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Transitional Justice, Peace and Everyday Reality: Somalilands Experience with Justice and Security-Sector Reform

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Transitional Justice, Peace and Everyday Reality:
Somaliland's Experience with justice and security-sector reform

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Abstract

Somaliland's peace and security-sector reform has largely been dictated by the early peace conferences (1991-2000) and framed its legal system to reflect its experiences with statebuilding. Customary law (*xeer*) stems from clan/kin networks and reflects local knowledge held by clan elders in adjudicating issues between and among clan families. Today it largely functions as a dispute resolution mechanism. Common law was inherited by the British colonial experience that ended in 1960 with the union with Somalia. Shariah law is more loosely applied and reflects the Islamic identity of many Somali communities but has rarely been recognized as 'official' law till Somaliland's constitution elevated its status.

This paper looks at Somaliland's transitional justice process and the role that legal pluralism has played in shaping its attempts at justice and security-sector reform. By utilizing concepts like hybridity and the everyday, this paper frames these processes with an understanding that while legal pluralism has established Somaliland's peace and security infrastructure, it has created opportunities and challenges for marginalized and vulnerable groups. Such challenges include accessing and participating in legal reform initiatives that support social transformation. This paper concludes with the need to frame transitional justice, from the onset, in a way that recognizes the importance of communities as the site of transformational justice.

Dedication

To my mother who links me to my past and to my sons who keep me hopeful for the future.

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Chapter One

Introduction: Transitional Justice and Security-Sector Reform in Post-Conflict contexts

The transition to peace can be fraught with periods of violence as society works to return to 'normal.' That distinction between a violent past and more peaceful present is an important discussion for researchers of post-conflict societies. The understanding that violence is a continuum was popularized by researchers studying gendered violence during and after conflict and emphasizes the need to better study violence from prior to the advent of conflict through to the post-conflict period.[1] Somaliland's post-conflict process is certainly unique – even in an African context – in the way that traditional authorities (clan elders) have acted as drivers of peace. The establishment of a system of governance and constitution that melds customary and common law is an exercise in legal pluralism that has succeeded for over twenty-five years. This is remarkable especially when contrasted with the experience with peacebuilding in Southern Somalia - nearly twenty internationally organized peace conferences, with that country only emerging from 'transition' with the selection of Hassan Sheikh Mahamoud as Somalia's first president in 2012 to replace the transitional federal government that emerged from the Arta Conference in Djibouti (2000-2012).

The grassroots and culturally-rooted development of Somaliland's peace process has spawned research on hybrid forms of governance and the role they can play in building sustainable peace.[2] The scholarly preoccupation with the systems in place that uphold Somaliland's institutions can often overshadow the role that local communities have in securing

[1] Aoláin et al., 2011
[2] Richmond, 2015

and maintaining peace on a daily basis. By looking at local communities' desire to return to a sense of normalcy, the value of concepts like 'the everyday' or 'everyday life' become important scholarly tools of analysis. My own experience of Somaliland's peacebuilding process came through my time there beginning in 2011 with frequent trips till 2016.[3] At the time, I was conducting research with women's rights organizations, groups and activists, and questions beyond my research agenda came to the fore. These included finding ways to make sense of the means and tools that post-conflict societies used to re-establish peace and security after violent conflict. My interest in the notion of 'everyday life' as foundational to peace and security was taking shape and through this lens, women's contributions to peacebuilding became even more significant when, at the time, I was interviewing women peace activists and civil society leaders.

While interviewing Somaliland women for my PhD research, I found that women's rights groups and organisations used grassroots advocacy strategies to demand an end to conflict and advocated for greater gender equality. This included holding peace rallies where women sang songs and poetry demanding that violent attacks end and that women be given equal opportunity to participate at these peace conferences. During my time there in 2012, women civil society leaders frequently stated that because women were largely excluded from Somaliland's early peace conferences (1991-1997) as delegates and voting members, their capacity to demand gender equality was limited; although a few women attended they were given observer status.

These early peace conferences were significant for women because they established *xeer* (customary law) as the primary method for dispute resolution during the transitional justice

[3] My PhD field research was from the fall of 2011 till the summer of 2012 where I collected data in Hargeisa, Burco, Gabiley and Sheikh in Somaliland. I returned in 2013 and 2014 for the Hargeisa International Bookfair each trip last a month. From 2014 till 2016 I was working on a research project with an INGO based in Nairobi where I did frequent trips to Mogadishu and Hargeisa with each trip last 2-3 weeks at a time. At this time the research project was closely related to my PhD research, relating to women's experiences of conflict and post-conflict reconstruction with an emphasis on women in South-Central Somalia.

process. *Xeer* is led by clan families and Somaliland's peace conferences were largely organized around five major clan families. *Xeer* (customary law) has a wide reach and serves as a code of conduct between two (or more) disputing clan families. It is largely unwritten and as such texts will not give us insight into the real impact of *xeer* on Somaliland's peace process. Instead, the impact may be seen through the accumulation of everyday social practices.

Searching for ways to understand how unwritten codes of conduct impact social and political life led me to scholarly works related to 'everyday life'—a term popularized by Henri Lefebvre in his *Critique of Everyday Life* (1961). Critiquing capitalism, Lefebvre contends that everyday life is the site at which processes reproduce and sustain themselves (specifically 'consumption' in relation to capitalist modes of production). Since his seminal works, everyday life has been taken up as an analytic category by geographers, sociologists, anthropologists, legal scholars and political scientists. Lefebvre's three volume *Critique* has opened up dialogue and discourse on how to understand local communities through everyday practices that constitute what may be considered 'normal.' The everyday interests me in relation to post-conflict societies and peacebuilding given that scholars tend to focus on macro-formulations of peace processes (commissions, negotiations, political transition) and less on the daily or 'everyday' practices that contribute to sustainable peace. While macro-level peace initiatives are still very much relevant, the micro-level *experiences* of peacebuilding needs greater attention. In the Somaliland context, this focuses the attention on clan-based peacebuilding processes, grassroots organizing by peace activists, and locally driven attempts to pursue legal reform by all these actors.

Research Question and Thesis Outline

This section outlines my approach to transitional justice in Somaliland and focuses on the way in which the 'everyday' can be used to understand justice and security-sector reform during the early peace process. My research questions directly relate to the processes and experiences of justice and security-sector reform in Somaliland –a legally pluralistic environment. Moreover, the interaction between community-led justice initiatives and state-run reconciliation processes are juxtaposed to emphasize the importance of community in transitional justice processes to legal reforms that have a significant impact on local experiences of justice. Consequently, agency for communities in articulating, resisting, and negotiating legal reforms in post-conflict societies ought to be given greater weight intellectually as well as empirically. This thesis concludes that without integrating transitional justice with everyday experiences of justice and security-sector reform in communities and addressing social inequalities and other forms of exclusion, the capacity for sustaining peace will be diminished.

The concept of the 'everyday' here is applied to practices and norms surrounding the establishment of the justice and security sector in Somaliland. Focusing on these sectors can add insight into the intentions that early peace negotiators and participants had when instigating a reform process that included customary (*xeer*), Shariah and common law into its constitution. By framing 'everyday justice and security' in the context of these larger peace processes, this thesis looks at both macro and micro-level experiences of peace and security. I ask: Who were the principal actors in initiating these reforms? What were these processes? How do we understand legal pluralism in Somaliland? And lastly, how can the concept of the 'everyday' help us understand the role of communities in reforming the justice and security-sector in Somaliland. I

believe that through assessing the everyday, the level at which society interacts to engage in these transactions, contestations and compromises, it is possible to begin to answer some of these questions.

The thesis is divided into four chapters: the first outlines the methodological and theoretical approach including the way I utilize concepts like the everyday and its relationship to peacebuilding through 'hybridity and hybrid forms of governance.' This chapter also identifies my approach as oriented by an engagement with local communities as important stakeholders in peacebuilding but also as a source of legitimate authority. The second chapter outlines the scholarly debates surrounding the development, application and understanding of transitional justice in post-conflict societies. The contention between international human rights norms and locally-oriented justice processes illustrates the global dynamic between peace and security and community-derived processes (i.e., truth commissions vs. culturally-derived forms of reconciliation).

The third chapter provides a background of Somaliland's transitional justice process and focuses on the role of clan/kin networks on justice and security-sector reform. The relationship between Somaliland's transitional justice experience and its legally pluralistic environment stems from the series of negotiations conducted between clan/kin networks to ensure that institutions like the judiciary, police and military are functional. This chapter contextualizes the understanding of everyday justice and security in relation to Somaliland's transitional justice experience and interrogates the judicial and security-sector reform laws. The fourth chapter focuses specifically on transitional justice processes and the interaction of global-local processes to frame justice and legal reform in the context of social transformation. This chapter highlights the distinctiveness of African states transitional justice processes, emphasizing reconciliation

over retributive justice and the role that customary forms of dispute resolution have had in facilitating this reality. Somaliland's experience is not unlike many other African states—although it is an unrecognized state—yet it is still unique. This thesis concludes that without taking into account notions of the 'everyday', practices that stem from communities will be ignored and sustainable peace –including participatory forms of engagement—cannot be adequately understood or achieved. More specifically, it is at the community-level that social transformation can be most acutely felt.

Defining the 'Everyday'

The notion of 'everyday justice/security' in Somaliland allows us to examine more closely the interaction between customary laws and state laws in a legally pluralistic environment. Everyday justice has been explored in a range of disciplines and this thesis will draw from law and development, socio-legal studies, transitional justice and African studies to inform the analysis. An especially helpful definition of 'everyday justice' has been articulated by Waldorf (2017) and this thesis utilizes it thus:

> Everyday justice is all about how ordinary people avoid, negotiate, and resolve the myriad disputes that form part of everyday life so as to co-exist. Put differently, it is how people produce justice in everyday life, drawing on their understandings of state law, customary law, spiritual practices, and normative beliefs.[4]

By bringing together research surrounding community-led justice, hybrid forms of governance and the notion of the 'everyday', I arrive at an analysis of Somaliland's transitional justice process that allows for a high degree of compromise and coexistence between *xeer*, Shariah and common law. Understanding the notion of 'everyday life' (and by extension everyday justice/security) in relation to the law (thereby impacting the perception and practice of

[4] Waldorf, 2017, p. 160

justice and security) is best articulated by Sarat and Kearns (1995). They distinguish between the constitutive and instrumental perspectives of 'law and everyday life' (or law *in* everyday life). Instrumentalists view the law and everyday life as distinctive spheres of influence. However, a constitutive perspective of law and everyday life suggests that "social life is run through with law, so much so that the…law shapes society from the inside out, by providing the principal categories that make social life seem natural, normal, cohesive, and coherent."[5] The law as it impacts social and political life is constitutive of social values, norms and practices. It is relational and comprised of experiences that are often understood as necessary i.e., justice requires procedures, processes, rules around fairness and equality. Similarly, everyday security, as Higate and Henry (2010) point out, maintains the same features and may be understood as "…important because it can provide nuanced insight into…[how] security practices are seen, and in turn how these (usually taken-for-granted) practices contribute towards perceptions of security."[6] This is key in that perceptions of security and justice are highly social –impacted by social and cultural norms. The notion of the 'everyday' encompasses all aspects of these norms and social life, thereby sustaining legitimacy for any post-conflict regime.[7] This thesis defines 'everyday justice and security' similarly –as constitutive of Somaliland's norms and values while perpetually (re)shaped by communities (whether based on kin networks, professional associations, advocacy groups and other non-state actors).

Somaliland is an appropriate case study for how everyday justice and security operates and impacts legal norms. During its transitional governance period (1991-2000), reconciliation did not involve truth commissions or tribunals, rather clan/kin networks held local conferences

[5] Sarat and Kearns, 1995, p. 22
[6] Higate and Henry, 2010, p. 33
[7] Robins, 2013

(1992, 1993, 1997) to re-establish social ties broken by war and conflict during the Somali civil war (1981-1991). Customary law (*xeer*) and norms derived from Shariah were utilized to promote restorative justice (rather than retributive justice) principles as well as form the basis for constitution-building.

In Chapters 3 and 4, I outline Somaliland's transitional justice experience, providing a qualitative review of Somaliland's police, military, and judicial reform processes, focusing on Law No: 24/2003; the 1963 Military Code; 2012 Police force Bill in order to highlight the interaction between *xeer* (customary law), Shariah and common law and consequently the experience of 'everyday justice and security.' The texts of these documents are available online and have been oft utilized by the advocacy organisation the Somaliland Human Rights Center. I use these online sources recognizing that *xeer* is unwritten but discursively communicated. Critical engagement with these texts will help with documenting the changing norms and values in this society to understand how 'everyday life' impacts justice and security-sector reform. These reports were vital to assessing structural and systemic inequalities including those brought about by the use of customary laws. As is often noted, *xeer* is rarely written down and implemented by a select few clan members. This makes it difficult for ordinary Somalilanders who participate in *xeer* proceedings to adequately challenge rulings. This has a profound impact on the everyday experience of justice and security for the most marginalized communities.

The popular narrative that emerges in the historical accounts of this transitional justice experience deemphasizes accounts of contestation and violence (despite the presence of both). Using the 'everyday' as an analytical guide helps to fill that gap by recognizing the presence of violence during transitional justice processes; the promotion of hegemonic norms and the

socially constructed experience of peace, justice and security. It also requires us to ask: What does reform mean? How is justice perceived and experienced by communities?

This thesis is guided by those scholarly works that have uncovered the contradictory as well as complementary ways in which diverse legal systems can co-exist but also contradict one another depending on which system is used and when. While the pursuit of justice does not necessarily entail the absence of violence, obscuring their relationship to one another is misguided and impacts the interpretation of the law on everyday life in post-conflict societies.

The Everyday and Hybridity: An analytical lens

This thesis situates hybridity in the context of weak and fragile statehood placing emphasis on "indigenous institutions that create local forms of order."[8] By contrast, the literature on legal pluralism, as Reyntjens (2016) notes, can cover a wider array of interactions between a "normative system" and "…individuals, individuals and institutions and between institutions." Legal pluralism can potentially cover intersections across the spectrum of "human behaviour."[9] This thesis is looking at a very narrow set of interactions with respect to legal pluralism in Somaliland (between shariah, customary and common law) as it relates to hybrid governance (namely the use of *xeer* and Islam as a cultural basis for shaping norms that give rise to institutions and practices). In essence, hybrid governance refers to understanding the experience of using localized and indigenous practices to promote peace and justice in the Somaliland.

Social and political pluralism are among the ideals that transitional justice scholars and practitioners seek to promote in post-conflict societies. International legal scholars and institutions emphasize conditions for power-sharing that include pluralism as a mandate. In

[8] Reyntjens, 2016, p. 347
[9] Ibid, p. 350

practice, this can equate pluralism with independent spheres of influence (the socio-political on the one hand and the legal on the other hand). Treating these practices as separate processes for post-conflict rebuilding treats local communities and the state as independent forces. In reality hybrid forms of governance (socio-political as well as legal) have existed in diverse social contexts since the establishment of the modern global political order. More specifically, when scholars refer to 'hybridity' in the context of post-conflict societies, the language refers to "hybrid-forms of governance associated with local patterns of politics, [and] a post-liberal form of peace, [where] the liberal and the local meet each other on the ground, reach and modify each other."[10] There are key points that ought to be recognized in this iteration of hybrid governance that impacts post-conflict contexts.

In my analysis, hybridity emerges when it is acknowledged that international norms have a presence and yet, local communities maintain agency over how 'peace operates on the ground.' Transitional justice operates at this intersection – among socially diverse communities that deploy hybridized forms of governance (i.e., TRC's, community courts as well as hybrid courts). The use of the term 'hybrid forms of governance' refers to legally pluralistic societies that apply internationalized forms of governance (rule of law) but localized understandings of legal norms and values (including shariah and customary law) are still utilized. How do we as scholars then begin to make sense of disparate legal systems, communities and norms?

The 'everyday' is a useful orientation in both colloquial and analytical ways to understand legal norms and values in hybrid forms of governance. Applied to our understanding of local communities and how they operate in post-conflict societies, we are taking into consideration everyday social realities, as well as the way in which they are reimagined.[11] This

[10] Richmond, 2011, p. 117
[11] Richmond, 2011; Boege et al., 2009

can include studies on the relationship between informality and the state, the role that markets play in shaping liberalism in post-conflict societies, and the shifting nature of legal norms. The 'everyday' and 'hybrid forms of governance' are not euphemisms for culturally rooted or even notions of 'community'. Rather, as Richmond (2011) notes it is difficult to 'manufacture' hybrid forms of governance or social contexts, and that contestation and agency are mutually co-constitutive. Consequently, hybridity has come to redefine the practice of transitional justice and other forms of peacebuilding and security-sector governance. As Richmond (2011) highlights:

> …internationals realised that they had to forge relationships with customary actors and elders, negotiate tradition and traditional sites of power and social, political and economic organisation…and in the process they encountered acute alterity which challenged liberal value systems and norms, and institutional arrangements. Some internationals withdrew from this confrontation, others ignored it, and others engaged. Implicitly, these encounters have challenged and modified local and international peace systems.[12]

Without critically engaging with the 'everyday' to understand these negotiations and compromises, we cannot begin to understand the ways in which the concept allows for communities to act as legitimate brokers of peace. Moreover, incorporating local perspectives becomes critical to moving away from the dichotomy of community vs. state interests. In instrumentalizing hybridity, as scholars and practitioners, the concern is that we may lose the "understanding of local agency and the ability [for]…local and international actors to produce unexpected outcomes."[13]

Conceptually, the 'everyday'[14] largely referenced the social construction of urban life and the way in which 'space' and 'spatiality' enveloped the urban subject in an environment where they exercise contestation and compromise simultaneously. Taken up by geographers and urban

[12] Richmond, supra note 10 at 133
[13] Mac Ginty & Richmond, 2016, p. 220
[14] More specifically 'everyday life' first posited by Henri Lefebvre's *Critique of Everyday Life*

planners, the scholarship on the 'everyday' has since grown to encompass a broader understanding of social reality that incorporates critical theories of space and spatiality while exploring 'everyday life' more ethnographically. Its utility can be felt when scholars discuss inequality and the hierarchies that are being dismantled to make way for greater equality. Peace and conflict scholars have again reimagined the 'everyday' to include the ways in which social realities are reconstituted in the wake of conflict and the process of generating and inculcating norms and values acceptable to post-conflict societies. Without taking into consideration the presence of hybrid forms of governance, engaging with notions of 'everyday life' cannot be so easily discerned.

Understanding Transitional Justice in post-conflict societies

Transitional justice as an approach to post-war rebuilding utilizes rule of law, peace and institution-building to support the transition to functioning and viable legal and political institutions. Accountability measures feature prominently in these processes, without which justice as a tenet of peacebuilding cannot be achieved. Regimes and/or individuals enacting gross human rights violations must be held accountable for society to transition from conflict to sustainable peace. Embedded in these transitions are accountability processes that include rebuilding legal institutions and customs to evaluate wrong-doing and accord appropriate punishments.

However, considering the variety of abuses that can occur, the diversity of repressive regimes and the wide range of socio-political conditions in societies at war or emerging from conflict, it can become difficult to predict which transitional justice tools will prove successful in practice. For this reason, theorizing about transitional justice and predicting appropriate remedies has remained a difficult task for scholars. Grodsky (2009) considers this issue by pointing to the

variables that scholars have utilized to assess the practicality of transitional justice tools. Power is a reoccurring variable that features considerably in the literature from the birth of transitional justice during the post-World War II to the end of the Cold War era. This includes the ways in which one group of elites is supplanted by another group thereby ensuring accountability for one group and a sort of 'transition' from the prior regime for incoming political elite (victors justice). Universalizing transitional justice tools can be difficult to do since what a successful transition ought to look like would merely entail transposing western democratic ideals onto diverse communities. In case studies emerging from the Balkan states at the end of the Cold war, human rights abuses were so widespread among diverse factions during conflict that accountability (and blame) could equally be shared.[15]

While the way that power operates is certainly an important variable and motivation for ensuring accountability measures are in place, it is insufficient as the sole variable to assess the value of transitional justice as a study and in practice. Grodsky (2009) proposes a "transitional justice spectrum" that emphasizes method over and above positing an overarching theory of transitional justice.[16] Their interest lies largely in assessing causation among a diverse set of practices in order to "impose greater clarity on what, and subsequently how" transitional justice is empirically assessed. The need to determine some methodological approach for how and why transitional justice can become most effective is a preoccupation for scholars and practitioners with 'accountability' present as an important variable for societal transformation and peace.[17]

The role of the state as the driving force behind reconciliation and rebuilding is still a dominant feature, as well, in the analysis of transitional justice practices. Grodsky (2009) insists

[15] Ibid
[16] Grodsky, 2009, p. 819
[17] Ibid

that scholars must veer outward and consider local communities as equal stakeholders and powerbrokers during periods of transition, in an attempt to displace the scholarly dependency on the state as the sole arbiter of accountability in post-conflict societies. [18] The state is still necessary, particularly given that immediately after a war institutional capacity is weak or absent. Contestations that arise in addressing human rights violations can give rise to competing narratives. The state is best equipped to navigate transitions from violence since it is capable of "individualizing blame" and thereby ensuring accountability on a limited set of actors or group(s).[19]

At the very least, the state must be seen to be concerned with enforcing accountability measures whether it includes criminal prosecutions or truth commissions. The new regime's capacity to enact justice allows for a degree of distancing from the previous regime's actions as well as to legitimate its own authority. More telling is the scholarly focus on power as inevitable given the role of the state and the emphasis on elite dynamics – especially how incoming regimes enforce accountability.

The relationship between accountability and power forces a narrow assessment of regime change, whether punishments are favoured or if restorative justice practices are utilized. For Grodsky (2009) power alone as a relative concept is insufficient as an analytical foundation for measuring the success or failure (and indeed study) of transitional justice initiatives. The choice to single out one factor, in determining variables that contribute to the type and approach of transitional justice is attractive. Still, there is no foundation that exists to champion one variable above another – rather many cross-cutting variables exist in different forms across diverse post-conflict societies. Political elites, institutions, intelligence and other security-sector actors, as

[18] Ibid, p. 820
[19] ibid

well as the wider community are all relevant in different ways when transitional justice is utilized. Empirical approaches like Grodsky's (2009) are important in identifying variables across a broad set of practices to provide a comparative analysis.

The lack of an overarching theory of transitional justice makes it difficult to speak in categorical terms. But that has not dissuaded scholars and policymakers from prescribing conventional approaches that include some mix of prosecutions and amnesties – but the real impact of these decisions can influence an incoming regime. For example, the incoming regime may target a former regime using prosecutions or amnesty to legitimize themselves as well as weaken the leadership of the former regime.[20]

It is worthwhile asking then, what should be the goals and aims of transitional justice in post-conflict societies? Is it the pursuit of accountability for perpetrators? Societal healing and reconciliation? State building through strengthening justice and security-sector institutions? Community-centered development? Sustainable peace? At various levels, scholars agree that many of the above issues are key to the wellbeing of post-conflict societies.[21] Still, much of transitional justice is grounded in legal principles and foundations without often reimagining alternatives to rule of law approaches to securing justice. Socio-legal theorists and critical legal scholars have often cited the gap between normative approaches to the 'law' and the daily lives of communities. Even more, the law can sometimes obscure its origins, particularly as Western legal thought is predominately applied to post-conflict societies in non-Western states.

For Rowen (2008) the premise that "ideal-type societies" can exist and facilitate "mutual interests" is false. Even in Western democracies, the exercise of democracy is ongoing rather

[20] Teitel 2005; Thoms et al., 2008; Mani 2008
[21] Mani 2008; Leebaw 2008; Nagy 2008; Graham 2003

than something that has been achieved without the input of future generations.[22] Indeed, consider the basis for legal authority in any society and the source can be traced to the way in which communities organize themselves rather than the view that the law exists without the impact of social or political processes. Consequently, "rebuilding community should be of primary importance in creating a legal system in a country emerging from violence" and can only be strengthened by incorporating legal authority that is more or less contextualized to post-conflict societies.[23] This leads us to consider 'how is legal authority organized in any given community?' By asking these questions the role of transitional justice may be better understood. The goal is not to propose a constructivist approach to the study of 'law' but to suggest that we take a broader approach to the way in which laws impact societies and communities.

By understanding the source(s) of authority as Rowen (2008) suggests the "law can contribute to community as well as serve as an authority."[24] An examination of the way that communities utilize legal authority can dispel the notion of universal ideals regarding the role that laws can play in post-conflict societies. International human rights norms – of which transitional justice is an extension – emphasize the importance of establishing rule of law after violent conflict but communities may already possess mechanisms for redressing violent acts and abuses. This is significant since it allows for communities to consider alternatives to trials or criminal prosecutions.

Restorative justice practices (truth commissions, testimonials etc.…) certainly aid in bridging gaps between state capacity and local forms of legal authority. The emphasis is placed on the way in which legal authority is necessary for social cohesion. Rowen (2008) and Leebaw

[22] Rowen, 2008, p. 93
[23] ibid
[24] Ibid, p. 95

(2008) highlight that social relations are impacted by more than legal authorities when it comes to establishing peace and cohesion after conflict. Indeed, in the Somaliland example, transitional justice processes stemming from the international legal order were largely absent. Much of the rebuilding required for social order and an end to conflict stemmed from local clan families and kin networks. As violence spread from inter-clan conflict to intra-clan conflict, clan families sought pathways to reconciliation to avoid the complete deterioration of communal (social) relations. In such cases where legal institutions and customs cannot be divorced from social conditions, legal authority that stems from community and social organizing has a very significant impact on how the law operates. Rowen (2008) considers a positivist approach wherein legal systems are impacted significantly by communities in the case that "rules for rule-making and social relations" are present.[25] While reflecting on Hart's *Concept of Law* Rowen (2008) views this process as indicative of the "rule of recognition" whereby

> …social rules and customs form the primary rules by which people order their daily lives. The rules become law when an authority, validated through secondary rules which determine who has authority-known as the rule of recognition-deems the rules to be law and enforces them as such.[26]

This is especially appropriate with communities emerging from violent conflict that involve kin networks or where social bonds form the basis for legal and political organizing. The debate here is not whether the 'law' exists outside of or beyond social relations but through this "rule of recognition" any "legal system is an authority that is successful at promulgating directives that tell people how they ought to behave."[27] As such, the measure of success as Grodsky (2008) seeks to emphasize, is not merely where authority resides without consideration for how it operates but the measure of *legitimacy* that any authority has in communities abiding by its

[25] Ibid, p. 98
[26] Ibid
[27] Ibid

directives.[28] This perspective gives a wide breadth of legitimacy for authority that stems from diverse sources; potentially coexisting in competing or complimentary ways (i.e., legally pluralistic societies). The reliance on "social facts that become sources of law" is an indication that everyday life can lead to the development of legal norms and customs that are authoritative and sustainable.

Cases that illustrate the importance of re-establishing community norms and values in post-conflict societies exist but providing a means to comparatively understand their emergence, application and suitability to providing forms of justice and healing are difficult to ascertain. Unless we view these cases (i.e, Rwanda, Sierra Leone, South Africa, Bosnia etc….) individually, what can scholars suggest in the way of policy or legal prescriptions on transitional justice tools and strategies that can be widely utilized? Here Rowen (2008) asks us to distinguish between form and function – that is, the norms and values in communities that have the potential to form the basis of legal authority and the actual exercise of this authority.[29]

The gap between transitional justice mechanisms and their suitability for diverse contexts involves primarily viewing transitional justice as not only 'ideals' to aspire to but a means to "create community."[30] Rowen's (2008) concern is the way in which those in power subvert the ideals of transitional justice to "create a self-serving narrative."[31] This skepticism is appropriate given the wide scale purge of prior regimes that can accompany political transitions after violent conflict. An approach to transitional justice that is context-specific but can build upon the foundations of tools and strategies that have been deployed over time can be useful to bridging this divide between top-down institution-led justice vs. bottom-up community-led justice.

[28] Ibid
[29] Ibid, p. 100
[30] Ibid, p. 116
[31] Ibid

Scholars have agreed on many occasions that it is important to democratize transitional justice in order to provide alternatives to the prevailing top-down approach and promote sustainable peace.[32]

The debate surrounding the impact of legalism in or on transitional justice processes, includes what both Rowen (2008) and Grodsky (2008) appeal to –greater pluralism, as a preferred alternative norm to guide the practice and application of transitional justice. My approach to transitional justice involves paying critical attention to this dichotomy between strictly legalistic approaches vs. socio-political approaches. The literature is dominated by international human rights legal scholars and their over-reliance on legal and universalistic notions of rights and the inviolability of those rights. McEvoy (2007) rightly states that "transitional justice discourses are themselves still 'in transition.'[33] As rule of law is deeply rooted in the 'ideals' that are articulated throughout transitional justice processes, the politicization of social life is also endemic to the practice of forming legal norms and customs in post-conflict societies. The experience for many communities emerging from violent conflict is rarely discussed at the intersection of these divergent processes despite the reference by scholars to the complexity of transitional justice whether through institutional or community-focused processes. More specifically, as Rowen (2008) emphasizes, there is no legal authority without community. As such, understanding the communities and social realities of post-conflict societies – prior, during and after conflict – is as relevant as considering the appropriate legal measures to take to re-establish rule of law. The resonance that social life can have on the development of law (in form and function) is essential to the ways in which compromises and negotiations occur to end violent conflict but also help promote more equitable social relations.

[32] Sharp, 2013
[33] McEvoy, 2007, p. 439

Searching for Community in post-conflict societies

Communities can animate concepts of 'law' and 'justice.' Recognizing that social relations, boundaries, and the roles of community members are always in flux, cultural norms and values are used as strong foundations for post-war rebuilding. *Gacaca* courts and *Ubuntu* principles of reconciliation are frequently cited forms of community-building to transitional justice contexts.[34] It is worth asking what other forms of social organizing exist at the intersection of community-building and transitional justice procedures. Hinton's (2010) definition of local justice is apt here: "local justice [as] concerned with the ways in which justice is experienced, ranging from village-level interactions between former victims and perpetrators, to offices of nongovernmental organizations, to the courtrooms of international tribunals."[35] In essence, local forms of justice directly impact and are impacted by internationalized forms of delivering justice in post-conflict societies (tribunals, national courts). Nevertheless, it cannot be said that post-conflict societies impose their ideals on the way in which transitional justice is conceptualized at a global level. Rather, the agency of these communities can be seen through the ways in which they *resist* the internationalization of their localities.

Hinton (2010) cautions scholars against overemphasizing the agency and power of communities in a scenario where transitional justice is superimposed from the outside. Instead, he asks us to consider the ways in which the norms of transitional justice have produced "shrinkage" within these communities.[36] Social relations become reduced to "manageable (and often controllable) categories" where victims and perpetrators are easily identifiable but more importantly these relationships are frozen in "zero time by which past and present are

[34] Hinton 2010
[35] Ibid, p. 1
[36] Ibid, p. 7

foreshortened and reframed."[37] The complexity of community relations is dismissed or obscured. Categories of 'victim' and 'perpetrator' are not always fixed—like in cases of ethnic social division and violence in Rwanda. Hutus and Tutsis are framed as *both* victims and perpetrators depending on the perspective of the narrator. The detriments of ignoring the complexity of communities is wide ranging and can deter transitional justice initiatives.

This view of how to do transitional justice with respect to communities has become largely outdated despite the origins of transitional justice as a sort of 'victors justice'; popularized by Western Europe's post-World War II Nuremberg trials designed to punish former Nazi soldiers. As such, it is worth asking, how the law treats communities during transitional justice processes where 'law' refers to the way western legal thought dominates transitional justice principles and values, operates and is integrated into post-conflict societies.

As Hinton 2010 notes:

> …people are seemingly transformed into liberal subjects, as autonomous citizens imbued with freedom, equality, and rights [engaging] in democratic, social, juridical, and political practices. Thus, in a trial, due process rights are afforded to defendants, while judges, lawyers, and monitors work to ensure that proceedings accord with international standards.[38]

For Hinton (2010), this process can have a profound impact on the "social body."[39] The community member is distanced from their previous relationship to others (and the state) and placed into their new role as citizen-subjects. It does not displace post-conflict social relations – that is, it does not absolve perpetrators from criminal prosecution. Rather, this process seeks to offer post-conflict societies a break from the past and from the grievances that led to violence.

[37] Ibid
[38] Ibid, p. 8
[39] Ibid

While this may resemble some of the ideals of transitional justice as it is theorized, the complexity of social relations and the environment they are embedded in is not engaged with.

Hinton (2010) proposes framing "justice in the vernacular" of local communities to better reflect local norms and values. The *Gacaca* courts and *Ubuntu* are emblematic of this and have given rise to considerable scholarship in this area. What Hinton (2010) references as "vernacularizttion" is often noted as complex, incoherent and requires a high degree of negotiating. Undoubtedly, this process is contentious "as the meaning and form of transitional justice idioms are mediated, appropriated, translated, modified, misunderstood, ignored, or even rejected in everyday social practice."[40] It is at this site (community, local) and in this process of translating transitional justice (i.e. vernacularization) that illuminates everyday justice. More particularly, these tensions underscore the hegemony of internationalized conceptualizations of justice, especially when contrasted with the norms and values of local communities.

Another preoccupation of the search for community-oriented justice is the focus on the state and its legitimacy. Indeed, the source of any successful transition, by orthodox standards, is the state's capacity to effectively govern and re-establish rule of law. Promoting a 'bottom-up' approach to counteract this statist perspective has certainly been proposed in the past.[41] The emphasis is to decentralize "decision-making over the design, remit, conduct, character, and outcomes of the transitional justice process to members of a given community affected by violence."[42] Common examples include Rwanda and Northern Uganda with the valorization of community-centered justice initiatives touted as a viable alternative to state power. O'Rourke (2008), however, cautions against dichotomizing the benefits of justice as either state-centric or

[40] Ibid, p. 11
[41] O'Rourke, 2008
[42] Ibid, p. 271

community-oriented and instead recognizes that violence and inequality may be perpetuated at the community-level in equally violent ways as the state.[43]

The reality of competing stakeholders (community, the state and non-state actors) in the transitional justice process enables certain groups to take advantage of conflicts that arise over how to establish and enforce rule of law. These "meta-conflicts" may be more substantial in their reformation goals i.e., a call to reorganize social hierarchies responsible for the outbreak of conflict including gender inequality. Meta-conflicts between the state and local communities are only as helpful as they allow for meaningful contestations to occur.[44] For example, as O'Rourke's (2008) emphasizes, meta-conflicts that can help transform gender relations in post-conflict societies are positive and fundamental to establishing equity. The community as a site of contestation is crucial to acknowledging that social hierarchies cannot be used as a "stabilizing force in society" to the detriment of radical social reorganizing.[45]

An emphasis on pursuing greater pluralism in transitional justice approaches has been championed by community-oriented actors and advocates as a means to ensure power and authority are decentralized. This pluralism can take the shape of increased representation for marginalized groups, enshrining legal pluralism, and establishing autonomy for community-focused justice. Contestation in the form of competing discourses on social and political organizing is inevitable. It is also necessary to further these pluralistic aims and will likely continue after the establishment of rule of law and governance in post-conflict societies. The degree to which post-conflict societies can support contestation depends on the level of shared power among political elites and between community-based actors. While the goal is a

[43] Ibid, p. 272
[44] Ibid, p. 290
[45] Ibid

successful transition to sustainable peace, an acknowledgement that sites of contestation can co-exist in peaceful post-conflict societies is crucial. The (contested) complexity of the relationship between peace, equity and rule of law in a post-conflict society needs to be understood as qualitatively no different from other forms of dissent and contestation seen in democratic societies.

Community-building in pursuit of transitional justice

Communities rely heavily on forms of social organizing that can maintain harmony and cohesion among members, yet in some of the most violent conflicts (i.e., Rwanda, Sierra Leone, Somalia) social exclusion was pervasive prior to the outbreak of conflict. Without first fortifying these communities with inclusive political cultures, the values that are espoused by transitional justice initiatives risk furthering the gap between rule of law and localized justice. The collapse into violent conflict is certainly related to a lack of cohesion among community members. Mani (2005) adds to that by underscoring that "transitional justice often cannot and does not produce the by-product of reconciliation" (i.e., healing, solidarity).[46] The 'justice' that is sought within transitional justice continues to frame community members as either victims or perpetrators (as noted above). This raises a critical issue, namely: where do community members who exist outside of this paradigm go to seek justice and healing? Delivering justice and embodying justice can diverge in terms of their aims and aspirations.

While delivering justice is more easily recognizable through instituting rule of law, the embodiment of justice is more akin to community-building as a means to provide a foundation for reconciliation. Mani (2005) advocates for incorporating reparative justice principles to invigorate value-driven local justice; with added measures for "an inclusive civic national

[46] Mani, 2005, p. 512

identity and thriving political community."[47] Indeed, unless reconciliatory measures are taken in conjunction with punitive acts, transitional justice will remain divisive. Mani's (2005) approach includes emphasizing a "survivor-oriented" ethos to veer away from the victim/perpetrator distinction.[48] This is valuable and necessary since it points to the tendency for transitional justice approaches to encase practices and identities through temporal boundaries. Reparative justice seeks to extend itself beyond this as means to contribute to the ongoing process of 'community-building' as a continuum that extends beyond the end of formal conflict.

The history of transitional justice and its bureaucratic, western legal approach has certainly proven to be inadequate in sustaining viable peace and rule of law in many post-conflict societies. Its relative successes are also apparent, especially in drawing attention to the need for establishing a critical assessment of legal systems and structured inequality prior to the outbreak of conflict. Whether arguing for a reparative or transitional justice approach, the disproportionate responsibility that communities now bear for facilitating restorative justice mechanisms is becoming more and more apparent.[49] This practice by transitional justice practitioners to transfer responsibility for restorative justice onto communities is oversimplifying the "complex human needs, expectations and experiences related to justice and reconciliation."[50]

The use of 'community' as a metaphor for all things local, informal and connected reduces members to monolithic entities that exist to serve justice in post-conflict societies. Conflict and contestation are frequently rife after violent conflict and to varying degrees, community members may seek to redress past harms through a combination of strategies and

[47] Ibid
[48] Ibid p. 521
[49] Lambourne, 2009
[50] Mani, supra note 34 at 31

tools.[51] What can emerge thereafter is a relationship that is co-constitutive and interdependent among the state and communities, rather than mutually exclusive.[52] The disjuncture between the 'local' and the state was present from the early manifestations of nation and state-building (post-colonial states emerging from conflict inherited colonial legal traditions). The transformations of communities through various political iterations of statehood cannot be ignored and then called upon in the aftermath of conflict in the name of reconciliation and peace. Community-building as a form of re-establishing justice and peace is an approach that needs to be centered in transitional justice approaches that do not instrumentalize the role of communities (i.e., as the site of restorative justice measures).

Rebuilding communities should be seen as nation-building since community-building is important to rebuilding all social and political institutions in post-conflict societies. Indeed, as Lambourne (2009) notes, given the histories of post-conflict societies, there has always been some form of pluralism in their legal traditions (including informally). To avoid romanticizing communities, it is important to recognize that retributive justice may be taken up by communities in the same way that restorative justice mechanisms may be utilized by states in a pluralistic or *hybrid* approach (i.e., Truth and Reconciliation Commissions; Hybrid courts). This experience has been more instructive for many post-conflict societies than the literature indicates.[53] Ultimately, the notion that hybrid political communities utilize diverse legal norms means that the relationship between community and the state is constantly evolving. The goal is to perhaps evolve in a direction that ensures rule of law while managing culturally significant legal values.

[51] Ibid
[52] Ibid, p. 32
[53] Lambourne, supra note 37

Chapter Two

This chapter outlines the disconnect between transitional justices' ideals and its outcomes. I will argue in this chapter that the development of transitional justice has been heavily influenced by the normative frame of internationalism which is itself a western legal framework. It is this application of universalist western ideals in the context of complex, post-conflict and legally pluralist societies in the global South, that, in my assessment underpins the disconnect between the ideals and the outcomes of transitional justice in these settings.

Transitional justice practice has roots in post-WWII courts (i.e., Nuremburg trials) and suggests that Western legal thinking dominates its approach and practice on post-conflict societies. The conflicts of the 1990s and post 9/11 emphasis on global security has shifted the lens away from stable Western democracies to global South countries mired in conflict and political instability. However, with the advent of international institutions to promote human rights, justice and accountability, new discourses emerge about the role of alternative forms of seeking justice in post-conflict contexts. This includes reconciliation tools and bottom-up approaches to justice. This chapter concludes that transitional justice has since been adapted accordingly and while its values and ideals are still globally promoted, the case of Somaliland, for example, can be better understood. While Somaliland cannot claim to exist in isolation of international legal norms, its transitional justice process was largely bottom-up and has had little influence from the international institutions.

The emergence of transitional Justice as normative practice in post-conflict societies

Contemporary transitional justice practices emerged from international humanitarian law (IHL) stemming from the Geneva conventions (1949)[54] and the Hague conventions (1899 and 1907)[55] that helped frame the rules of engagement among enemy combatants as well as the treatment of wartime prisoners and non-combatants. Other considerations helped develop IHL standards and norms including customary international law. Mitigating the rules of conduct during wartime, IHL and transitional justice methods have established a necessary legal framework allowing the International Criminal Court (ICC) and other international tribunals to assert authority over war criminals with criminal prosecutions. Scholars continue to debate about the relationship and distinction between (IHL) and international human rights law. While this is not a central debate for this thesis, it is worth noting that much of the literature on transitional justice does utilize both and they are seen as complimenting one another.[56] Transitional justice more specifically concerns itself with redressing human rights violations in transitional or post-conflict societies. The list of rules and processes to transitional justice in practice, stemming from IHL norms, is negligible in the way that post-conflict societies experience and engage in transitional justice. Instead, a holistic approach is usually taken in contemporary experiences with transitional justice that draw from international and local legal traditions.

The distinction between contemporary and historical experiences of transitional justice is relevant since it points to the changing global dynamic of states, the international legal order and the capacity to deal with human rights violations particularly at the end of the Cold War. Charles Call (2004) refers to this period of justice-seeking as a part of the "third wave of

[54] https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm
[55] https://ihl-databases.icrc.org/ihl/INTRO/195
[56] Ben-Naftali, 2013

democratization" beginning with the "…end of the Cold war [and] largely sparked by the advocacy of human rights organizations."[57] It was at this time that transitional justice as a research inquiry began to gain resonance with scholars and activists evolving from "a human rights instrument of democratisation to becoming an essential aspect of post-conflict transitions and peacebuilding interventions."[58] As a staple of peacebuilding processes, the UN definition of transitional justice notes the importance of scale in societal and political transformation. As global and regional conflict grew increasingly violent and protracted the UN sought to emphasize the impact of dealing with "large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation."[59] In this way, scholars point to the inherently political foundations and principles of transitional justice processes that include interest-based groups vying for power.[60] Historically, as transitional justice in practice is linked to the Nuremberg trials post-WWII, the notion that political considerations impose upon what may be seen as legal processes is apt. Even truth commissions are laden with conflict, discord over narratives, and trauma. What is memorialized is often a political process of "what is included or left out."[61] Given these complexities, it is worth asking what if any benefit can transitional justice processes bring to a society emerging from conflict or dealing with vast human rights abuses?

Transitional justice cannot attempt to resolve complex conflicts and heal societal rifts, not unless other tools are utilized to support its initiatives. Indeed, it is intended to function in consort with other features of peacebuilding (i.e., negotiations, disarmament, demobilization, reintegration (DDR), security-sector reform etc…).[62]

[57] Call, 2004, p. 103
[58] Haider, 2016, p. 3
[59] Ibid
[60] Andrieu, 2010
[61] Haider, supra note 42
[62] Thoms et al., 2008; Duthie & Seils, 2016

It is this relationship between peacebuilding and transitional justice that can often blur the distinction between strictly legal processes and those associated with societal change (at the community-level, for example) as well as the politics underlying it. Traditionally, for transitional justice to effectively challenge past abuses and conflict, an internationalized approach has prevailed. Technical experts and legal expertise are utilized to strengthen rule of law whereas peace processes engage with a broad spectrum of institutions and practices from the local to the national to build sustainable peace. These processes are occurring simultaneously in post-conflict societies so to understand them as distinct spheres of influence is misleading. Rather, as Ruti Teitel (2003) notes, the evolution of transitional justice reveals an important relationship between justice and peace:

> over time, [there exists] a close relationship between the type of justice pursued and the relevant limiting political conditions. Currently, the discourse is directed at preserving a minimalist rule of law identified chiefly with maintaining peace [my addition].[63]

Teitel's work has significantly shaped the field of transitional justice scholarship by extending our understanding of transitional justice as having gone from "regulating international conflict to regulating intrastate conflict as well as peacetime relations…"[64] It is this assessment by Teitel in how they outline the evolution of transitional justice, that is helpful in showing the rise of intervention on the basis of protecting human rights – an approach that has shaped legal developments in the field as new political contexts emerge impacting upon the way that transitional justice operates in post-conflict societies.

Teitel's work (2003; 2005) on developing a genealogy of transitional justice in relation to global political processes lays out a chronological as well as a thematic outline for how to understand the global and local developments of transitional justice. Beginning with the

[63] Teitel 2003, p. 69
[64] Ibid, p. 74

Nuremberg trials, Teitel's framing is useful in outlining the various political motivations of global actors (whether they were allied forces in WWII or the ICC during the Milosevic trial). As well, Teitel's usage of 'phases' is a useful way to link the relationship between justice and peace in the contemporary literature on transitional justice. What is understood as the first phase refers to the Nuremberg trials following World War II as well as the level of internationalism brought on by the trials. The second phase is chronicled from the 1989 "wave of democratization, modernization, and nation-building" that was occurring after the Cold War. The third phase, occurring at the turn of the twentieth century, is heavily influenced by what Teitel views as the "conditions of persistent conflict which lay the basis for the generalization and normalization of a law of violence."[65]

Transitional justice in this frame is acutely felt at times of extreme political and social upheaval. The persistence of conflict and the role of international proceedings continues to shape the currency of justice-serving initiatives. For example, a series of "justice-packages" regularly feature in peace settlements and negotiations for post-conflict societies.[66] Without the acceptance and insistence of the international peacebuilding regime, justice-sector reform and transitional justice priorities reflect these reforms often at the expense of local populations.[67] These conditions cannot exist without recognizing the strength of the global legal order over and above the sovereignty of post-conflict states.[68]

In this third phase, the imposition of concessions relating to transitional justice measures on post-conflict societies has become the norm. This is directly related to early interventions of WWII where "national justice was displaced by international justice" whereby post-WWI's

[65] Teitel, 2005, p. 839
[66] Lundy & McGovern, 2008 p. 266
[67] Ibid
[68] Teitel, 2003, p. 72

national trials in Germany yielded an inadequate means of deterrence.[69] As such, international accountability becomes and important aspect for transitional justice processes in post-conflict societies.[70] Moreover, while this analysis emphasizes internationalism, Teitel cautions against reframing it as justice for justice's sake, instead indicating that the early Nuremburg trials were seen largely as a means "intended to justify and legitimate Allied intervention in the war."[71] Similarly, contemporary intervention strategies deploy protection of human rights to justify international accountability standards. To account for this internationalism, the post-WWII era emphasized the need to strengthen rule of law.

In Teitel's (2003) genealogy the importance of context is reiterated as the evolution of transitional justice across post-war Europe demonstrates that values and political conditions cannot be reproduced. Moreover, transitional justice became heavily associated with international legal norms.[72] The implications for post-conflict societies throughout the third phase is evident. For scholars of transitional justice, Teitel's critique centers on the enormous role that international legal norms can have in profoundly re-shaping national contexts. It is worth enquiring then about the role of a national/local justice-sector in being able to hold individuals and groups accountability for human rights abuses. The standards of accountability have shifted to reference international conventions that were solidified post-WWII including the Geneva convention. As such, the internationalism that Teitel (2003, 2005) and other scholars highlight is an enduring feature of transitional justice.[73]

[69] Ibid
[70] Ibid
[71] Ibid, p. 73
[72] Ibid
[73] Lekha, 2007; Lundy & McGovern, 2008; Duthie & Seils, 2016

Internationalism is also in conflict with local and national justice-centered institutions with many local communities seeing them as more legitimate than state institutions.

The emergence in the third phase of transitional justice practices includes the presence of hybrid courts (incorporating international and national legal experts in dispensing justice) which have gained prominence over time. The legacy of successive transitional justice practices demonstrates the importance of context and challenges the duplication of tactics in diverse political environments. Modernizing transitional justice means focusing on strengthening national/local justice institutions in post-conflict societies to support succeeding regimes. In Latin America, particularly in the aftermath of Argentina's Trial of the Juntas (1985), the trial was a means to empower the newly elected democratic government. The role of national trials can ensure accountability (at least in the eyes of the successor regime) and justice serving institutions can remain intact – albeit with new judges and prosecutors. Whether national or international, transitional justice as a paradigm was normalized, particularly in relation to post-conflict contexts and wherever political instability was frequent over a period of time. The influence of the international legal order can be found in the way that post-conflict states organize their justice-sector institutions. In fact, as conflicts and instability dominated the post-Soviet states that emerged after the Cold War, so too does jurisprudence based upon International Humanitarian Law [IHL]. International Humanitarian law is consistently linked to pervasive conflict (in light of human rights abuses), and as Teitel (2005) notes, what emerges is a "continuum between the local and the transitional" in how transitional justice is dispensed with.[74]

[74] Teitel, supra note 65 at 840

Accelerated by transitions in Eastern Europe, Africa and Central America, what Teitel terms as Phase II of the evolution of transitional justice is an emphasis on nation-states' development of rule of law. Rule of law in these dynamics refers to the normalization of IHL especially its universalizing language. Indeed, transitional justice in contemporary practice cannot be divorced from the language of human rights. New norms were also introduced during this period including that of amnesty for violators depending on the scale of violence enacted by perpetrators. For many scholars[75] transitional justice during periods of instability in states, reflected the pragmatism that was perhaps needed to achieve peace and the complexity of imposing prosecutorial justice; allowing for "multiple [conceptualizations] of justice" to emerge.[76]

The conditions for compromise that are required to end conflict and secure political transitions are almost inevitably imperfect. Certain factors contribute to these conditions including the state of justice-serving institutions (courts, police and military forces) after conflict, the scale of abuses perpetrated by violators, and the extent to which the state was involved as the primary contributor to political violence.[77] Pragmatism as a feature of peacebuilding is well established especially in the way that political settlements can heavily influence the shape of important institutions including those in the justice-sector.[78] In the context of transitional justice, this pragmatism is far reaching, particularly in the way rule of law is conceived of – as a tool of successor regimes to purge detractors and preceding agents from ongoing reforms. It is difficult to conceive of this as less than punitive especially if criminal prosecutions are pursued. New laws are enacted, judicial dismissals become frequent and rule of law dilemmas abound.

[75] Sharamo & Mesfin, 2011; Leebaw 2008
[76] Teitel, supra note 57
[77] Teitel, supra note 57 at 77
[78] Mani, 2008; Lundy & McGovern, 2008

Phase II (post-1989) periods of transitional justice recognized this particularly among those states where weak judicial systems were in place and where instead other mechanisms were utilized, including amnesties.[79] Phase II was exceedingly contextual and limited in its replicability and unlike Phase I, in the post-WWII period, internationalism gave way to national sovereignty with varying degrees of success.

In moving away from strict uses of criminal prosecutions, post-1989 post-conflict societies and societies in transition utilized alternative methods for pursuing justice and securing peace that privileged what some refer to as "law and society responses."[80] What emerges is a restorative model of justice that emphasizes truth over justice and prioritizes victims above offenders. Often captured through truth commissions (a tool of restorative justice)—"an official body, often created by a national government to investigate, document and report upon human rights abuses within a country over a specified period of time."[81] Truth commissions were first used in Argentina and popularized in post-apartheid South Africa in the 1990s where peace and reconciliation was the priority.[82] It is through truth commissions that we can see the role and accountability of communities and groups taken above that of the individual. Truth commissions seek to emphasize notions of justice, fairness and accountability at the community level, as well as the overall goal of identifying perpetrators, victims, historicizing grievances and producing a national account of gross human rights violations.[83]

[79] Teitel, supra note 57
[80] Teitel, supra note 57 at 78
[81] Ibid
[82] Graham, 2003
[83] ibid

This process of using truth commissions, which seeks to preserve peace rather than promote punitive justice, impacts how transitional justice operates. Transitional justice in the context of truth commissions focuses on the victim and serves primarily as a pathway for the victim to address and heal in some way from past grievances. Truth commissions utilize dialogue and has been widely touted as a successful alternative to criminal prosecutions that are more retributive in nature.[84] As well as contributing to enhanced agency for victims, restorative justice practices, like truth commissions, has shown offenders are less likely to re-offend. Overall, restorative justice has shaped transitional justice to become a vehicle for dialogue between victims and offenders. Unlike the first iteration of transitional justice, the 1990s experience promoting restorative justice values, actively shaped notions of legitimacy by devolving power to local communities and their understandings of justice. While positive and negative outcomes can come from this practice, the Rwandan use of *Gacaca* courts is a prime example of ways to enhance local voices while legitimizing legal standards and norms set by the ruling government. Ultimately, the "problem of judgment" more commonly associated with retributive justice was less favoured.[85] Restorative justice practices sought to deemphasize the strictly legal norms and practices that dominated to allow for psychological, theological and other moral considerations to drive the transitional justice process.

This second phase (post-1989) was truly transformative by expanding the number of actors and agents involved in transitional justice initiatives. This included churches, civil society organizations and human rights groups that all work largely outside of conventional legal processes and systems. For example, testimonials became confessionals with an "ethical-

[84] Call, 2004; Graham, 2003; Lundy & McGovern, 2008
[85] Teitel, supra note 57 at 80

religious discourse."[86] Guilt was established through moral understandings of responsibility and accountability that were largely outside of the legal domain, and while this was a function of the role that participating local actors/agents took on, the state had to establish norms consistent with democratic governance (i.e., devolving legal authority to non-state actors). Nevertheless, local actors, not represented by the state, became central figures in critiquing the globalizing nature of previous transitional justice practices. As well, the tension between local and community-level practices of transitional justice and the international legal order continues.

The contemporary experience of transitional justice (post 9/11) – globally can be best characterized by the presence of civil war, political instability and longer periods of peacebuilding and post-conflict reconstruction. Considering the origins of transitional justice in the post-WWII era where extraordinary conditions were necessary to warrant legal and political intervention by Western allies, weak states and "war in a time of peace" has normalized transitional justice as a necessary component to democratic governance.[87] The consequences of this, as scholars indicate, is the increasing politicization of the law and the impact that has on entrenching global legal norms onto nation-states. The ICC has a permanent place in the practice of prosecuting war crimes, genocide and crimes against humanity. For Teitel (2003) this represents an "expansion on the law of war" effectively challenging the local practices of justice that emerged in the mid-1990s.[88] The implication is that fragile and weak states where small conflict and civil strife were rampant cannot be relied upon to effectively uphold rule of law standards. The individual, state legal order and global legal order come in direct conflict with the ruling regime. Leaders are considered directly responsible for war crimes and crimes against

[86] Teitel, supra note 57 at 83
[87] Teitel, supra note 57 at 89
[88] Teitel, supra note 57 at 90

humanity. These processes are complex, not unlike the case of Serbian leader Slobodan Milosevic. This resurgence of International Human Rights Law (IHRL) sees transitional justice revert to a discourse that is utilized to justify intervention.

Among the first instances of intervention on the basis of human rights abuses is the NATO intervention in Kosovo as a "humanitarian basis for [a] just war."[89] Scholars are swift to highlight that this basis for intervention can offer a form of transitional justice that is used to justify the prevention of current and future human rights abuses.[90] In the context of transitional justice, particularly its aims and evolution, the conflating of international human rights law (IHRL), criminal law and the law of war muddles the effort towards challenging states that are culpable in human rights abuses. Contemporary transitional justice does not revert to post-WWII era principles and practices, rather the justification for international intervention on the basis of IHRL co-exists with the increasing politicization of peace and justice initiatives in post-conflict societies. Moreover, the broadening of humanitarian intervention in the case of the war on terror is a departure from the foundations of IHRL. While this paper does not explicitly focus on the war on terror, it is worth noting that the political and legal environments that the state operates within are displaced by external (global) pressures to align with the militarization of justice in the name of the war on terror.[91] More importantly, transitional justice in principle is still considered a post-conflict tool and is difficult to utilize as a pre-emptive measure to ensure justice and security. As Teitel (2003) notes, "any attempt to generalize from exceptional post-conflict situations in order to guide politics…becomes extremely problematic."[92] So, as transitional justice tools including both criminal and restorative practices become normalized in

[89] Teitel, supra note 57 at 91
[90] Nagy, 2008; Shaw et al., 2010.
[91] Shaw et al., 2010
[92] Teitel, supra note 57 at 92

contemporary global politics, the importance of context and local agency becomes more apparent.

Transitional justice in post-conflict African States

Transitional justice initiatives that are implemented in African states generally occur after "negotiated transitions", meaning that an end to the conflict does not necessarily accompany regime change. For example, the Lome Accord in Sierra Leone was the third such agreement to bring about a cessation of conflict among warring factions.[93] Bosire (2006) is right to ask "what constitutes a transition"; particularly in the African context? Even in the Somaliland context, transitions in the form of legal and political reforms are ongoing. In this sense, transition as outlined by international humanitarian norms is far from many African experiences with transitional justice. Bosire (2006) advocates for legitimating a transitional justice project that is sustainable and reflects the institutional capabilities of war-torn societies while recognizing that not all experiences are devoid of international assistance or involvement.[94]

While the experiences of African states transitioning from conflict are complex, many do fall into the category of "weak states [experiencing] unclear transitions, [with]… frequent resort to transitional justice measures."[95] For instance, prosecutions traditionally have a role in transitional justice processes especially in cases of widespread human rights abuses. But in weak and fragile states, the difficulty of holding trials or bringing together experienced and competent judges and a general environment of poor legal capacity makes it extremely challenging to ensure criminal prosecutions will be fair and successful. Somaliland's courts were in an abysmal state in immediate post-conflict period with few to no qualified judges familiar with the British

[93] Bosire, 2006, p. 74
[94] Ibid, p. 75
[95] Ibid

or Italian legal codes. Rather, many of those that were considered judges (clan elders) were those familiar with *xeer*.

Examples are plenty when it comes to African states and their experience with transitional justice. Rwanda experienced an eruption of violence and civil war in the 1990s and its transitional justice process has been well documented. In the aftermath of the Rwandan genocide, legal professionals were few and far between with perpetrators vastly outnumbering these professionals. In the 2000s, Rwanda had an estimated 125,000 perpetrators in detention.[96] With this enormous imbalance, the judicial system can be overwhelmed. Perpetrators were in many instances serving jail terms "without ever being convicted."[97] Consequently, to deal with the lack of capacity, traditional and community-oriented courts arose - the *Gacaca* court system was formally established to deal with the backlog but more importantly give agency to community-level mediation processes. Similarly, in Sierra Lone, post-war infrastructures like the judiciary were nearly absent or dysfunctional. The Special Court for Sierra Leone (a hybrid court – made up of international and local adjudicators) was established in part due to this break down in judicial capacity. The International Criminal Tribunal for Rwanda (ICTR), another ad hoc court indicted 80 individuals believed to have masterminded the most heinous elements of the genocide, but among those only 20 were convicted along with 3 acquittals.[98] This outcome suggests that while hybrid courts may be effective in dealing with capacity issues in the aftermath of violent conflict, they do not guarantee accountability for all perpetrators. Moreover, the role of the ICC has been heavily criticized particularly as it relates to the prosecution of African heads of state. Still, even if cases were to be referred to the international body, other

[96] Ibid, p. 76
[97] Ibid
[98] Ibid, p. 77

issues limit its effectiveness (ability to prosecute) including the "security of the country…[and] state cooperation."[99]

Other approaches like truth commissions have been utilized in transitional justice processes across different African states. Commissions though, operate in a similar fashion to formal courts and prosecutions and are dependent upon an institutional infrastructure that may be non-existent or limited in some way. Truth commissions are seen as able to fill that "impunity gap" where victims are not only able to recount their experience with conflict/violence but perpetrators can also be identified. Recommendations tend to stem from these commissions and range from reparations, institutional reform and/or further prosecution.[100] The mandate of any commission involves both developing an historical account of the events as well as producing a final report that is seen as authoritative and legitimate. Yet this can prove to be a highly contentious and politically imbued process. For Bosire (2006) these commissions "must be seen to be moral, just, representative, consultative, credible, and open to public scrutiny."[101] That is an enormous task for any institutional body and whether or not the Truth Commission is granted independence in their mandate is a key part of success. Mandates are often negotiated during peace agreements by elites with little to no input from those victimized by widespread violence and abuse. A second concern with the legitimacy of truth commissions can include the commissioners themselves and the political nature of their appointments. Sierra Leone's truth commission was seemingly allied with the ruling party.[102] The issuance of the final report also lends truth commissions a finite mandate and time to complete their work that may be less than

[99] Ibid
[100] Ibid, p. 78
[101] Ibid
[102] Ibid

ideal for participants – victims and survivors alike. While reparations and other forms of compensation may be recommended, enforcement lies with the authorities in power.

Reparations are another tool of transitional justice that serve specific goals. First, they seek to prioritize victims and the violent dispossession that occurs during conflict. Second, they can serve to demonstrate state authority and action in the area of reparations owed to citizens, third, to rebuild trust between citizens and state authorities and lastly to establish social cohesion among the disenfranchised and victimized.[103] Ideally, this transitional justice mechanism operates in an integrated manner with truth commissions, otherwise reparations can quickly be seen as bribes and forms of coercion aimed at silencing a victimized citizenry. In the short term, as the case in South Africa, reparations can offer immediate relief from such extreme conditions of poverty and depravation. Yet, the funds that were to be distributed by the Committee for Reparations and Rehabilitation (CRR) in South Africa were nearly two years delayed, amounts were much lower than anticipated and distribution frequently caused tension between community members that received them and those that did not.[104] The Sierra Leone truth commission's recommendation that payments be made for "amputees, the wounded, women who suffered sexual abuse, children and war widows" is a recognition of the compound victimization that occurs during and after conflict.[105] Reparations have been made in this case in the form of pensions, skills-training or other social benefits.[106] There is also growing resentment that rehabilitation efforts have been aimed at perpetrators in Sierra Leone. As such, there is a disconnect between truth commissions that prioritize victims and programs geared at reintegrating perpetrators into wider society rather than prosecuting them. Reparations are often

[103] Ibid
[104] Ibid, p. 80
[105] Ibid, p. 81
[106] Ainley, 2017, p. 436

cited as necessary to ensure the mandate of any TRC is seen as legitimate and a source of empowerment for victims.[107]

Underlying all of the preceding is the question of political will to enact these measures; a major concern during periods of transition. The issue of 'vetting' those in any new regime for human rights abuses may prove difficult when political elites are entangled in perpetrating these same abuses in the name of war and conflict. This makes it nearly impossible for new political settlements to entrench themselves without discarding a vetting process. Consequently, legitimating any government will be a concern in cases where a large proportion of those in government are seen as perpetrators. This is no more evident than in the security-sector, as the army and police are generally implicated in human rights abuses. Sierra Leonean security forces were heavily connected to the war and in the TRC's final report it noted that "the army was responsible for the third most institutional violations of human rights."[108] Reforming the security-sector was highlighted in the Sierra Leone's TRC report but can require an incredible mobilization of political will and resources in order to professionalize former guerilla fighters and pay salaries of security-sector forces more regularly. Taken together, approaches to transitional justice that include truth commissions, reparations etc… means that the degree of complexity embedded in processes of transitional justice can be unending even after the formal end of conflict. Somaliland's process was entirely dependent upon local communities' willingness to participate as well as diaspora members contributing funds towards the peace conferences. Are the outcomes of negotiations done in this way less legitimate in comparison with hybrid or internationalized approaches to transition? It is this experience of community-

[107] Hayner, 2010
[108] Bosire, supra note 93

building and 'everydayness' in Somaliland that is not too dissimilar from transitional justice experiences of Rwanda, Sierra Leone as well as South Africa.

Transitional Justice in a socio-legal context

Since its inception, transitional justice has become a readily available strategy that is considered necessary for socio-political reform in post-conflict societies. A mix of international criminal tribunals, hybrid courts with local and international experts, the ICC, and truth commissions has enabled transitional justice to advance human rights advocacy and legislation.[109] Scholarship that is critical of transitional justice is plentiful.[110] Many of these critical assessments point to the overly deterministic language that comes from exclusively analyzing transitional justice through a legal lens. Teitel (2003; 2005) recognizes that transitional justice is seen as necessary by non-western states emerging from conflict as a means to rebuild legal, political and social structures. But she also notes that rule of law standards often falls short of appropriately assessing the role of customary legal practices/other forms of legal pluralism.[111]

This may in part be due to the way in which transitional justice has been envisioned. Although a singular definition is difficult to come by, what is agreed upon is a fairly limited view that transitional justice has on "violence [and its] remedy" with an identifiable victim and perpetrator.[112] Rather than localizing justice in various ways including expanding roles for customary legal authorities, Western approaches to [transitional] justice emphasize rule of law standards that cannot be met by post-conflict societies. Critics note this gap in capability has led non-Western states to conclude that the promotion of rule of law standards is a tool for Western democracies to destabilize transitional societies and to promote instability in non-Western

[109] Nagy 2008, p. 275
[110] Nagy, 2008; 2012; Bell, 2009; Lundy & McGovern, 2008
[111] Nagy, 2008; 2012
[112] Nagy supra note 109 at 277

states.[113] Contrary to Teitel (2003, 2005), Nagy (2008) insists that while rule of law (as a set of procedures) is needed for reform in transitional societies, it falls short of addressing issues relating to "gender, customary law, culture and social justice…"[114] Moreover, societies impacted by authoritarian or communist rule are structurally different from those deemed 'fragile' and 'war-torn.'[115] Finally, Nagy (2008) insists that western liberal democracies cannot be the sole models for social and political change.

Mani (2008) argues that without incorporating an inclusive approach to peace and justice, post-conflict societies cannot begin to address the structural conditions of violence. Echoed by Nagy (2008), Mani introduces the idea of 'reparative justice' that includes reforms of justice-sector institutions (police, judiciary, military), utilizing tribunals, truth commissions and cultural tools, but also considers the inequalities within communities impacts a society's capacity to enact reform.[116] The role of culture and local knowledge is a paramount concern for Mani – a component that features significantly in post-conflict African states. The dominance of the international legal order cannot be understated and has led to a disconnect between the technocratic demands of this order in comparison to the customary practices and other forms of local knowledge in communities impacted by violence. The assumptions underlying demands made by international actors (including the ICC) to utilize international human rights standards can lead to an approach to justice that is 'depoliticised.'[117]

[113] Nagy 2008; Bell & O'Rourke, 2007
[114] Nagy, supra note 109 at 277
[115] Ibid
[116] Mani 2008
[117] Nagy, supra note 109 at 278

By focusing on the socio-political/socio-legal dynamic of post-conflict societies, as researchers, we can begin to enquire about what it means to transition. How do other processes, including peace negotiations and Disarmament, Demilitarization, Reintegration (DDR) work in conjunction with other tools of transitional justice (truth commissions, reparations, prosecutions, reconciliation)? These processes and strategies cannot be circumscribed by fixed periods of social change or official transition. Instead, as shown by examples in Rwanda, South Africa and Liberia, transitional justice becomes an ongoing and dynamic process.

Political will plays an important role in ensuring that peace and reform initiatives are sustained. Moreover, interventions like transitional justice often occur after violent and repressive periods in a given state. This makes it very difficult to suggest that peace and reconciliation can be fulfilled in a particular time period. Rather, as Nagy (2008) emphasizes, the legacy of structural violence is widespread and can take decades to heal. For instance, "to construct transition as a break with past violence also neglects the domestic violence that many women face in a militarised society after male combatants return home."[118] Other scholars have considered the way in which women experience conflict and post-conflict differently from men and the resurgence of a violent patriarchy in the post-conflict context.[119] Indeed, the socio-economic environment cannot be distanced from efforts to ensure peaceful transitions to democracy. Issues like unemployment, housing, and food insecurity are all development concerns that require leaders to engage with transitional justice in a holistic manner.

These critiques offer a complex understanding of transitional justice that interrogates not just the need to re-establish rule of law but to address the myriad of concerns that can arise when we speak of post-conflict reconstruction. Nagy (2008) and others point to the asymmetry that has

[118] Nagy, supra note 109 at 280
[119] Bell & O'Rourke, 2007; Bell, C., et al., 2007

always been embedded in the international legal order. This criticism is often repeated by leaders in post-conflict African states. Transitional justice essentially becomes a "victor's justice" pointing to the manner in which tribunals in Yugoslavia refused to "investigate alleged violations of international humanitarian law committed by NATO during its bombing campaign in Kosovo"; as well as the tribunal in Rwanda that "halted investigation of the governing Rwandan Patriotic Front for war crimes." [120] The limitations of these transitional justice processes reveals the dubious ways in which international actors (i.e., the International Criminal Court) are seen as politicizing transitional justice processes. The suggestion by states political actors, who have been accused of war crimes, is that these processes may have little to do with local contexts in war-torn societies.

Framing justice in such narrow terms can limit the scope of the healing and reconciliation that is needed in the aftermath of violence and conflict (including genocide, massacres, and sexual violence). Scholars who argue for expanding the reach of transitional justice approaches also propose a broadening of the scope of recognized violations.[121] Nagy (2008) in looking at the South African TRC notes that while apartheid was widely recognized as a "crime against humanity", the victims and perpetrators were narrowly confined to those that "suffered egregious bodily harm" and presumably those that inflicted it.[122]

Not unlike other systems of violence, apartheid permeated every facet of social, economic and political life for non-Whites in South Africa. The debate thereafter is the extent to which apartheid constituted the "context to crime rather than the crime itself."[123] Systemic violence in the form of poverty, racism, dispossession – all of which constituted oppressive acts

[120] Nagy, supra note 100 at 282
[121] Bell, C. et al., 2007
[122] Nagy, supra note 100 at 284
[123] Ibid

–left a legacy that still disproportionately impacts non-White South Africans. The TRC's role was too limited to address those impacts, however. Finally, as human rights become more expansive, including claims to rights to food, housing and employment, the notion of justice ought to include protection of economic, social and cultural rights (ESC) as well.

Many of these discussions permeate the way in which scholars and practitioners of transitional justice approach its strategies and tools in post-conflict societies in Africa. The debates range from how to ensure adequate local expertise is reflected in formal criminal prosecutions to incorporating traditional mechanisms for justice and reconciliation. In Somaliland, the transitional justice process, though entirely without international support/intervention, included many similar issues. The role of the state, community, and clan/kin networks in framing the legal environment is still being debated. These debates offer some insight for the need to infuse context-sensitivity into any analysis on transitional justice processes. While Somaliland offers an interesting case study, drawing parallels between Somaliland and other African post-conflict societies shows very similar contentions; between customary and western-legal traditions as well as the need to understand the role of communities in facilitating not merely justice but peace after violent conflict.

Chapter Three

This chapter delves into Somaliland's transitional justice experience and the development of its legally pluralistic environment. It outlines the way in which Somaliland's experience with colonial and post-colonial legal systems has shaped its approach to constitution-building after violent conflict. More specifically, the need to form the basis of reconciliation, legal norms and values as well as political organizing on *xeer* customary laws meant that clan/kin networks featured heavily in the post-conflict phase. When to invoke sharia in court cases or divert judgement on the basis of *xeer* is not always clearly outlined by political and clan elites. However, sharia is still a part of Somaliland's legal culture and aids in identifying Somaliland's political and cultural values as Islamically derived. This chapter concludes this ambiguity about the relationship between sharia and *xeer* has contributed to stagnant legal reform in the areas of justice and security-sector institutions.

Background: Somaliland's experience with transitional justice

Map of Somaliland[124]

The Somali people are considered to be a largely homogenous ethnic group that reside in the Horn of Africa and are dispersed throughout many eastern African countries including Ethiopia, Kenya, and Djibouti with the majority living in Somalia and Somaliland. A large proportion (but not all) of Somali people are characterized by an abiding belief in Islam and its tenets as well as taking pride in their lineages (*abtiiris*). The agnastic grouping of Somalis into clans based on common ancestry is a system that has been borrowed from Islam and Arabia.

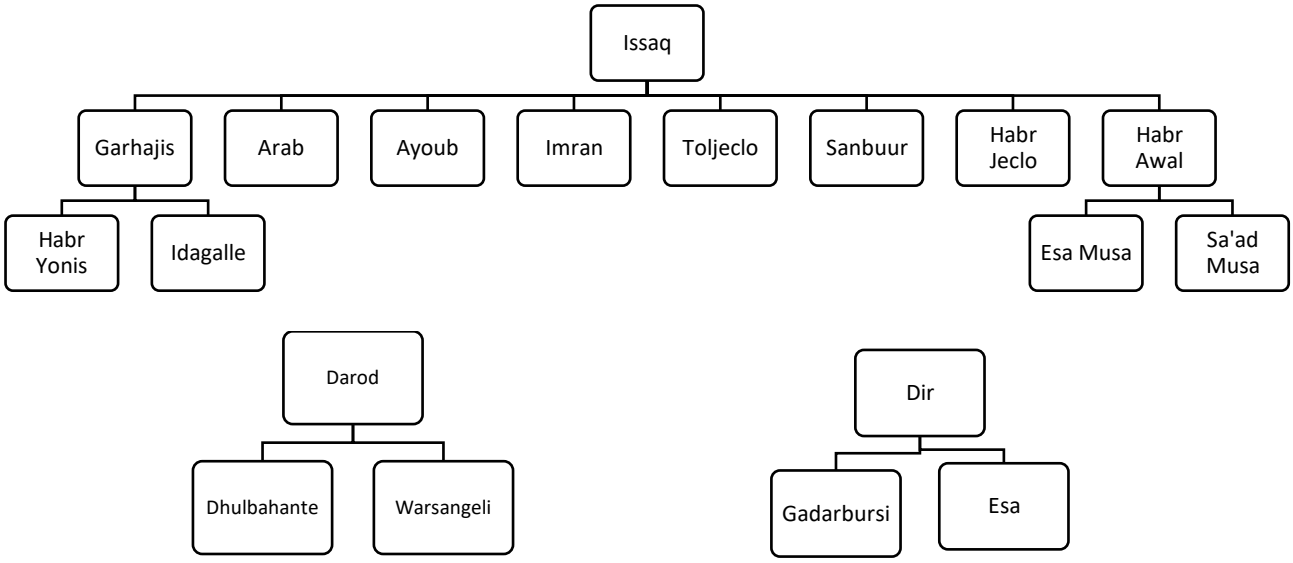
[124] Africa Confidential. 1999. "Reconstructing the state step-by-step is showing the results – but outsiders stay sceptical. Vol 40 (19)

Somalis are divided into six major clans: the Darood, Dir, Issaq, Hawiye, Digil, and Rahanweyn. All of these clans claim a common Arab ancestry with the family of the Prophet of Islam Muhammad ibn Abdullah.[125] Lewis describes the hierarchical structure of Somali genealogy by grouping them into 5 distinct categories. The uppermost units are clan-families that can have from 100,000 members in the case of small groups and up to 1 or 1.5 million members in larger clan-families.[126]

Large clans are also further divided into sub-clans which often have a political leader called a sultan (*suldan*). The next level below that is the primary lineage group that is marked by close ties and participation in decision making for the group. The lowest level is known as the *diya*-paying group, consisting of groups of family who share a common responsibility in maintaining order through compensating the families of murdered or injured people in what is known as *diya* or blood-wealth. Customary legal proceedings often include this clan group (*diya*-paying group). This level is the one in which a person's identity lies and bears the most responsibility towards. Many Somalis will state their *diya*-paying group when asked about their tribal affiliation rather than recounting their *abtiiris.*[127]

[125] Lewis, 1999, p. 4
[126] Ibid, p. 7
[127] Ibid, p. 6

Northern Clan Families (Issaq, Darod and Dir)



The clan-families do not have permanent political ties with one another but unite for a common goal for specific purposes. Among pastoral communities, clans contribute to their security and livelihoods by protecting one another from raids on livestock. They often join forces against other clans to maintain land and water sources for grazing cattle.[128] This is important since the nature of clan relationships throughout the post-colonial independence period (post-1960) has become much more politicized and divisive. The unification and separation of Somalia (in the south) and British Somaliland (modern day Somaliland in the north) led to the difficulty of bringing different types of state-building processes together (with Italian colonial authorities in Somalia being far more interventionist and British colonial authorities being more hands-off). With the transition from colonial to post-colonial statehood largely to blame, unification of the

[128] Ibid, p. 242

Somali territories gave greater demographic numbers to the Southern clans as opposed to the Northern clans.

During the Barre dictatorship (1969-1991) resources were generally geared towards Northern clans to discourage any separatist tendencies given their underrepresentation in military and civilian institutions. Prior to colonialism, law and order were historically maintained through interpretation of Islamic Law derived from the Shafi'i School of thought and punishment was usually left up to the enforcement of clan elders.[129] Somali social contracts known as *xeer* law were the main form of governance regulating and guiding customs and norms within and between clans as well as with colonial powers.[130] Interpreting *xeer* law is generally left up to clan elders. The interpretation of *xeer* laws and clan relations are generally left to the *wadaads* (clan elders) while the enforcement half of clan governance is led by the *waranleh* (warriors).[131] This structure was predominant throughout the clans of Somalia but as colonial rule spread in the Horn the role of elders in Somali society would be challenged and ultimately transformed.

Colonial and Post-colonial governance: Statehood, Sovereignty and Clan politics

Historically Somalia has served as a port of trade for both the Far East and the Middle East and with the main export being livestock. This has long been the main source of revenue for Somalis living in British Somaliland and Italian Somaliland since the geography of Somalia/Somaliland does not lend itself to extensive agricultural use, and the majority of Somalis were pastoral nomads who move with their livestock. Camels are considered to be the most valuable of the livestock and are favoured especially by clans in Somaliland while goats, sheep, and a limited amount of cattle are also kept.[132]

[129] Ibid, p. 26
[130] Ibid, p. 193
[131] Ibid
[132] Lewis, 2008

The British were interested in the port cities of Berbera and Harar as the main sources of food and supplies for the Yemeni port of Aden where British ships docked on route to India. The necessity to maintain access to these ports and control transport routes precipitated British colonial expansion into Somaliland as a protectorate. There was limited economic exchange in the original treaty, which provided the Somalis with indirect rule.[133]

This experience with indirect colonial administration formed a basis for Somaliland's later political and legal identity as well as serving as the foundation for pursuing independence [1889-1960] and dissatisfaction with the union with Somalia in 1960. Still, colonial rule was no less brutal in Somaliland than its southern counterparts. Moreover, there was little to no economic growth or development occurring in Somaliland in comparison with Somalia (under direct Italian colonial administration). Although Somalia benefitted from the economic growth of Italian investment, Italy's heavy-handed subduing of Somalia by infiltrating its public administration, systems of governance and culture is still felt today.[134]

The period after World War II saw Italy's colonial power severely diminished especially in East Africa and the removal of the partition of the Somali provinces under British rule. The Four Power Commission (Britain, France, the United States and Russia) supervised a process that sought the union of the two Somali territories. The UN led this process towards independence though and Italy was granted a ten-year trusteeship of the southern Somali state with the aim to unite Somalia and Somaliland within ten years. To this effect the first legislative assembly election was held in 1956 with the election of Somalia's first premier 'Abdillahi 'Ise, the leader of the Somali Youth League (SYL). Similar steps were being taken in Somaliland to facilitate the democratic process. The union between Somalia and Somaliland is now viewed as

[133] Ibid
[134] Ibid

a part of the legacy of colonial mismanagement with effects for Somalia and Somaliland apparent till today. Chief among these is the perception of marginalization on the part of Somaliland which lacked infrastructure and economic investment compared to that in Italian Somaliland at the time of unification.[135]

Many of the issues that have contributed to state collapse are directly related to colonial rule yet post-colonial processes of state and nation-building brought their own challenges and changes. The 1969 coup led by General Siyad Barre, conducted under the guise of ridding Somalis of their traditional and primordial attachments to kinship and clan, is the prime example. Barre's goals were embodied in the ideology of Scientific Socialism that framed 'tribal' (i.e. clan) affiliations as 'backward.' Barre had Pan-Somali pursuits that came into direct confrontation with issues of sovereignty dictated by the policies of the Organisation of African Unity (OAU) while clan politics continued to play a vital role in elite politics.

The legacies of Barre's rule are still felt in Somaliland. In many ways, contemporary Somaliland is battling against practices that have emerged through colonial practices (indirect rule), post-colonial statehood (unification), state and nation-building (Scientific Socialism) to identify its national identity. These legacies certainly made peacebuilding and transitional justice challenging after a return to clan and kinship ties during the civil war (1989-1991) ensured inter-clan conflict as a strategy for defense and domination throughout the Horn.

Pan-Somali unity, as a policy sought by Barre's regime, became increasingly difficult not only outside of the Somali borders but within the Somali state between 1969-1977. Clan rivalries threatened Barre's pursuit of pan-Somali nationhood. Somalilanders certainly felt disenfranchised by the Barre regime's practices with cultural and political favouritism and

[135] Ahmed & Green, 1999; Samatar, 1992; Bradbury, Abokor & Yusuf, 2003

double speak. For example, the Barre regime openly praised aspects of Somali tradition like "the nomadic tradition, but also ignored and degraded other Somali traditions."[136]

Barre maintained his position by securing allies with foreign powers and local tribes yet dissatisfaction and dissent grew in the South and a rebellion had begun by early 1980 in the North (the Somali National Movement—SNM 1981-1991). In the South the Hawiye-dominated liberation group known as the United Somali Congress (USC) under General Mohammed Farah Aideed overthrew the government in 1991, while in the north the SNM made significant gains against Barre forces. By January 1991, the Somali state was in a state of total collapse that was marked by the overthrow of Siyad Barre. With the removal of the Barre regime from Somaliland, independence was declared and followed by a peace process lasting nearly a decade that sought to restore order and security in the region.

The independence of Somaliland and the peace process

The nature of Somaliland as a state is a precarious one where the international community touts its peace efforts yet remains indifferent to its pursuit of independence and formal recognition. Consequently 'peacebuilding' in Somaliland has been driven largely through grassroots efforts. Somaliland often stands out for this approach to constituting peace with little outside intervention. Contrast this with the peace conferences through the 1990s until 2000, established and led by the UN, US, AU, IGAD and Ethiopian, Kenyan and Djiboutian governments playing host to these conferences aimed at securing peace for Southern Somalia.[137]

In Somaliland, peace was built through ongoing conferences (*shiir*) in Borame, Berbera and Burao and the transition from military administration (through the Somali National

[136] Lata, 2004, p. 156
[137] Kibble and Walls, 2010; Ahmed and Green, 1999; Walls, 2009; Lewis, 2010

Movement leadership) to a civilian government in the span of ten years until President Mohamed Hajji Ibrahim Igal (1999-2002) established the first civilian government through popular consensus (with clan leaders) rather than electioneering. Somaliland statehood was envisioned by clan elders as the fusion of traditional and modern systems of governance that saw a role for clan elders as traditional sources of political authority through the *Guurti* (Senate) as unelected members and at the same time to have an elected form of representation through the House of Representatives.

Somaliland's achievements in sustaining peace certainly challenges labels of failed statehood associated with the collapse of Somalia in 1991. Many cases have been made for exempting Somaliland from that list.[138] The notion of 'hybrid political orders' is more useful in describing Somaliland's peace process. Hybrid political orders do not suggest what the state *is* but instead look at what the state/political entity 'does.'[139] Local attempts at peacebuilding in Somaliland began in 1991 with conferences that were held from February through March and in May of 1991 in Borame and Burao respectively. These two conferences held not long after major conflict had ended were marked by their reference to Somali cultural norms through assemblies (*shiir*). These early conferences established two key themes: that the union with the South was undesirable and that revenge should not be exacted on prisoners of war—effectively setting the stage for future conferences aimed at establishing peace, security and statebuilding.

[138] Kibble, 2001; Boege et al., 2009; Lewis, 2010; Renders and Terlinden, 2010
[139] Renders and Terlinden, 2010; Kibble and Walls, 2010; Kraushaar and Lambach, 2009

In fact, it was the May conference in Burao that proclaimed Somaliland independence.[140] Two years later in 1993 the SNM surrendered state power to a civilian administration. Shortly thereafter the Borama conference brought together the major stakeholders and elders from various clans and the *ulema* (religious scholars) to initiate a reconciliation process and discuss and outline the nature of a Somaliland government. While it was largely an elite-driven process, it was much more inclusive and bottom-up as it was organized locally and all major clans in the Northwest were included. In fact, one of the reasons for the establishment of the *Guurti* (Council of Elders) was to avoid potential future conflict and have structures in place to deal with them. Being able to turn to traditional clan structures played a significant role in the success of Somaliland's peace and reconciliation processes while disaggregating power to various groups. However, despite the success of the early peace process in Somaliland there were outbreaks of armed conflict between clan militias.

The first one erupted in 1991 in the Berbera area, the location of the major seaport in Somaliland. It started as a dispute between several clans regarding the distribution of the wealth gained from the port.[141] The second outbreak was in 1994-1995 in Hargeisa, involving a conflict over who would lead the nascent nation. The peaceful resolution of these conflicts was once again rooted in traditional mechanisms already in place for dealing with conflict and, Prunier (1998) agrees, those mechanisms account for the institutional strength and popular support of the Somali National Movement. In 1997, a third national conference was held in Hargeisa solidifying the institutional structure of the state. As the conference with the widest range of participants, this was also the one that managed to develop the framework of the state. During this process the House of Representatives and Senate were established, a supreme court was

[140] Prunier, 1998; Bradbury, 2008
[141] Jhazbhay, 2008, p .63

organized and the roles of the presidency and cabinet were elucidated.[142] Peace and the development of the state and nation thus took nearly ten years to get to the point where viable state institutions were developed.

Transitional Justice in Somaliland

Periodically, Somaliland's transitional justice, peacebuilding and institutional reform process can be divided into phases of the SNM insurgency and civil war (1981-1991), peacebuilding (in 1991 culminating in the Burao conference); security-sector reform (1991-1993 culminating in the Borame conference); Institution-building (1993-1997 culminating in the 1997 Hargeisa conference); Democratisation (1997-ongoing).[143] These processes overlapped and involved multiple stakeholders representing individual clan families coalesced around familiar *xeer* practices outlined above but also:

> …differed in terms of organisation, scope and attendance, all shared a number of key characteristics: they were funded largely or wholly by Somaliland communities…in the diaspora; they involved the voluntary participation of the key figures from each of the clans affected; and decisions were taken by broad consensus amongst delegates. The 1997 conference in Hargeisa was the last in the series leading to the establishment of an administrative system that has since proven relatively stable.[144]

The collapse of Somalia into civil war was shaped along clan lines and the legacy of these large and small-scale conflicts is felt today in Somaliland's declaration of independence and Puntland's semi-autonomous governance status. Consequently, peace negotiations in Somaliland centered on the clans residing in the northern region and major-sub clans (Issaq, Gadarbursi, Esa, Dhulbante and Warsangeli) of which the Issaq-clan families are the largest and comprised the majority of Somali National Movement (SNM) participants. After the major

[142] Ford et al., 2004
[143] Ali, M. O., Mohammed, K., & Walls, M., 2007, p.15
[144] Ibid, p. 16

conflict with Barre's forces ended, inter-clan conflict in the North continued with each clan organizing their own respective militias. With surrenders and truce agreements organized by various clan families. Clan meetings (*shiir*) began to emerge and in February 1991 the SNM (comprised of largely Issaq political leaders) along with the clan elders from the Issaq, Dhulbathante, Warsangeli, Gadarbursi and Esa held the first meeting in Berbera to reaffirm a ceasefire.[145] At this conference future reconciliation conferences were set up with a timeline to establish some form of governance structure. The second conference, held on May 18 1991 in Burao, reaffirmed the declaration of Somaliland's independence establishing pre-unification (1960) colonial boundaries. Any administration would inherit a war-torn economy and society as a consequence of under investment by the Barre regime in the 1970s and 1980s. Moreover, clan militias were rampant with demilitarization a significant issue of most reconciliation conferences. What was to be done with so many weapons?

For this reason, among many others, Somali conflict resolution strategies were often deployed through large and small-scale reconciliation efforts. *Xeer* formed much of the basis for reconciliation conferences. These deliberations were undertaken by a clan elder or *'aaqil* (an individual who displays sound judgement; a judge) who is also head of the *diya*-paying group.[146] Accordingly, there is no limit per se to the number of *aaqil*'s that a clan or sub-clan can deploy but in the clan family hierarchy these judges are subordinate to clan *Garaad's* or *Suldaan's*. These elders can form a larger decision-making body within clan families (mainly the *diya*-paying group) and can represent clans in deliberations or judgements on the basis of *xeer*. The value of an elder is held up by the Somali term *hadal yaqaan* (skilled orator) since until 1976 Somali society relied significantly on its oral cultural tradition to the extent that, the orator is one

[145] Ibid, p.11-12
[146] Adopted from the Arabic, meaning 'brain', 'sane' or 'knowledgeable

that "…can convince others through rhetoric." Yet not all elders (*odays*) are *aaqils*, rather only a combination of *hadal yaqaan* (skilled orator) and *xeer yaqaan* (knowledgeable in customary law/practices) qualifies an individual for this title and status.[147] Cementing these individual actors –all elders—is the term *guurti* (group of elders) that come together to specifically resolve disputes within and between clans. Somaliland's peace conferences and reconciliation strategies (*shiirs, xeer, guurti*) all formed the basis for its transitional justice experience.

Customary Law (Xeer)

Often understood as the basis upon which customary law operates in Somali society, *xeer* is largely unwritten and not uniformly applied. *Xeer* is an agreed upon set of principles and practices that are "agreed upon by the clans in each area, and dependent on the deliberations of elders who gather to resolve specific problems." It is a living and dynamic set of principles/practices that evolve over time.[148] It encompasses an individuals' life-cycle from birth to death including rituals and acceptable moral behaviour and rules. It establishes and fosters community-building through intra-clan deliberation and inter-clan communication. New *xeer* rules emerge as clans seek to resolve disputes with the leadership of the *guurti* (group of elders) and if some negotiated settlement is not reached, the *xeerbeegti* (jury) is brought together upon which the settlement terms become final and non-negotiable. With the *xeerbeegti*'s participation all disputing clan members understand the jury members to act as neutral parties with the venue also acting as a neutral space.[149]

Somali clans (more specifically the *diya*-paying groups) are built upon a system of patrilineal descent with clan intermarriages serving as a basis to strengthen clan ties and "*xeer*

[147] A *sheikh* or religious scholar is also quite a significant actor in dispute resolution but this is not a necessary condition to qualify as an *aaqil*
[148] Ali et al., supra note 126 at 13
[149] Ibid

agreements." With these social functions severely disrupted as a consequence of conflict, the Somali National Movement's reconciliation conferences involved 'bride exchanges' (led by clan leaders) but also resource allocation and DDR (demobilization, disarmament and reintegration) of clan militias. Satisfying the tenets of *xeer* meant that reconciliation venues were neutral to participating clans and *guurti* members were drawn from these clans. The reconciliation conferences may be understood as a "clan-based discursive democracy" that focused on ending conflict and establishing structures of governance. With men largely in attendance and acting as decision-makers, the role that Somaliland women had was limited to supporting these conferences through meal preparation, cleaning and decorating the venue. Few women spoke during these conferences because 'clan' was the foundation and basis for who could participate during the peace conferences. This is significant because these conferences shaped reconciliation and dialogue and the patriarchal basis excluding Somaliland women from post-conflict rebuilding and reform. Since then, women's rights movements have been challenging *xeer* practices that they saw as detrimental to their civil and political rights from the onset of the reconciliation conferences.

Xeer was the most significant socio-legal practice that shaped the reconciliation conferences that lasted from 1991 – 1997 and encompassed a number of major clan dominated towns and cities.[150] These locations were the sites of significant clashes with Siad Barre forces, prior to the collapse of the Somali state, effectively decimating homes and institutions in the North. The civil war centered on clan conflicts and dynamics fueled by decades of mistrust and suppression of Northern clan families by the dictatorship. Consequently, *xeer* is an appropriate foundation to base reconciliation efforts upon since it predates modern state institutions and

[150] Hargeisa, Borame, Burao, Berbera and Sanaag

practices. Significant achievements attributed to *xeer* include restoring social relations between warring clans; and demobilisation of clan militias making way for an organized armed force under the auspices of a centralized government. Following the formal peace negotiations during the reconciliation conferences, a period of institutional and physical rebuilding was initiated with the establishment of the first SNM civilian administration (1991-1993) included the development of security and governance infrastructure. Democratization was an ongoing process throughout the 1990s, leading to the referendum on Somaliland's constitution (2000).

Xeer and Legal Reform

This period of reconciliation and transition nonetheless was marked with difficulties of weak public infrastructures and revenue generation for the state being an important preoccupation. It depended on a mixture of remittances and generating tax revenues. A problem related to government expenditure was also a hugely inflated army, reportedly taking up to 70% of the budget.[151] Somaliland's constitution was ratified in 2000 with a reaffirming vote of confidence for independence despite that fact that the vote was quite close. This illustrates that perhaps larger questions regarding Somaliland's national identity are not quite as agreed upon as many popular discourses may suggest. Moreover, beginning in 2001 there were small-scale conflicts between Somaliland and its neighbour Puntland over boundaries and authority over the regions Sool and Sanaag that were claimed by both Puntland and Somaliland.[152]

The emergence of Somaliland's nationalism and peace and statebuilding process is underpinned by discourses about how little it has in common with its neighbours to the South. In particular, the localized efforts at reconciliation and the tools that were used (i.e. *shiir,* bride-

[151] Ibid, p. 13
[152] Jhazbhay, 2008

swapping, elders) are framed as enduring practices for building cohesion in a divided society. In that sense, it is worth considering whether colonial rule interfered so little with Somali culture due to the benevolence of colonial authorities or owing to the strength of Somaliland clans and their elders' capacity to negotiate colonial agreements benefiting themselves?

Among the challenges in sustaining functioning legal systems was the way in which legal reform was envisioned during the transitional justice period. Developing parallel but competing legal systems (religious, customary and secular) involves a combination of written and unwritten doctrines and norms. Customary law (*xeer*) was more closely developed and aligned with shariah legal values (closely following the Shafi'i school of jurisprudence). Often applied informally and unevenly across clan families (*diya*-paying group), *xeer* and shariah allowed for a degree of autonomy among clan families while also strengthening the notion of a legal community through a common set of practices that included marriage, divorce and inheritance rights. For example, shariah allows women to maintain property rights and strictly regulates inheritance rights. In this way shariah may be seen as more flexible than *xeer*, including who could interpret Shariah (i.e., religious leaders who were also clan elders but not always).[153] *Xeer* customarily subsumes any property owned by women into her husband's clan. It was often customary legal rulings that offered the best opportunity for clan elders to exert their authority and reinforce male dominance in family life. Shariah is more strictly interpreted by sheikhs and individuals with a stronger background in Islamic jurisprudence, while *xeer* judges—as individuals with observable good character—with knowledge of customary legal traditions acquired through successive rulings, could conceivably be any member of the clan family who has attained the status of an 'elder.'

[153] Academy for Peace and Development (APD) The Judicial System in Somaliland. Workshop Report April 2002, p. 2

This may be one of the many reasons why *xeer* is more efficiently utilized than shariah in disputes. British colonialism deployed a "codified law and a judicial system based on British Common and Statute Law and the Indian Penal Code."[154] Moreover, looking at what was an informal gathering between elders and relevant members during dispute resolution meetings in communities, the British sought to formalize this process through establishing "Akil's [*aaqils*] courts and…Qaadi's courts to apply customary law, while Shariah law continued to be applied in domestic matters."[155] The relationship between shariah and *xeer* was deepened prior to British colonial rule through the administration of Egyptian colonial officers (1875-85) that further arabized Somali lineage bonds through "…a system of indirect rule through lineage headmen ('*aaqils*)." This system merely served as a formalizing of authoritative rule by clan elders to act as mediators between colonial authorities and clan families.[156] British officers further institutionalized these authorities through the *Local Authorities Ordinance of 1950* and with 360 *diya*-paying groups in 1958, according to I.M. Lewis (1959), organizing some system for dispensing the legal authority of British colonial officers meant that *aaqils* were merely figurehead authorities employed to act as go-betweens for colonial administrators.[157] This practice essentially diminished the value of *xeer* as an effective dispute resolution mechanism because it was subject to the authority of British administrative laws.

British Somaliland (in the North) and Italian Somaliland (in the South) united to constitute Somalia (1960) with no less than four legal traditions in operation (British, Italian, *xeer* and shariah). There was an attempt to assimilate these laws in the legislature in (1962) where the "…civil, penal and commercial laws [were] based on Italian law, whereas the criminal

[154] Ibid
[155] Ibid
[156] Lewis, 1959, p. 277
[157] Ibid

procedure code was to be based on Anglo-Indian law."[158] Shariah and customary law (certified and endorsed by civil courts) dealt with family and civil issues as well as land, water, diya-payments and grazing rights, respectively. This legal pluralism was in place from 1962 – 1977 in Somaliland where British common law was still practiced in part because the judges were more familiar with it, than the Italian legal code. Not until 1973 did the Barre military regime introduce some form of a unified civil code dealing mainly with "inheritance, personal contracts and water grazing rights which sharply curtailed both the Shariah and Somali customary law."[159] Changes to Shariah and customary legal practices were targeted for destruction by the dictatorship whereby the death penalty was applied to homicide offenses and compensation was restricted to a "close relative." Diya-payments were in many cases divvyed up by extended clan members and curtailing this meant further devaluing the role of customary law as an important dispute-resolution tool. Moreover, Shariah law was targeted through the enactment of the 1975 Family Law effectively granting equal status to women to inherit land and wealth.[160] This latter change resulted in a violent confrontation with religious scholars that saw ten executed in one day by the military regime. The actions of the Barre regime effectively pitted women's rights against Shariah law, a narrative that impacts perceptions of Somaliland women's rights activism till now.

Throughout Barre's dictatorship, the courts were also severely diminished in terms of capacity and resources with the Supreme and constitutional courts dismantled and the authority of the lower courts (district and appeals) were reduced to make way for the creation of the National Security Courts (NSCs). These courts operated in secrecy and targeted those the

[158] APD, supra note 153 at 3
[159] Ibid
[160] Ibid

government considered subversives and threatened national security interests with courts in the capital (Mogadishu) and other major cities.[161] The repressive tactics deployed the Barre dictatorship, particularly in the aftermath of the Somali civil war precipitated a desire among Somaliland peacemakers to re-establish traditional and customary legal authorities. However, among the challenges in establishing an effective judiciary and legal system(s) was that those known jurists returning from the IDP camps and the diaspora were largely fluent in the Italian legal code of Southern Somalia. It was not until the Borame conference in 1993 that a charter outlining an independent judiciary and the need for a civilian police force and reverting to pre-1969 legal traditions was established. This charter was effectively ratified and framed the Somaliland constitution which was later affirmed in a public referendum in 2001

In practice though, the primacy of customary law (*xeer*) was consistently reinforced since many judges and legal institutions were still in their infancy in the early 2000s. Not only is Shariah difficult to interpret in a meaningful way (with knowledgeable jurists) popular sentiment has suggested that the Somaliland populace is wary of its potential abuse; as such Shariah is rarely utilized.[162] *Xeer* is even more inconsistent but prevails owing in part to the presence of customary judges and the weak enforcement of civil courts. In one report that conducted interviews with workshop participants, some participants felt that the common law system ought to "…apply to civil and criminal matters, the shariah to family matters and customary law to clan matters."[163] To emphasize the incoherency of these systems operating on an instance of homicide, Article 418 of the criminal code results in the death penalty for a convicted felon, Shariah recommends the death penalty or compensation for the relatives of the victim. Finally,

[161] Ibid
[162] Ibid p. 5
[163] Ibid

xeer (as established between the two parties through precedence and general practice observed by each clan family) treats the matter as a collective responsibility and like Shariah offers the same two options with many victims relatives opting for compensation.[164] These comments suggest that ordinary Somalilanders recognize the inconsistent and often contradictory role that common law, *xeer* and Shariah law can play in arriving at judgements.

Judicial Reform

As Somaliland's political and legal system arose out of the Borame Conference (January – May 1993) where priorities included establishing a viable system of governance and the development of a National Charter. This charter maintained the "independence of the Judiciary and the impartiality of judgement; the right to justice and equality under the law."[165] The Borame conference also asserted the powers of the *Guurti* (elders) as the Upper House in a bicameral legislative assembly. The *Guurti* in its nascent form after the Borame conference ensured the cessation of minor conflicts in 1995 and 1997 to emerge as an authoritative collective of local leaders. The institutionalization of the *Guurti* did not take place till the ratification of the constitution in 2000 and till today this Upper House maintains a bridge to traditional legal authority (*xeer*) in Somaliland.

Somaliland's judicial system is comprised of three levels including the Supreme Court, Court of Appeal and Regional/District Courts (serving six regions and innumerable districts). These courts operate with varied levels of capacity and effectiveness with less populated regions/districts having fewer courts to deal with legal matters.[166] This framework is largely derived from the 1962 (post-independence) constitution and ratified in 1993 (post-Somaliland

[164] It has also been noted that with the price of compensation increasing over time many families have opted for the death penalty as a form of punishment if the offending party cannot fulfill the judgement of *xeer* judges (ibid).
[165] Battera & Campo, 2001, p. 7
[166] Ibid, p. 8

independence). Elements from the 1962 Criminal Code that remained included sentencing and compensation, the role of each court (district, regional and supreme) and the download of civil cases to District courts only. The role that sharia law has is more ambiguous and where sharia/customary law (which are not equally applied) is used it is only ever applied to "personal statute matters i.e., family disputes, inheritance, child custody."[167] There is no formal sharia court in Somaliland and many of these personal statute cases are heard in district courts with the presiding judge deciding on their outcome. Issues surrounding the competency of judges often arises particularly in cases where penalties and sentencing are deemed too harsh and indeed it has been noted that with each ascending level, the qualifications of judges goes up.[168] Appeal courts (commonly referred to as regional courts) and the Supreme court are not mandated to engage with issues relating to customary/sharia law although there is no legal provision excluding them from hearing or ruling on these cases. The role of district and regional courts that often become the first point of contact in civil, criminal and customary law or sharia cases is the most relevant for Somalilanders engagement with a legal pluralism as an everyday experience.

This transitional justice experience (focusing on local conferences and that was reconciliatory in nature) emphasized the role of traditional authorities and practices derived from *xeer* and sharia (although only the latter is enshrined in the Somaliland constitution).[169] The degree to which customary laws or sharia laws are utilized is not predictable. Choices are often made on a case by case basis by clan elders. Considering the prominence that *xeer* has had in the transitional justice process of Somaliland, the interchangeable usage of shariah/customary laws at the district courts demonstrates the default status of *xeer* over sharia. Sharia is enshrined in the

[167] Ibid, p. 10
[168] Ibid
[169] Ibid, p. 23

Somaliland constitution in so far as if there are laws that contradict it, the former will supersede any judgement that is derived from an alternative source. However, it is recognized more as a symbolic statement than enforced unlike shariah-strict legal systems that exist in Saudi Arabia.

The aftermath of conflict also illustrates the importance of rebuilding vital institutions including the judiciary. District/regional courts are not all operational in every district in Somaliland nor are there sufficient judges to hear cases that may arise in more peripheral regions in Somaliland.[170] This is not uncommon particularly when considering that during the transitional justice period at the Hargeisa conference (1997), the Awdal region was provided with ample judges between the district and appeals courts (six in total) and yet deference was given to local elders in mediating and arbitrating disputes. These were then sent to the district courts as written accounts of proceedings. This practice is still happening today with elders and customary laws, largely taking the role of judges and courts in major civil and criminal disputes and the courts are relegated to dealing with minor level civil and criminal disputes.[171] This includes homicide cases which are also settled outside of courts and accordingly "…if the family of the victim agree on the blood compensation (*diya*), the homicide is free."[172] That is to say, the perpetrator faces no jail time.

The competing legal frameworks of customary, shariah and British common law in Somaliland, often mean that the "Islamization" of Somaliland is constantly under review and negotiated through courts, elders and the use of *xeer*.[173] The significance of this is one of degrees of punishment whereby *xeer* allots compensation for homicide cases, and sharia by all accounts mandates capital punishment in instances of homicide. In the early peacebuilding period (1991-

[170] Ibid
[171] Ibid p. 24
[172] Ibid
[173] Ibid, p. 23

1997), *xeer* proved more effective as a dispute resolution mechanism since it privileged clan and kin ties whereas sharia has certainly gained resonance in contemporary Somaliland directly challenging the role of *xeer* and by extension clan ties.

Reforming the judiciary to strengthen the institutional capacity of courts and judges is contentious indicating that Somaliland's nascent judiciary is still in transition. As well, the tenuous balance between Shariah, customary and common law is an example of everyday justice – reflective of community practices and evolving social norms. Institutionalizing the judiciary to establish rule of law during the early peace process was important for Somaliland peacebuilders. Initially between 1997-2000, this was prioritized to enable democratic institutions to flourish in the interests of independence and formal recognition of Somaliland as a viable state separate from Somalia. Certainly, challenges persisted particularly in the case of how a legally pluralistic environment operates in practice. As noted, the capacity of the judiciary was severely limited as a consequence of the civil war and post-war preference for customary law (*xeer*) to resolve disputes throughout the peace process. Bendana and Chopra (2013) highlight that during the institutionalizing of Somaliland's judiciary, certain standards could not be maintained. These standards include the "principle of equality, due process, transparency, the right of appeal, individual liability, and the presumption of innocence."[174] These are fundamental rights in the context of international law, yet, in many instances, demonstrates the gap between formal institutions and "less state-centric justice norms" including customary practices.[175] In order to advance notions of everyday justice as a part of legitimate process of delivering justice and security, the experiences of community practices peripheral to the state need to be explored further.

[174] Bendana & Chopra, 2013, p. 45
[175] Ibid

Clan and kin networks are most effective at the local level to the extent that justice and security-sector reform were not taken seriously till the 2010 election of the Kulmiye government in Somaliland. With varying degrees of success, Somaliland's experience with transitional justice mechanisms (including *xeer*) has ensured that "clans and power individuals continue to dominate the provision of justice and security…without hesitating to use formal legal institutions to enhance their power."[176] This tacit use of institutions to reinforce traditional authorities is difficult to outline since many of these discussions between political elites and clan elders are done in secrecy. Indeed given the overlap of Shariah and customary legal practices there is a degree of arbitrariness to the way in which judges or traditional authorities provide rulings on cases. The concern, with the lack of transparency, arises when we see that customary legal practices are fluidly adopted to benefit local clan elites to the extent that clans "shape [the] performance" of Somaliland's legal system. Judges are chosen for their clan affiliation rather than their level of expertise.[177] Shariah cases are largely evidenced through family law matters including marriage, divorce and inheritance although customary practices are imposed from time to time. Moreover, while laws exist to ensure that the foundations for democratic governance and rule of law are maintained, "their application is continuously negotiated."[178] How does this impact the way that everyday justice operates in Somaliland? How might this threaten or maintains its fragile peace? Looking more specifically as Somaliland's security-sector and justice-sector reform process, we can discern the ways in which everyday justice, involving clan elders, political elites and ordinary citizens, impact on Somaliland's legal pluralism.

[176] Ibid, p. 46
[177] Ibid, p. 47
[178] Ibid

Security-Sector (Police and Military) Reform

Somaliland's attempts to reform the Police and Military during and after the transitional justice period (1991-2000) were largely ignored by clan elites, unlike judicial reform attempts. This was due in part to the rise of intra-clan conflict in the mid-1990s that relied heavily on reconciliatory justice practices founded on *xeer*. As such, police and military laws were still based on the 1970s doctrines derived from the Siad Barre dictatorship era. Re-established in 1993 the Somaliland police force is loosely governed by regulations that equip it with broad but limited enforcement powers.[179] Considering the state of institutions in post-war Somaliland, policing was largely absent in the traditional sense and the force itself can be said to have acted more as 'peacekeepers' than enforcers of the law. However, as Somaliland's political and judicial institutions have grown in sophistication, police and military legal reform remains stagnant. Article 130(5) refers to the "test of conformity" that outlines any legal reforms or doctrines must be in conformity with Shariah laws and respect human rights.[180] Although in many instances, international human rights standards may be in contradiction to Shariah laws. Instituting security-sector laws that derive from pre-1969 (pre-dictatorship) laws requires considerable scrutiny, particularly considering the adoption of colonial laws that characterized newly formed institutions in a unified Somalia at the time. It is worth considering in this context, what reform means in the Somaliland peacebuilding context and how police and military legal reforms aid in supporting locally driven peace initiatives.

[179] Jama, Ibrahim Hashi. (2020, January). *Somaliland Police Force Law 2017. And Proposed 2018 Amendments other Current Police Laws*. Somaliland Law. www.somalilandlaw.com, p. 1
[180] Ibid

Security-sector reform occurred with three significant attempts (2011, 2012, 2017) with the introduction of the Somaliland police law; first introduced during the transitional justice period in 1995. The 1995 law[181] set the foundation for the structure, appointments and recruitment. The 2011and 2012 reforms attempts involved establishing greater accountability for police officers when they abuse their powers. Police accountability is mediated through military courts and civilian oversight is entirely absent. The Somaliland Human Rights Center has long advocated for an independent, civilian body to investigate claims made against police officers. The 2017 reform bill that was formally adopted in July 2019 still does not address or take up the issue of accountability. The 2017 reform bill was put forth in the House of Representatives and it sought to separate the police force from being seen as an extension of the military force through a series of constitutional amendments to Article 5 of the Somaliland constitution.

This relationship between the military and police force stems from the legacy of the civil war. Somaliland's relatively disorganized militias came together under the banner of the Somali National Movement (SNM) to revolt against Siad Barre's military forces. The difference in capability and organization was clear from the onset. As such, Somaliland's independence and the development of nascent laws relating to the security-sector recognized the need to ensure that a viable military force existed to push back against aggression by any future government in Somalia. Secondly, the clan militias emerging from the civil war required effective DDR (demobilization, demilitarization and reintegration) into an organized police and military force.[182]

[181] Law No. 54 of 3 November 1994. It was formally adopted after a series of amendments (Law No. 7/95). These amendments focused on police organization and accountability that was ongoing through to the 2011, 2012 and 2017 reform attempts.
[182] Ibid, supra note 179 p. 2

The establishment of the military and police forces occurred simultaneously in 1995 and given the small-scale conflicts among Somaliland clans, the police were given "provisional military status."[183] This was carried over into the 2017 reform bill and critical appraisal of the bill indicates that among the key issues was accountability for police officers. Whereas a military court is established to deal with abuses of power or offenses committed by military officers, the police reform bill (2017) extends that same protection from civilian courts to police officers. For human rights advocates this approach can prove quite contrary to democratic principles and ideals.

This history is hugely relevant to the way in which Somaliland's police force operates in contemporary times. The Somaliland police force has its origins in the colonial period when Somaliland was a British protectorate (then known as the Somaliland Police Ordinance No.2, 1927). These officers were entirely in service to British colonial officers and included a formal police force along with a "rural constabulary (known as *Illalo* – look out or guard)" in 1959 that supported policing efforts in pastoral and remote communities in British Somaliland at the time. These two factions merged into the modern police force in 1970.[184] Under various iterations of statehood from post-colonial independence to post-war statebuilding, the Somaliland police force was last known as a civilian force in 1958 (Police Ordinance No. 2 of 20 February 1958) and can only be subsumed under the military force in times of war. This has significant implications for legal reform in the security-sector and points to the legacy of the transitional justice process during the early peace conference.

[183] Ibid
[184] Ibid, p. 3

The transitional justice conferences underscored the pre-1969 laws and statutes from the British colonial era to post-colonial statehood (1960 – 1969). This approach in many ways stalled security-sector reform attempts under the guise of securing peace between clan and kin networks. Indeed, the 1993 National Charter, upon which much of Somaliland's current legal framework is based, has enabled institution-building and enforced peace and security along with *xeer*. Legal reform is taken up by the House of Representatives as well as the House of Elders (*Guurti*) and this has proven challenging for many given the tenuous relationship between clan, community and the state making it difficult for reforms to be passed. Coupled with a complicated merger during the union with Somalia (1960 – 1991), the Somaliland military and police force has been under the command of military officers since post-colonial independence. Many of those in attendance at the Somaliland peace conferences were police or military officers familiar with the pre-1969 and 1972 police and military laws. As such, the incentive to carry forward laws recognizable to many who foresaw similar roles for themselves in a post-conflict Somaliland was certainly attractive and has been maintained as the status quo.

The extent of social and political marginalization for citizens that are not represented in meaningful ways through clan/kin networks is acute in the face of stalled legal reforms. Legal reforms in the security-sector have stalled significantly and certainly impact on the capacity of ordinary citizens to seek justice. It may also be the case that Somaliland's relative stability has given way to new forms of 'everyday' that seek to privilege a post-war status quo in the face of weak institutions.

The everyday and Judicial and Security-Sector Reform

Somaliland's justice-sector reform evidenced through its transitional justice experience in the early peace process has left a legacy of incoherent legal norms and practices. Yet the delivery of justice and security, as complex as it is, still plays a functional role in stabilizing its nascent post-war institutions. It is through the experience of 'everyday justice' that ordinary Somalilanders enact agency, reinforce community and enact *xeer* on a daily basis to maintain its relevance. Indeed, considering its absence from the constitution, outlining its limitations and applications, *xeer* is left to social groups (clan and kin networks) to enforce. Its reach also spreads to the police force wherein the "police like the judiciary are no guarantor of impartiality, as they too reflect and respond to various clan interests."[185] This can take the form of releasing offenders into the hands of clan elders/families rather than jailing them – another enduring practice from the early peace process where perpetrators often sought asylum with clan families. In light of this, negotiated settlements has become such a norm that judges and police at the district level have come to expect them. Practices like this speak more readily to the way in which communities have come to rely upon a decentralized delivery of justice (where the district courts rarely enforce rulings outside of clan elders involvement) that community and clan supersede other governing institutions. This disjuncture between de jure governance and de facto governance may seem haphazard and lacking in accountability. In many ways, particularly for women and other vulnerable groups subjugated by patriarchal clan dynamics, the state is severely lacking in accountability and rights-based governance. Yet, it is also in this same system that Somalilanders have relied upon to ensure their fragile peace is maintained and act as a deterrence against retributive justice at the community-level (i.e., inter-clan conflict).

[185] Bendana and Chopra, 2013, p. 49

In a clan-based society like Somaliland the role of elders as adjudicators, mediators and enforcers of law and order seems necessary in the context of customary processes being seen as responsible for ending large and small-scale conflicts. The benefits of privileging customary laws has enabled Somaliland to promote reconciliatory forms of justice and healing but issues of equity, and accountability persist. While *xeer* is largely unregulated and left to clan families to utilize and dispense with, the Guurti (house of elders) is the de facto legislative body responsible for institutionalizing aspects of *xeer* that have become commonplace. However, these elders are an unelected body of legislators that serve lifetime appointments. Consequently, there is growing discontent with the Guurti with many in Somaliland viewing it as a "conservative body" that can curtail progressive "social and legislative change."[186] The decentralized nature of governance and the presence of different legal systems operating simultaneously ensures that the community remains the basis of legal authority and power for many Somalilanders. Moreover, "notions of justice and security [that] are based on communal, rather than individual responsibility" are powerful vestiges of Somali cultural norms and values.[187] The distinction between the state legal system and customary laws "…is that the state law system is virtually never used for a civil claim. Thus, the state legal system comes to be identified almost completely with criminal justice."[188] How might justice and security-sector reform be approached in Somaliland in the face of entrenched local customs and norms? Does reform involve dispensing with legal pluralism and promoting the state legal system?

[186] Ibid, p. 52
[187] Ibid
[188] Ibid, p. 53

The fact that customary legal traditions are rooted in community and clan networks makes it difficult to wrest these traditions away from local elites. The complicity of state authorities should also be noted in the way they rely on clan politics to ensure political representation while simultaneously seeking to limit the powers of traditional authorities. The patriarchal nature of clan and kin networks is among the main issues of concern for legal reformists in Somaliland. Political leaders and parties in Somaliland operate on a power-sharing model that seeks equal representation in the Upper (*Guurti*) and Lower House of representatives in terms of clan. As, Somaliland's constitution ensures that should the President be from the Issaq clan, then the Vice-President *must* be from the Gadarbursi clan. Women and minority clans are absent from this power-sharing framework. In this regard, Bendana and Chopra (2013) are apt in suggesting that the "state itself is incapable of or is uninterested in subtracting itself from clan politics as its own composition reflects clan balances."[189]

Where the needs of local elites are maintained and reinforced, directly correlates to lack of state capacity to effectively govern; what Ken Menkhaus (2008) terms as the "mediated state" – "when state authorities develop an interest in asserting or reasserting security and rule of law in their hinterland, but lack the capacity.[190]" Negotiations and compromises between state authorities and local elites are rampant and curtails judicial reform in favour of stability. The impact of this is effectively stalled democratic governance in terms of legal reform and weakened state accountability where institutions are less and less relied upon to deliver basic services including the justice and security-sector. For example, victims of crimes are often redirected from taking punitive measures in common law courts to customary proceedings where a negotiated settlement is privileged.

[189] Ibid, p. 54
[190] Menkhaus, 2008, p. 31

Still, the goal of justice and security-sector reform in Somaliland cannot be to entirely do away with *xeer*, particularly as it serves a key function in promoting reconciliatory justice. Somaliland's justice and security-sector exists in a framework that allows for legal pluralism to exist in balance between state and traditional authorities. While marginalized communities and groups cannot claim power in this context, examining this sector through the lens of everyday justice can offer insight to the ways these groups circumvent blocks to access to justice and corrupt security forces. This arrangement between state and non-state security and justice sector providers has been termed "multi-layered" and held together by a "mutual recognition of capital (economic, symbolic, cultural and social)."[191] With the army and police forces as its "key resources" these security and justice providers maintain control and their work can often dismiss human rights approaches to justice and security.[192] Yet, without totalizing the experiences of Somalilanders' notions of justice and security as compromised and deficient, Moe and Simojoki (2013) suggest that there is progress being made. The struggles of "everyday…peacebuilding" must also include approaches to legal reform. Everyday peacebuilding also includes justice and security-sector reform.[193] Contrast this with the international human rights approach that sets universal values and norms as standards for effective rule of law. Moe and Simojoki (2013) caution against framing the delivery of justice and security in conflict-affected states by international human rights standards. Rather, as the gradual institutionalization of these services has grown and become more sophisticated in Somaliland, so too has the expectation of the state by its citizens.[194] This includes appointing competent and impartial judges given the practice that many judges are appointed by clan elders to occupy common law courts (i.e., for district courts)

[191] Moe and Simojoki, 2013, p. 395
[192] Ibid, p. 396
[193] Ibid, p. 397
[194] Ibid

to their benefit. Instead, appointing knowledgeable and impartial judges, would allow for greater trust between local communities and state authorities. This institutionalization does not displace the prominence and reliance on customary laws and practices to safeguard and deliver on justice and security. This hybridization of laws and norms has proven effective for ordinary Somalilanders. Moreover, the adaptability of traditional authorities to the increasing role of the state has been documented indicating that customary practices are dynamic and capable of evolving with social norms and emerging legal practices (including incorporating greater protection under international human rights laws for vulnerable groups).

A Danish Refugee Council (DRC) project was initiated in 2003 to address the gap between the approach of traditional authorities to rule of law and protections for human rights. This was the first initiative to address justice and security-sector reform outside of the transitional justice process in the early 1990s. The project was generated after an increase in revenge killings in Somaliland among sub-clan groups led to clan elders relying on traditional approaches (i.e., mediation between warring clan groups) to end these killings. The DRC was initially reluctant to support *xeer*-based approaches considering the lack of inclusivity of local actors that are already marginalized by customary laws. Despite the controversial approach, the DRC acquiesced to support traditional elders in their mediation efforts arguing the importance of locally rooted justice and security-sector actors. Their belief was that the legitimacy derived from these elders offers a greater opportunity to develop access to justice and improved security programs for rural and otherwise peripheral communities.[195] Secondly, the DRC posited that their participation allowed for them to advocate for better cooperation between traditional authorities and state security providers. While idealistic, the proposition put forth by the DRC

[195] Ibid, p. 399

served to enhance the authority of traditional elders while simultaneously seeking to promote human rights. With varied levels of success, DRC officials during workshops and sessions highlighted those areas where *xeer* conflicted with human rights standards and elders agreed to amend those areas. This agreement, drawn up with the support of the DRC, became known as the Elders Declaration at a conference in Hargeisa in 2006. This declaration included commitments by customary authorities to turn over "offenders of serious crime" to the state rather than clan, and expanding protections (physical and financial security) to vulnerable groups including widows who were often dispossessed after their husbands death by his clan family.[196] While this declaration was significant at the time, its implementation and adherence to date has had mixed results with the *Guurti* largely ignoring it in practice but openly restating its value. Moe and Simojoki (2013) attributed this to the disconnect in principles between international law and customary approaches to law particularly where the latter privileges oral agreements and the former written agreements.[197]

When assessing the overall adherence and success of the Elders Declaration on Somaliland society, everyday instances of justice and security delivery are best seen through court administration. In general, respondents in a post-Declaration assessment indicated that levels of revenge killings had decreased and a greater number of offenders of major crimes (including murder) are referred to state courts. Moreover, shariah law has been increasingly preferred by women's rights organisations since shariah provides a more equitable distribution of inheritance and marital property (for example) than *xeer*. Women's rights organisations have sought to assert their rights through shariah giving an indication of the progressive role that shariah has for Somaliland women when compared to the use of *xeer*. The Elders Declaration

[196] Ibid, p. 400
[197] Ibid

reinforced the authority of traditional elders effectively maintaining the status quo and male privilege. As well, other marginalized groups that have limited access or lacked status and representation from clan families (including women and members of minority clans) remained unable to access justice and adequate physical security to protect their legal interests.[198]

The importance of legal pluralism to facilitating diverse pathways for justice and security delivery is touted as a success in the DRC case study but important challenges persisted as well. If deeply entrenched social attitudes towards inequalities are left unaddressed, legal pluralism will end up reinforcing those very inequalities. The DRC initiative was later expanded to include transformative social change at the community-level by empowering local actors (particularly those marginalized by all legal systems) to participate in the DRC's justice and security-sector reform programs. Operating at the micro-level (families, households, individuals) to challenge systemic barriers to reform, the DRC integrated its work with other peacebuilding initiatives. The DRC eventually recognized that without framing the experience of justice and security-sector reform in the context of the pursuit of 'peace' and an end to major and minor conflict, local support would be difficult to come by.

Global NGOs like the DRC are part and parcel in the process to reform justice and security-sector practices in post-conflict societies. In the DRC project, similar to the UNDP's justice-sector reform initiatives, the global and local interact in ways that impact significantly on local norms and practices. In the context of weak state capacity and infrastructure, international agencies/organisations will continue to play an important role in pushing for reform. Hybrid forms of governance involve international actors as a part of the transitional justice process. But it is important for communities that these programs are directed at are also contesting their

[198] Ibid, p. 402

presence and can assert local agency surrounding legal reform. Ultimately, any reform initiative may have a lasting impact on local communities and for it to be sustainable it must also be highly participatory. Contrary to conventional approaches to justice and security-sector reform, contestation is not necessarily an adversarial experience for local actors participating in reform projects initiated by international organizations. What is crucial is maintaining the positive practices related to peacebuilding and conflict resolution while recognizing the importance of dismantling social inequalities.[199] The role of international actors as facilitators and mediators ought to include collaborating with communities to address social inequality. Consequently, post-conflict societies with experience in legal pluralism can help to facilitate access to power for marginalized groups (i.e., women's rights activists seeking to use shariah over *xeer*). The presence of international organizations or actors does not entirely do away with the power structures that uphold these legal systems. For instance, men are still seen as authoritative jurists in shariah and *xeer* adjudication processes. Nevertheless, legal pluralism as manifested in the everyday experience of law for ordinary Somalilanders does not suggest, from the DRC experience, that social norms are inflexible. Instead, Somalilanders have taken up various reform initiatives (whether initiated from international actors or locally driven) and found ways to ensure that contestation does not lead to conflict. In 2012, I witnessed numerous attempts by women's rights organisations to collectively organize to initiate legal reform. This includes ad-hoc meetings I attended with women in Hargeisa, from the same sub-clan, who came together to demand appropriate compensation in terms of property allocation by their clan elders. This was an issue of concern since many women who end up divorced or widowed forfeit all the property that was in their husband's name; directly impacting their livelihood. These women sought to

[199] Ibid, p. 408

challenge this practice in common law courts as well as in *xeer* proceedings. In this way, everyday justice for Somaliland women who are negatively impacted by *xeer* can include forming new social relationships that are not dictated by *xeer* (i.e., a women's association based on clan affiliation).

As Moe and Simojoki (2013) point out, the emphasis on "relationships rather than distinctively on law" has been central to the DRC's relative success with reform. Everyday justice encapsulates this process by highlighting that "…the empirical reality of justice and security being processes deeply steeped in sociopolitical dynamics, societal norms and power relations" can be a peripheral experience for Somalilanders who understand *xeer,* civil/common law and Shariah law as a matter of *experience* "…rather than isolated and strictly legal domains."[200] Indeed, the 'everyday' on the one hand is an accumulation of daily experiences in highly social and relational contexts and on the other hand, it is at this level that social transformation and agency are the most impactful. The everyday can destabilize universalist approaches to justice and security-sector reform in favour of more tailored and nuanced practices. In this way, Somaliland's legal pluralism is adaptive and fluid. This illustrates my larger point that transitional justice in practice can seem far removed from local understandings of the 'law.'[201] The perception can arise when local processes become institutionalized (such as the *Guurti*). Somaliland elders (who are not members of the *Guurti*) who hold interpretive power with respect to customary laws may be more generally allied with the legislative body concerned with decision-making largely comprised of elders. This process can distance the individual clan members or those unaffiliated with a clan from a culturally specific and accessible form of justice. Hybrid political processes can be instrumental here to aid in alleviating significant forms

[200] Ibid
[201] Ibid, p. 410

of marginalization. It also means that Somaliland as a state needs to strengthen its common law doctrines to enable ordinary citizens access to the formal courts. However, as is shown below, Somaliland's attempts at legal reform are juxtaposed against the need to maintain peace and order at the expense of potentially contentious social and political dialogue.

Chapter Four

This chapter outlines how we understand 'the everyday' in relation to legal reform in general and the aims of transitional justice (i.e., sustainable peace) more specifically. This is done to offer an alternative perspective to legal reforms that are not seen as legitimate in the eyes of Western legal institutions. This chapter outlines the connections between local experiences of justice in post-conflict contexts and international legal approaches to achieving justice. In post-conflict African states' experience with transitional justice has given rise to localized understandings of justice that privilege reconciliatory approaches. This is juxtaposed with international humanitarian laws that are often imposed top-down. A critical turn towards justice and security-sector reform stemming from the bottom-up (communities) has enabled the emergence of 'the everyday' as an analytical lens. The Somaliland case has shown that given the presence of three distinct legal systems, communities have privileged local knowledge and customary approaches; although there are many that challenge this deference to *xeer*. As well, legal reform in Somaliland has not advanced in a significant way since the end of formal transitional justice process during the early peace conferences. The state has not diminished in legitimacy though and the role the state has in formalizing (institutionalizing) customary legal judgements is still central to Somaliland's legal culture.

The everyday - particularly everyday justice and security—as an analytic lens delves more deeply into community social realities than does transitional justice (which tends to be a top-down approach) to examine dynamic social networks and bonds as actively shaping legal norms and values. To account for this impact, transitional justice theories have expanded to include social transformation, a goal that seeks to bring in local approaches to justice into formal and informal processes during the transitional justice process. Consider the way that transformative justice as an approach has gained prominence over time. Transformative justice seeks to redirect our attention towards forms of violence and social hierarchies that are detrimental to sustainable peace. Seeking social transformation through justice-sector reform means that the focus is on communities and localized approaches to achieve social transformation rather than relying on international legal norms and the state to mandate rights and mitigate against social exclusion. Transformative justice seeks to make visible issues of inequality that may remain invisible during transitional justice processes that do not meaningfully take into account 'everyday' social relations and their impact on violence in post-conflict societies. To the extent that the everyday is taken for granted as a reality rather than as the site where social change can emerge can lead to stalled reform endeavours (legal and political) in post-conflict societies.[202] After all, why engage in legal reform that may not impact 'everyday life' in a significant way when the delivery of justice and security are already taking place (i.e., by communities or customary authorities). Discursively linking the experience of everyday life to institutional legal reform is valuable and necessary to achieve sustainable peace.

[202] Sarat and Kearns, 2009, p. 6

Transitional Justice to Transformative Justice: Accounting for 'everyday' interactions

My analysis of the Somaliland case offers some insights for the literature on transitional justice. The broader literature encompasses both critical and normative approaches to establishing rule of law and recognizes that states emerging from conflict will have varying legal capacities. Somaliland's stalled legal reform process does not imply that rule of law is absent entirely nor that it is less effective by Western legal standards. Instead, given the plurality of legal systems that exist and the strength of customary legal approaches, a new understanding must be established in the delivery of justice. Crossing disciplinary boundaries, transitional justice is a significant feature of peacebuilding literature and the concept of a 'just peace' alludes to an aspiration of a kind of peacebuilding (as a process) that takes into account formal and informal approaches to justice and security in post-conflict societies.[203]

As noted, with transitional justice approaches seen as partly aspirational in nature[204], notions of inclusion, equity and accountability must be seen as tangible goals for those participating in transitional justice initiatives. Otherwise, reinforcing pre-conflict social hierarchies is almost inevitable in post-conflict contexts. Gready and Robins (2014) suggest that an entirely new approach to justice in post-conflict contexts is necessary given the lack of societal 'transformation' in transitional justice practices to date. Transformative justice is a proposed approach –not to displace transitional justice – that encapsulates the way in which we speak about the everyday including occurrences of everyday violence.

[203] Lambourne, 2013
[204] Teitel, 2003

Gready and Robins (2014) define transformative justice as:

> …transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusions at both the local and the global level. While transformative justice does not seek to completely dismiss or replace transitional justice, it does seek to radically reform its policies, [the] local and priorities. Transformative justice entails a shift in focus from the legal to the social and political, and from the state and institutions to communities and everyday concerns.[205]

The need for radical social transformation is necessary and appropriate in the face of human rights violations and abuses during conflict. The need for transitional justice initiatives grew out of the recognition that forms of legal accountability were needed to ensure that perpetrators of violence were held accountable. But many pointed out that reconciliatory approaches, localized knowledge and community-building practices were ignored in this legal approach, particularly noting the rise of customary legal applications of justice in post-conflict African states. Gready and Robins (2014) ask us to shift our focus entirely to the role that 'justice' ought to serve – as a part of a larger package of social transformation. This does not entirely do away with legalistic approaches to justice but complements it. Especially as we dispel the notion that transitions in post-conflict contexts are fixed, and begin to see them as dynamic and fluid. Indeed, Somaliland's 'transition' to effective legal institutions is certainly ongoing. Moreover, transitional justice as a holistic approach emphasizes that justice is an unequal experience for many of society's most marginalized. Everyday violence is seen as a part of the continuum of violence rather than limited to political violence.[206] In a hybridized political environment with plural legal practices, the everyday is an appropriate lens to apply to *all* the interactions that occur at the community level to elevate our approach to everyday violence with the understanding that all forms of violence are a legal matter. Sexual and gender-based violence for

[205] Gready and Robins 2014, p. 339
[206] Ibid, p. 343

example is one realm in which sharia and customary laws in Somaliland often treat it not as a legal issue but as part of personal and family matters. In the case of rape, what occurs in practice it that customary authorities seek a negotiated settlement that often sees women compelled to marry their rapists.[207]

To advance this transformational approach in transitional justice, Gready and Robins (2014) articulate an "actor-oriented approach" to human rights that situates them in local struggles for emancipation.[208] The aim here is to view the pursuit of greater socio-economic rights as foundational to any post-conflict societies engagement with justice-sector reform. Localized knowledge and contexts are magnified as the cure to, as well as the source of violence. Gready and Robins (2014) have meaningfully approached the distinction between localizing rights-based "consciousness" as opposed to imposing it from the outside (i.e., international human rights regimes),[209]; situating rights through an actor-oriented approach may answer the question of 'who is responsible'? but narrow the view on 'who is accountable'? The state has a role to play in expanding on the view of who is accountable? The state as a 'force of law' can ensure the enforcement of what Lambourne (2013) terms as the pursuit of "political justice." Seen as:

> …necessary to ensur[ing] the successful implementation of transitional justice measures including institutional reform, rule of law and respect for human rights, addressing socioeconomic needs, and avoiding the appearance of victor's justice or a culture of impunity…political justice requires delinking of political identity from cultural identity and a move towards democracy that involves institutional reform, and separates and makes accountable the powers of the executive, legislature, judiciary and administration….without political justice, transformative justice is therefore incomplete and peace unsustainable.[210]

[207] Battera & Campo, 2001
[208] Gready & Robins, 2014, p. 353
[209] Ibid, p. 354
[210] Lambourne, supra note 203 at 32

Dichotomies (institution/community; local/international; state law/customary law) feature heavily in much of the critique surrounding transitional justice as a normative approach. Owing to the relevance of the post-conflict rebuilding of political and legal institutions, the weight of delivering justice, however imperfect, has rested with the state since the state is seen as the source of legitimacy in international law. However, the rise of critical analysis including the 'everyday' as an analytical lens, transformative approaches to transitional justice, as well as the emphasis on local knowledge has reshaped our approach to justice and security-sector reform in significant ways. Given the anecdotal and empirical evidence emerging from post-conflict African states, legal pluralism has enabled communities in conflict to assert agency while impacting on formal political and legal institutions.

Connecting the Global & Local: Somaliland and legal reform

In conflict-affected societies the notion that everyday justice and security are fluid concepts and practices may be taken for granted and usher a period of sustained 'transition.' Reforms and social transformation initiatives may be put on hold or stalled in favour of stability in the form of a centralized government and stagnant laws. This is why aspects of everyday life become central to micro-level analysis of transitional justice processes *after* the conflict has ended. Everyday life is imbued with elements that are central to our existence but rarely analysed; these include our "emotions, interactions, tensions, power struggles, tactics of domination and resistance and small and big ceremonial routine events…"[211] Everyday life is magnified in conflict and post-conflict contexts and requires focused and determined analysis. Legal transformation may also take some time to emerge when taken up by the state, whereas local communities embody these transformations in much more dynamic ways. To legitimize

[211] Kent, 2018, p. 147

these localized understandings of norms and values hybrid forms of governance (i.e., customary and state laws) are crucial to challenging the "technocratic turn" that transitional justice and peacebuilding by extension, have taken.[212] Yet while hybridity as a practice may be able to support the diffuse ways that social groups organize legally and politically it can also reinforce hierarchies to the detriment of less powerful groups.

In order to counter the globalized, top-down technocratic approaches to peacebuilding and transitional justice (courts, prosecutions, peace agreements, settlements), viewing communities through the lens of everyday life means embracing the multitude forms of social organizing (formal and informal). Global and local approaches do not exist in separate spheres but also reinforce one another. The institutionalization of localized forms of justice is another process through which transitional justice, as a top-down exercise, reasserts itself on communities. Communities are routinely mined for their perspective and labour. Local knowledge consistently flows upward to institutions rather than being seen as a process that is "difficult, restless and [full of] unceasing negotiation."[213] Transitional justice processes that stem from international actors and international humanitarian laws often dismiss this crucial process of contested reconciliation.[214] This dismissal or institutionalization of local approaches has led to distinct forms of governance and legal values and norms that compete for dominance or are loosely bound together. While legal scholars recognize hybridity and legal pluralism as valuable to ending conflict and rebuilding institutions, they tend to be overlooked in the implementation side of things. And, if legal institutions become the sole source of law-making, the important contribution of local knowledge production to that process, can be obscured or even dismissed.

[212] Ibid, p. 148
[213] Ibid, p. 151
[214] Ibid, p. 152

As Kent (2018) emphasizes, the focus on institutions leads legal scholars to see *only* that which is "recognisably law like, such as customary dispute resolution practices" pieced together to frame a body of practices as 'customary laws.'[215]

Consequently, categories of distinct actors, processes and ideologies that co-exist in the transitional justice space may not be adequately measured or understood. Consider that everyday life operates at micro-level sites on macro-level processes/institutions; it can be challenging to assess the impact of local forms of justice or view the law as emerging from local sites in dynamic ways. Moreover, as conflict emerges, categories of perpetrator/victim become increasingly reified in post-conflict settings that dismiss violence committed across many fronts. For Kent (2018) these categories seem necessary in order to justify the work of transitional justice processes as a break from the 'violent past' towards the 'peaceful future.'[216] Rather, legal scholars may be better served with approaching legal reform through the prism of ongoing processes of reconciliation and conflict-resolution. More importantly, focusing on the everyday allows the scholar to view local actors as progenitors of legal norms since "the everyday is not a level of human organization but rather [a] dimension of human experience."[217] This means that some social actors at the community level may never seek to reconcile grievances but rather negotiate forms of power-sharing that are mutually beneficial. The everyday may be a site for radical social transformation and legal reform that lead to conflict resolution and peace. Yet it is also the site at which violence is reproduced and enacted as social hierarchies are reinforced on a daily basis.[218]

[215] Ibid
[216] Ibid, p. 159
[217] Ibid, p. 160
[218] Ibid

Legal reform in the context of a legally pluralistic environment can be made all the more difficult when conflict arises and uncovers deeply unequal social relationships. Rebuilding with the understanding that laws are reflective of social norms and values means taking a critical lens on pre-conflict legal systems. As the everyday reframes our focus on the role that communities play in shaping legal norms and post-conflict institutions, similarly initiating legal reform with the need to reconcile customary, state and religiously derived legal norms may be reflective of the power of local actors; even if these actors are embedded in social institutions that perpetuate inequality in personal and public ways (i.e., clan/kin networks). Hybridity as a concept recognizes the negative role that local power dynamics can have on shaping political and legal norms while accepting that communities are also the seat of authority for non-state actors.

Ideally, hybrid regimes offer pathways to compromise for post-conflict societies that have strong foundations for legal pluralism.[219] Somaliland is an example of the ways in which legal pluralism continues to have an enduring impact on social relations while also serving as the foundation for statebuilding. The 'everyday' is an appropriate lens to utilize in this context [for assessing the success of transitional justice efforts, especially considering legal reform in the context of Somaliland's [transitional justice] experience is very much still ongoing. With customary laws (*xeer*) maintaining a prominent role in Somaliland's reform process, communities and clan/kin networks must be central to any proposed legal reform.

There is no way to orchestrate hybridized regimes that benefit from local authorities' knowledge and legitimacy. Nor is there a means to derive a balance between competing legal systems, particularly in post-conflict settings. Why then, am I placing such emphasis then on hybrid regimes, 'the everyday' and their relationship to legal reform? First, Moe (2011) asks us

[219] Moe, 2011

to recognize that "international intervention strategies" (including transitional justice initiatives) are forms of hybridity.[220] Interventions include international humanitarian laws shaped by colonial and neocolonial encounters between "…Western and European rulers with people and communities in the Global South."[221] As such, local communities that resist and challenge these interventions (ideologically and practically) ingratiate indigenous forms of power and order that exist alongside Western-influenced legal systems.[222] Moe (2011) offers some examples of 'the everyday' that is common in post-conflict African societies including "small-scale patron-client exchanges, [largely] subsistence economies, family and kin protection networks, as well as [the dominance of] customary law and authority."[223] The everyday then becomes a means to understanding the various levels of compromise and contestation in a legally pluralistic environment. This is particularly so in Somaliland where a return to British common law is seen as a means to reassert independence from Somalia.

Including customary law (*xeer*) and sharia law as foundations for the post-1991 Somaliland state is to deviate from liberal peacebuilding norms (including transitional justice).[224] Including customary approaches to resolving conflict is unavoidable and lends greater credence to the notion that the community (clan/kin networks) more significantly inform legal and political reform rather than state authorities (who are members of these networks and structures). *Xeer* as derived from clan families and tradition is more acutely applied at the local level but Moe (2011) cautions us against the 'local' as "territorially bound" but rather to view the 'local' as "empirical, but not territorially fixed, relational sites of contestation, repulsion, reshaping and

[220] MacGinty 2019; Moe 2011
[221] Moe supra note 219 at 150
[222] Ibid
[223] Ibid
[224] Ibid

accommodation between international, liberal, state-based agendas *and* local agencies, customs and practices" (my emphasis). Without approaching these, often nuanced, interactions between the state and local communities, it becomes quite difficult to assemble a rationale for legal reform in a post-conflict context without identifying the basis upon which 'reform' is grounded. Otherwise, state-centric approaches to legal reform and justice can exclude local experiences and knowledge.

In the Somaliland context, the addition of *xeer* (customary law) as a part of its transitional justice process and constitution is that rationale. *Xeer* is seen as an antidote to the violence and conflict of the Somali civil war, and Somaliland's approach to peacebuilding through customary approaches has given emphasis to reconciliation among communities and clan families. Historically utilized as a dispute resolution mechanism, forming a legal order on the basis of *xeer* is difficult as it lacks a written form and has been transmitted largely as an oral tradition. As well, *xeer* is still inaccessible for many legal advocates since the authority resides in only a few types of adjudicators (male, elderly, morally upright). The need for a common/civil law adjacent to *xeer* in this sense becomes necessary and imperative when the aim is to promote greater pluralism in society. Moreover, recognizing that international laws are themselves already hybridized (international and local legal approaches and rationale). This may partly be due to a "…recognition that transplanting liberal and rational-legal political institutions turned out not to work as smoothly as suggested by past optimistic democratization scenarios."[225]

The resurgence of 'local approaches' as well as 'the everyday' as an analytical lens is due to the scholarly privilege that western-legal systems have in shaping post-conflict societies. Until the rise of transitional justice that saw the establishment of hybrid forms of legal governance in

[225] Ibid p. 151

the 1990s as African states mired in conflict engaged in reform, local knowledge was set aside as irrelevant. This "ontological narrowness" has missed a variety of experiences occurring at the local/community level that heavily influences institutional legal practices.[226]

As noted, Somaliland's criminal cases are diverted to customary courts and take the form of arbitration between the two parties. Not to dismiss formal courts entirely, the "settlements [that are] reached through the customary system are in some cases registered and filed" in effect formalizing decisions emerging from customary courts.[227] The everydayness of this is evident in the process or informal procedures that dominate the relationship between formal and informal legal practice are taken as a given. The police forces are responsible for diverting suspects to customary authorities who conduct proceedings in the hopes of reaching a negotiated settlement between two parties (representatives from corresponding clan families). The emphasis on 'negotiating settlements' is directly related to the threat of violence by both clan families in escalating the dispute. Nor are government courts seen as neutral actors in these disputes where even business-related cases are taken up by customary authorities.

The lack of effective reform in the common law area is one significant barrier to cases being brought forth in these courts but also the customary authorities are seen as less politicised than judges in the formal courts.[228] While this is certainly debated by individuals who are often marginalized by customary laws, the dual-track use of formal and informal courts has proven effective in maintaining localized security, dispelling small-scale conflicts, and ensuring accountability at the community-level. Nevertheless, the justice and security-sector reforms that may have driven progress towards increasing democratization and inclusion (2000-2010) has

[226] Ibid
[227] Ibid, p. 160
[228] Ibid

stalled. While security is a necessary precondition to effective governance, it has displaced the aspirational attributes of Somaliland's transitional justice in the early peace process. Moe (2011) reminds us that "…security is a precondition for the undertaking of several other activities necessary for the consolidation of political order" and this perspective continues to dominate Somaliland's legal reform approach.[229] To the detriment of its citizens, this practice merely serves to underscore the stagnant nature of Somaliland's legal reform project (a legacy of its transitional justice process) where basic forms of governance including security and the delivery of justice are satisfied. Still, ordinary Somalilanders engage with these institutions and practices by seeking to make also make them more equitable recognising that peace and security cannot be achieved in the absence of social, political and economic equality.

Conclusion

This paper has highlighted the way that complex legal systems interact with one another to shape Somaliland's peace and stability. To understand this complexity, I have utilized the key concepts of 'everyday life' and 'hybridity' as frameworks of analysis that allow me to better understand the process of legal reform ongoing since the early 1990s. Somaliland's early peace process was significant in bringing to light the need to take local knowledge more seriously as a foundation for building sustainable peace. As well, transitional justice scholars are approaching post-conflict societies in more nuanced ways by thinking critically of the top-down nature of international processes. This has involved discussions of whether hybrid approaches could be more fruitful for bringing about long-lasting peace. Throughout this thesis, I have argued that the role of community is key here to building legitimate institutions and cannot be persistently

[229] Ibid, p. 161

displaced to favour international legal instruments. It is by privileging community-building and local forms of knowledge that we can see more easily the role that everyday life –interactions and contestations, play in shaping social and legal norms in Somaliland. These everyday practices are helping to shape customary norms/laws. *Xeer* is continually evolving and there are certainly groups that are pushing for greater inclusivity in shaping it.

Researching Somaliland's experience with transitional justice continues to raise questions about the way that justice, peace and security are conceptualized in post-conflict societies. Similar to many other African states emerging from conflict we see the use of customary and international legal instruments to end small and large conflicts but to also negotiate new social and political bonds. Throughout this paper, the recognition that global/local processes are experienced through hybrid forms of governance speaks to the connectedness that embodies peace and the everyday experience of it. The concerns are plenty though and chief among them is the lack of inclusion for marginalized groups including women and minority clans in Somaliland when it comes to justice and security-sector reform.

Clan elders (largely male) drove these early peace processes using *xeer* and as such the judiciary and security-sector institutions reflect their concerns and authority. However, by recognizing shariah as a foundational legal framework and enshrining it in the constitution; by utilizing the common law system to offer hybrid political forms of order, Somaliland's early peacebuilders established broad frameworks for social and political inclusion. *Xeer* rulings are contested from time to time and particularly by marginalized groups including women and minority clans in Somaliland. In fact, women's organisations have actively advocated for shariah laws to be applied to issues surrounding family matters (since they view it as more progressive). Finally, political leaders and elite perpetually engage in processes of reform (though discursive)

and that has led to the 2019 Police bill that, while limited, has brought to the forefront the need to frame Somaliland's security-sector institutions in more democratic terms. These are all examples of movements for social and political change driven by community. This suggests that Somaliand's legal pluralism and reform continues to evolve and at the center of these experiences are everyday interactions between diverse groups –that are still connected through a community of clan/kin networks.

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