the UIC from the capital (Zuin, 2008). Even though the prominent leader of the UIC fled Somalia, fighting continued under its military wing known as *Al-Shabaab*. After two years of fighting,

Al-Shabaab controlled much of the south and central territories of Somalia, including parts of the capital, Mogadishu (Mulugeta, 2009). Following the intensification of *Al-Shabaab`s* insurgency, President Abdullahi Yusuf was forced to resign in December 2008. With all these troubles, a new peace process was conducted in Djibouti under the initiative of the UN, and in January 2009, the new Transitional Federal Government of Somali (TFG) was created.

Throughout 2009 and 2010, *Al-Shabaab* consolidated its control over most of the capital and the country's southern and central areas (Human Rights Watch, 2011). The waves of violence deteriorated the already dire human rights and human living conditions in the country. During this period, an estimated 1.1 million people were displaced, with over 22,000 killed and more than 475,000 having fled to neighboring countries (Dagne, 2011). Once again in 2011, with the support of troops from the Africa Union Mission in Somalia (AMISOM) and Ethiopia, the TFG struggled to expand its control over southern Somalia, including the capital. Although by now *Al-Shabaab* had left the capital, terror and insecurity accompanied by targeting killings and suicide attacks still troubles Mogadishu.

Defining Transitional Justice

States emerging from civil war and violent conflict often face challenges in their endeavor to achieve peace and reconciliation. It is because the issues of the perpetrators of violent crime and the victims of these crimes often dominate the process. Dealing with society's past and building its future are dependent today's justice. Usually transitional communities establish temporary courts and commissions or international tribunals to provide justice for victims and to initiate a longer-term process of healing (Barsalou, 2005). An emerging field that deals with the most contentious issues of post-transitional societies is known as *"Transitional Justice." It was* coined by Neil Kritz following his publication *"Transitional Justice: How Emerging Democracies Reckon with Former Regimes"* in 1995. Kritz (2004) defined transitional justice as how societies "transitioning" from repressive rule or armed conflict deal with past atrocities; overcome social divisions or seek reconciliation; and create justice systems aimed at the prevention of future atrocities. His definition incorporated three core purposes of transitional justice: doing justice; reconciliation and healing; and prevention of future atrocities. Former UN Secretary General, Koffi Annan (2004), understood transitional justice as a full set of processes and mechanisms used by societies while attempting to address the legacy of past human rights abuses so as to serve justice and achieve societal reconciliation. It focuses on rebuilding societies after the suffering of human rights violations and making perpetrators accountable for their actions.

The process of transitional justice should be accompanied by different intrinsic and extrinsic transformation in diverse aspects of the society. The process is expected to give adequate response to past human rights violations in order to remedy the interest of the victims and to efficiently lead the society towards national reconciliation. According to the International Centre for Transitional Justice (ICTJ), the following are considered the important comprehensive elements of transitional justice: criminal prosecution, reparation, institutional reform and truth commission (International Centre for Transitional Justice [ICTJ], 2012). These elements, however, are not the only elements; states may follow their own approaches to address past human rights violations. Scholars argue that the types of transitional justice mechanisms that states espouse tend to reflect the situation that arises from the particular crimes committed and its social and political conditions. They also correspond to particular ideas about how and why justice must be done. Martha Minow

(1998) distinguished three distinct transitional justice paradigms: retributive, restorative, and reparative justice. The typology is useful as a means of both explaining and understanding the different ways of approaching transitional justice. "Retributive" justice is equated with legal prosecutions and the rule of law. This includes the kinds of court proceedings and sentencing, which is based on the notion of retribution or punishment for crimes committed. This may take place at national trial, international justice or a hybrid of both. "Restorative" justice is about restoring both the victim and perpetrator bringing them back to social harmony. The processes seek to dignify and empower victims so as to able them forgive and forget once again and begin a fresh start (Kisangani, 2008). Of the Restorative justice forms, truth commissions are the most important and effective way to restore the dignity of the victims and the social harmony once again. Finally, "Reparative" justice is doing the right things that have gone wrong. It is to make available a remedy for the suffering and loss that has occurred. It may be in the form of reparations, apologies, and restitution.

Somalia is a country where grave human rights violations were committed for many decades yet the violations appeared to have been largely neglected in the peace process of the country. The inability of the international community to integrate transitional justice into peace process efforts has left the perpetrators of heinous human rights violation unpunished. Such conditions opened the door to revenge justice dispensed on the street, and made the prevalence of the rule of law and peace an impossibility. I hold the belief that, for durable ad lasting peace in Somalia, the integration of justice and accountability is crucial. Identifying and implementing proper transitional justice mechanisms that could work in Somalia is paramount.

Transitional Justice in Somalia

Serious human rights violations had been a critical concern in Somalia ever since the coming to power of Siad Barre. Particularly over the last two and a half decades, the fundamental rights of the people of Somalia have been violated by all actors involved in the struggle to fill the power vacuum resulting from Barre's overthrow and all the perpetrators have been accorded virtual impunity (East and Horn of Africa Human Rights Defenders Project [EHAHRD], 2008). In situations of conflict where war crimes, crimes against humanity, and other human rights violations are committed, the dichotomy of peace versus justice presents a serious challenge. An effort to address justice will itself contribute to re-establishing order and the rule of law. It will build confidence in the institutions and systems of the state and will seek to transform the impunity that is pervasive in the country (Qalinle, 2010). In contrast, some argue that to negotiate peace, it is necessary to sit at the table with the perpetrators of violence in which the rights of victims become subject to negotiations. According to this point of view, attaining peace and justice at the same time is impossible. But, considering justice as an outcome will affect the process of peace making and peace building. If justice is considered as secondary to the peace process, durable peace may not be achieved as justice could be highjacked by "victory justice" (Zuin, 2008). The transitioning Somalia needs to integrate the issues of peace and justice as far as possible. Building international criminal responsibility against the parties involved in Somalia contributes a great deal to the peace process. However, dealing with specific individual or state criminal responsibility is not the focus here, rather what specific transitional justice mechanism could

be used to bring criminals to justice in Somalia based on the history, cultures and existing realities in the country.

Based on the prevailing conditions in Somalia and the theoretical and practical analysis of the relationship between attaining peace simultaneously with justice, both retributive and restorative transitional justice mechanisms could apply. Retributive Justice is when society punishes criminals by imposing negative experiences (Bronsteen, Masur, & Buccafusco, 2010). It is the punishing of wrongdoers using formal court procedures and is often linked to a westernized way investigating the truth that culminates with punitive retribution (Mobekk, 2005). It would be ideal for Somalia to punish those who committed, or ordered others to commit, human rights violations in courts of law (national or international). On the other hand, restorative justice is a process for resolving crime that focuses on redressing the harm done to its victims, while holding offenders to account and engaging the community in the resolution of conflict. Restorative justice will help to identify the harm by involving both the victims and the perpetrators through programs like victim offender mediation, conferencing, circles, victim assistance, ex-offender assistance, restitution and community service. Apart from helping both the victims and the perpetrators, restorative justice will also contribute to the peace process by incorporating an important aspect of disarmament, demobilization and reintegration (DDR) programs in the process. The DDR program functions as an important first step in ending or limiting violence by disarming large numbers of combatants and disbanding illegal, dysfunctional, or oversized paramilitary organizations (Office of the Special Adviser on Africa [OSAA], 2007). Therefore, both retributive and restorative elements of justice should be incorporated in the transitional justice in Somalia.

Possible Mechanisms

Ad hoc Tribunals

The Somalia conflict has involved different national and international actors which have contributed towards gross human rights violations. The involvement of international actors makes the transitional justice process complicated. Therefore, the integration of international justice mechanisms like *ad hoc* tribunals and trials held by the International Criminal Court (ICC) will help in the prosecution of those actors. Employing the international justice mechanism will probably help to make all parties involved in the war accountable for any violations committed, even if Somalia is unable to prosecute the perpetrators. Ad hoc tribunals can be created to deal with specific disputes by an international body like the United Nations Security Council. Such courts have geographical, subject-matter, and temporal limits on their jurisdiction and are generally responsive to past events (Kirsch, 2004). There are two well-known examples of *ad hoc* tribunals established after heinous human rights violations in Africa and Europe. These are the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). The ICTY was established in 1993, and is based in The Hague, Netherlands, and The ICTR was established in 1994, and was based in Arusha, Tanzania. Both of these tribunals were established by the United Nations Security Council to punish perpetrators of crimes against humanity during the Yugoslav Wars and the Rwandan Genocide. Similar tribunals were also created in Sierra Leone in 2000, and in Cambodia in 2003, based on agreements between the United Nations and the appropriate national governments. In 2000, the United Nations Transitional Administration in East Timor (UNTAET) also created a Serious Crimes Investigation Unit (SCIU) to investigate and prosecute cases in the District Court of Dili, East Timor's capital. The above four instances,

show that *ad hoc* tribunals are important mechanisms to address past human rights violations locally or internationally.

Ad hoc tribunal (either international or hybrid), has a potential to bring justice to Somalia. The hybrid nature, especially, can keep justice proceedings closer to the victims and increase a sense of Somalian ownership over the transitional justice process. But creating an ad hoc tribunal requires important preconditions; among others, establishing a minimal level of security is vital in order to protect victims and witness from further threats. Thus, considering the volatile nature of peace and instability in Somalia, it would be challenging to hold the tribunes locally. Therefore, it will be necessary to conduct the tribunal outside of Somalia, yet within close proximity in order that it is easily accessible for the people. Care must be taken in choosing the country of the tribunal, as most neighboring countries of Somalia have involved in the long year protracted civil war. According to Bjørn Møller Djibouti, Ethiopia, Eritrea, Egypt, Kenya, Sudan, and Yemen have all engaged directly or indirectly in the Somalia conflict (Møller, 2009). Selecting any of these neighboring countries to host an *ad hoc* tribunal would refute the intended justice process and only contribute to further mayhem.

As an important mechanism of retributive justice, *ad hoc* tribunals have goals to accomplish in the process. In the Somalia case, the first goal would be constructing accountability on the side of the perpetrators: to hold perpetrators responsible for their conduct, through public acknowledgement of the criminal responsibility for violations of human rights (Zuin, 2008). Building accountability of the perpetrators will help the peace and reconciliation process by singularly outing criminals who are trying to win over the peace process to their own side and claim immunity that will sustain impunity. Moreover, it will end conflicts by supporting the DDR program by convincing parties not to raise arms in their fight for a peaceful path to reconciliation. Another important goal of the tribunal will be serving as an important deterrent mechanism for further violations. Criminal prosecution discourages members of society from committing criminal acts out of fear of punishment. The most powerful deterrent would be a criminal justice system that guaranteed with certainty that all persons who broke the law would be apprehended, convicted, and punished, and would thereby receive no personal benefit from their wrongdoing. The strength of that certainty and the severity of punishment will influence behavior if potential offenders are able to weigh up the consequences of their actions and conclude that the risk of apprehension and punishment is too severe (Wright, 2010). The deterrent effect of the ad hoc tribunal in Somalia would be twofold. First, it would deter potential criminal behavior against human rights by applying punitive punishment to those who have committed similar crimes. Second, it will bring an end to the culture of impunity. The third important goal is to create an environment in which perpetrators and victims can realistically be expected to live next to one another by making the process fair and just; by avoiding vigilante justice in which victims seek punishment, or justice, from their perpetrators which would potentially create cycles of revenge.

Structurally, the period in which the jurisdiction that Somalia *ad hoc* tribunals must cover is the entire duration of the war and crimes committed since Barre`s regime. Conflict in Somalia has a long history; hence the tribunal's jurisdiction should cover all the periods since Barre. One of the most important aspects of an *ad hoc* tribunal in Somalia, would be prosecuting perpetrators who have committed crimes that occurred even before the

establishment of an International Criminal Court. The ICC has only *ratione temporis* jurisdiction; so only holds jurisdiction on crimes committed after the ICC's entry into force under the Rome Statute. As a result, the ICC does not have jurisdiction to consider cases perpetrating back to before July 1, 2002 (Farah, 2008).

Traditional "Xeer" Mechanism

Like *Gacaca* in Rwanda and *bashingantahe* in Burundi among others, the Somali people have their own traditional justice and reconciliation mechanism called *"Xeer." Xeer* is a customary code and procedure established upon contractual agreement between clans, representing a body of explicitly formulated obligations, rights and duties. The agreement determines the relationship between clans with regards to resources, family matters, and crime. Clan members transmit these agreements from generation to generation and through time, the agreements become precedents forming part of customary law (Zuin, 2008). *Xeer*, both guarded and implemented by respected elders, known as the *Xeer beegti*, traditionally has always been specific contracts entered into bilaterally between clans, primary lineage groups, and above all between *mag/diyah*-paying groups who have a historical relationship of interaction (Gundel & Dharbaxo, 2006). Diyah/Mag is understood as compensation paid by a clan whose member has injured or killed another clan or family member (Landinfo, 2011). Hence all men are defined by their belonging to a *mag*-paying group, and their social and political relations are defined by *Xeer* that are entered within and between *mag*-paying groups. Even though the *Xeer* are particularly important in rural areas where the presence of modern political institutions is weak; they are, however, also applied in urban areas with local administrations to dispute management, settlement and reconciliation among both ordinary citizens and business people (Gundel & Dharbaxo, 2006).

According to Elliesie (2012), *Xeer* has an important principle; to serve as a means to maintain a minimum level of stability, rule of law and justice despite the lack of a functioning central government, local structures within Somali society. *Xeer* is divided into two broad categories. *Xeer guud*, applies to the settlement of grievances and disputes at different levels of the lineage segments, and includes aspects that regulate common, day-to-day social interactions, civil affairs, and means of dispute settlement within a clan and between different clans. *Xeer gaar* refers to specialized professional norms that regulate traditional economic production relations for clans and sub-clans specifically involved in pastoralism, fishing, frankincense harvesting and other economic activities*.* The *Xeer* system encompasses both retributive and restorative justice. It includes restoring the harm done through the *diyah* system, deters future crimes by prosecuting those who commit crimes and reintegrates both victims and perpetrators within their communities. These inherent characteristics of the *Xeer* and the importance, legitimacy and acceptance it has, will make a potential effective transitional justice mechanism for Somalia. Furthermore, its speedy trial with minimum recourse; its legitimacy; and its indigenous nature and accessibility, give *Xeer* a capacity to be used as a possible transitional justice mechanism in Somalia.

Shari'ah

Islam prescribes certain principles that its adherents must obey absolutely. These legal principles, that Muslims are governed by, are collectively called the *"Shari'ah."* The primary textual sources of *the Shari'ah* are the Quran (the divine and holy book of Islam) and *Sunna* (body of legal and moral principles based on Prophet Muhammed's tradition). Somalia

traditions and values have been shaped by Islam over many centuries, with an estimated 99% of Somalians as strong adherents to the religion. The application of Islamic law as a separate, but complementary system of modern judicial institutions persisted through both eras of colonial and post-colonial administration (Le Sage, 2005). But following the collapse of the central government in 1991, a new *Shari'ah* court was established that adjudicates both civil and criminal matters. Currently, the *Shari'ah* court in Somalia has three important roles: organized militia to apprehend criminals to justice; pass legal decisions in both civil and criminal cases; and incarcerate those who are convicted.

Scholars who examine the Somalia justice system argue that analyses of sources of law and justice systems in Somalia reveal close links between *Xeer* and *Shari'ah*, processes, and that these systems are complementary. This complementarity can be clearly understood in the practice of different *Shari'ah* courts across the country. In reaching decisions, the *Shari'ah* courts have adopted the guiding principle of the *suluh*, which roughly translates to "resolution." Therefore, according to *suluh*, the *Shari'ah* courts, *Xeer*, and relevant state laws can be combined in order to arrive at a resolution that is acceptable to all parties (Le Sage, 2005). Successful reconciliation will require the reinforcement of this complementary nature. Although customary law is based entirely on conflict resolution without adjudication, the Islamic system, on the other hand, has both retributive and restorative elements of adjudication and mediation. Most of the time *Shari'ah* courts are simple in their organizational structure, but effective and has substantial legitimacy.

Like *Xeer, Shari'ah* has enormous capacity to be used as a transitional justice mechanism for Somalia. The wave of re-Islamization in Somalia is creating opportunities to learn Islam and to revive the true teaching, and hence increase the determination of the people to follow *Shari'ah,* not only as a judicial principle but also as a way of life. In addition, *Shari'ah* is the principle that different faction groups including *Al-shabaab* are propagating, and using as a factor of legitimacy among the masses. Therefore, the future peace negotiations in Somali should afford *Shari'ah* prominent placement so as to mitigate the interests of such groups. Overall, in the context of Somalian politics; the need for a comprehensive peace and reconciliation; and the inability of the formal secular justice system in Somalia, the future Somalia has a potential prospect to embrace *Shari'ah*. Therefore, there is a clear possibility in the future of *Shari'ah* used for transitional justice in Somalia.

Conclusion

Peace and reconciliation as a process should address not only the interests of the warring parties, but also the common people. The issue of human rights and humanitarian law violations should be incorporated in the idiom of political transformation in Somalia. This will be realized when the issue of transitional justice is part of the peace process. Transitional justice helps to create a better generation in the future by punishing the worst of the past. The Somalia conflict needs such a treatment that can deter all wrong doers involved in the conflict. The people of Somalia deserve a chance for opportunities in the process of peacekeeping, peace-making and peace building. Justice needs to be served for those who lost it. Both international and domestic justice mechanisms have possibilities for application in Somalia. The international community, especially the United Nations Security Council and the ICC should support the transitional justice process in Somalia by facilitating the prosecution of those who committed war crimes and crimes against humanity in

Somalia, especially those who are non-Somalis. Meanwhile, albeit, the future of Somalia is still uncertain, there are possibilities to use *ad hoc* tribunal, *Xeer* and *Shari'ah* for transitional justice in Somalia.

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