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Research into a Harmonised Legal System for Somalia and Analysis of its Different Judicial Systems

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List of Abbreviations

AMISOM	African Union Mission in Somalia
ARPCT	Alliance for the Restoration of Peace and Counter-Terrorism
CPP	Counter Piracy Programme
EU	European Union
FFP	Fund For Peace
GDP	Gross Domestic Product
ICG	International Crisis Group
ICU	Islamic Courts Union
IDP	Internally Displaced Persons
IGASOM	Intergovernmental Authority in Somalia
NGO	Non-Governmental Organisation
NSC	National Security Court
PDRC	Puntland Development Research Centre
SG	Secretary-General (of the United Nations)
SNF	Somali National Forces
SNM	Somali National Movement
SRC	Supreme Revolutionary Council
SRSG	Special Representative of the Secretary General
SSDF	Somali Salvation Democratic Front
TFC	Transitional Federal Charter
TFG	Transitional Federal Government
TFI	Transitional Federal Institutions
TFP	Transitional Federal Parliament
TNG	Transitional National Government
UK	United Kingdom
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNITAF	United Task Force
UNODC	United Nations Office on Drugs and Crime
UNOSOM	United Nations Operation in Somalia
UNPOS	United Nations Political Office for Somalia
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNSOA	United Nations Support Office for AMISOM
UNSOM	United Nations Assistance Mission in Somalia
US(A)	United States (of America)
USSR	Union of Soviet Socialist Republics
WFP	World Food Programme
WHO	World Health Organisation

Glossary

<i>Diya</i>	Blood compensation
<i>Jihad</i>	Holy war
<i>Jilib</i>	The group of clan members accountable to pay <i>diya</i>
<i>Madani</i>	Vigilante groups in Somalia
<i>Oday</i>	An elder appointed as judge by his clan
<i>Sharia</i>	Islamic law
<i>Suluh</i>	Practice to integrate several types of law into one court decision
<i>Tol</i>	Kinsmen
<i>Xaliwaad</i>	The informal money transfer sector in Somalia
<i>Xeer</i>	Somali customary law
<i>Xeer tolnimo</i>	Specific <i>Xeer</i> norms, applied by few clans
<i>Xeer guud</i>	General <i>Xeer</i> norms, applied by several clans
<i>Xissi adkadaay</i>	Fundamental principles of <i>Xeer</i>

1. Preface

Xeer la'aan waa xukun iyo xoolo la'aan.
(Without moral and social codes, all is lawlessness and abject poverty)
-Somali saying ¹

For the last two decades, Somalia has been labeled as the ultimate example of a lawless state by the international community. This has intrigued many authors to research the effects of such an anarchic situation. Although, when closely investigating the various judiciary systems existing in Somalia, we soon discover the country is not as lawless as it appears to be. Several local initiatives have been able to provide some degree of judicial security and protection, in order to tackle the malfunctions of the national government and its judicial administration. Somalis are rather distrustful towards a central government, which is not that aberrant, when taking into account their history. The national administration has either been used to impose unfamiliar colonial rules, to support the corrupt regime of military dictator Barre or has functioned as the main target for insurgent groups seeking power. In any case, it has not been able to provide a secure environment for the Somali people. As a result, the inhabitants of Somalia have created local initiatives to enforce their legal rights or have returned to the customary rules they lived by before there was any foreign leverage. However, since August last year, with the election of a president and the voting of a constitution, renewed hope has arisen for obtaining a functioning central government. Nevertheless, the new government still faces a lot of challenges, including the enforcement of its legitimacy throughout the whole Somali nation, especially in Somaliland and Puntland, two Somali regions that each abide by their own constitution and formal organisations.

The Somali case has grown into a global matter of concern, since it has become clear that the Somali deadlock is not only causing instability in Somalia, but also has significant effects on the international community. The Somali crisis had prevailingly become a forgotten one, until in 2005, the country's problems were increasingly making headlines because of the international piracy issue. International ships are still being hijacked by pirates, most of them Somalis living in poor circumstances, hoping to gain some financial benefits. Somali piracy has created global effects that are unknown to most people. A World Bank report that was released in 2013, revealed that Somali piracy has imposed a hidden tax on world trade.² The estimated yearly cost for the global economy comprises about \$18 billion.

Since piracy is organised on the Somali mainland, a comprehensive and holistic approach that tackles the Somali on shore problems, is ineluctable in order to stop it. Without a judicial system that can effectively sentence Somali pirates, piracy cannot be ended in a definite way. However, finding an efficient and thoroughgoing judicial set-up is no sinecure. The international community has done its best to make state building efforts for Somalia, but is all too often ignoring political realities when trying to do so.

¹ SAMATAR, A.I., *The Somali Challenge: From Catastrophe to Renewal*, Boulder-Londen, Lynne Rienner Publishers, Inc., 1994, 238

(Here on after: SAMATAR, A.I., *The Somali Challenge: From Catastrophe to Renewal*)

² WORLD BANK, *The Pirates of Somalia: Ending the Threat, Rebuilding a Nation*, Washington DC, 2013, January 1, Report nr. 76713, 22 (available at: <http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf>)

The various political interests of the major world parties and Somali stakeholders have repeatedly generated counterproductive actions in the past. Another difficulty is the increasing power of Al Shabaab, an Islamist movement, that claims to have ties with Al Qaeda, and the ongoing discussion on finding the most efficient policy to combat them. While searching an appropriate legal system, the choice for Islamic Sharia law seems to be a point of conflict for many (foreign) parties, because of their fear for radicalisation of the Somali people and culture, but is supported by most Somalis.

Numerous reports and academic articles have been written and published, concerning the Somali case, most of them however examining the political situation in Somalia. Given the fact that for over two decades, there were almost no working governmental institutions, the country has been an attractive subject for studies about the political administrations and their (lack of) accomplishments. Disquisitions about the flowering of various economic sectors in Somalia despite the lack of formal rules and economic guidelines, are also numerous. In spite of the multiplicity of these various studies, research material on the Somali law system appears to be less prominent. Dr. André Le Sage³ has however made a profound survey on the Somali law sources and as the most significant author in this matter, his work will be a guideline in examining these. A legal analysis of the Somali judicial systems will thus be made, but obviously while doing so, the political, anthropological and economic factors that have influenced the Somali rule of law and vice versa will also have to be taken into account

The sources used to base this dissertation on, are mostly secondary law sources, as Somalia does not have a comprehensive legal research system that collects sources of case law, documents from bar associations or legal databases. Therefore, it was obliged to especially use secondary law sources and reports from local organisations or state building initiators. Unfortunately, not so many authors seem to have focused on the Somali law systems themselves, as stated out above.

For obvious, though unfortunate reasons, it was not possible to carry out any field research. Therefore, the author has relied on findings made by other authors and will found this dissertation on a comprehensive study of existing and recent literature concerning Somali law and politics. It is believed this study can be advantageous since it pursues to give a plenary résumé of all the substantial findings on Somali law, without focusing all too much on or promoting one judicial system. The author therefore hopes to provide some modest new insights on the Somali case. Most of the authors on Somali law have indeed honed in on one particular judicial system, quite often in order to affirm their personal political suppositions. Besides Le Sage, not a single author was found, who puts the different judicial systems in a perspective in order to from there on, attempt to make a conclusion tackling the issues for a judicial harmonisation. Given this significant lack in research on Somalia, it is hoped that this dissertation can construct an honest attempt to pad this hiatus.

When studying the Somali case, several issues of law come to mind. How can law be efficacious in a country with various judicial systems? How do the Somali people see the concept of law? Are international human rights laws represented and respected in the Somali law sources? Is there a time for harmonising the various rules of law in Somalia? Which one of these judicial systems should then be the preliminary basis for unification? Does the international community have a responsibility to engage in this national

³ Dr. Andre Le Sage is the Senior Research Fellow for Africa at the Institute for National Strategic Studies (INSS).

matter? This dissertation will attempt to answer these issues by analyzing each question thoroughly. Somalia knows various law systems and each of them will be examined, in order to find the weaknesses and strengths of every system. The ultimate challenge of this dissertation comprises an unpretentious set-up for the harmonisation of these law sources. The need for harmonisation of these various judicial systems is indeed substantial and urgent, given the various aspects of Somali life that are now suffering from a lack of consistent rule of law. Furthermore, providing assurance of law enforcement and equal protection before the law, are two of the state's main responsibilities towards its people.

In order to fully understand the design of this dissertation, it is perhaps a necessity to clarify that this research on the Somali case will be twofold. The author combined law studies with political sciences studies and consequently will attempt to write a second master dissertation on the Somali case as well. Prof. Dr. Walraet will assist in the set-up of a scientific study on the political system in Somalia, discussing the most successful paths for state building in failed states, including the discussion between the top-down and bottom-up approach. As a law student, the author realised the importance of an efficacious judicial system in this state building process. During research for this dissertation, it was acknowledged that the actual question for harmonisation comprises the dilemma of choosing between the funding of a national unified law system, provided by the Federal Republic of Somalia, or the support for local legal initiatives. Consequently, the research on the strengths and weaknesses of these various legal systems will certainly be integrated in the author's future analysis on the need for either a top-down or bottom-up strategy in the Somali state building.

As for the structure of this dissertation, it will first be attempted to set out a short, but comprehensive outline of the Somali scene while giving an overview of the most important events in Somali history, an elucidation that is indispensable if one wants to fully comprehend the background wherein legal initiatives arose. Special attention will go out to the (legal) description of Somalia as a failed state and to the legal status of Somaliland, a part of Northern Somalia that has proclaimed its independence and seems to have indeed relatively succeeded in establishing functioning central administrations. Furthermore, an overview of the international actions that have been put out concerning the Somali state collapse and the subsequent humanitarian emergency will be provided. Most of this dissertation however will discuss the actual research question; how to create a harmonised, generally accepted and enforceable legal system for the Somali people, rendering them equal protection before the law. Before concluding the various options on such a judicial set-up, an attempt will be made to thoroughly analyse the various legal systems Somali people are living by. Somali rule of law is carried out, not only through the Somali formal administrations, embodied by the Somali, the Somaliland and the Puntland authorities, but also by Somali customary law (*Xeer*) and even Sharia law. Various key questions will be set-up, that are essential in trying to find the most productive or efficient legal system, with the ultimate goal of getting a sight on a way out of the Somali deadlock. However, it is important to acknowledge that the definite outcome of a national functioning legal system, will be defined primarily by the international stakeholders, as will be kept in mind when proposing various outcomes for a harmonised legal system.

2. The Somali Background: A Failed State

The Somali standstill has been dragging on for more than two decades now. In order to fully understand the Somali judicial set-up, it is no unnecessary assignment to briefly sketch the general Somali background in order to provide a historical explanation for the current political and legal Somali situation.

2.1 General Data

2.1.1 The Somali Scene

Somalia is situated in East-Africa, bordering the Gulf of Aden and the Indian Ocean, a strategic location for committing piracy. As the Somali state is situated at the tip of the African continent and close to the Arab world, Somalis do not consider themselves as a typical African population.⁴ The Somali state territory comprises 637 600km², but Somalis inhabit nearly 900 000km² of the Horn of Africa, since a lot of them live in parts of Djibouti, Kenya and Ethiopia, the three countries that border the Somali state.⁵ Due to colonialism and the randomly drawn borderlines, the "Somali nation" got splintered between these different countries.⁶ The Somali capital and at the same time the country's largest city, is Mogadishu. For a clear insight on the Somali geography and the distinction of its various regions, see the maps in the annex of this dissertation. It is estimated that there are some 20 million Somalis, but only about half of them live in the Somali territory.⁷ A study by the UNDP in 2009 has made clear that fourteen per cent of the Somalis have fled their native country since 1991, a phenomenon that is also called the Somali diaspora.⁸ Most of these refugees and migrants live in other East African countries, especially in the three aforementioned neighbouring countries (Ethiopia, Kenya, Djibouti) and also in Yemen. Somalis can also be found in the Gulf states, North America and Europe, more particularly in the UK, the Netherlands and the Scandinavian peninsula.⁹ During the Siyad Barre dictatorship from 1969 until 1991, a large amount of Somalis fled the country, especially professionals, leading to a so called 'brain drain'. This explains, amongst other things, the lack of qualified and educated judges in Somalia, which will be discussed later on in this dissertation. The majority of Somali people is illiterate; rough estimates define that 37.8% of the Somali inhabitants do not know how to read or write.¹⁰ This entails some serious

⁴ HARPER, M., *Getting Somalia Wrong? Faith, War and Hope in a Shattered State*, London, Zed Books, 2012, 14 (Here on after: HARPER, M., *Getting Somalia Wrong?*)

⁵ BRONS, M.H., *Society, Security, Sovereignty and the State in Somalia: From Statelessness to Statelessness?*, Rotterdam, International Books, 2001, 73

⁶ KNAPEN, P., *Somalië: Restore Hope: Een Land Tussen Hoop en Vrees*, Antwerpen, Standaard Uitgeverij, 1993, 8

⁷ <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html#People> (last consulted: 10/08/2013)

⁸ See: HEALY, S. and SHEIKH, H., *Somalia's Missing Million: The Somali Diaspora and its Role in Development*, UNDP, March 2009, 4 (available at: <http://www.so.undp.org/index.php/Download-document/70-Forging-Partnerships-with-the-Somali-Diaspora.html>), last consulted 13/08/2013

⁹ BRONS, M.H., *Society, Security, Sovereignty and the State in Somalia: From statelessness to statelessness?*, Rotterdam, International Books, 2001, 74

¹⁰ <https://www.cia.gov/library/publications/the-world-factbook/fields/2103.html> (last consulted: 10/08/2013)

consequences for the apprehension and implementation of unknown national law, as will be discussed further on in this dissertation.

2.1.2 The Somali Identity: Religion and Genealogy

Somalia consists of only one ethnic group, the Somali. The Somali unity in language, ethnicity, culture and religion is highly unusual for a country on the African continent, where multiple factors of dividedness have caused major internal conflicts.¹¹ Nevertheless, the country is strongly divided into innumerable clans, subclans and practically endless further subdivisions.¹² Somali people feel very connected with their clan identity, as for them, the concept of individuality is as good as non-existent. Knowing your genealogy is a vital matter, even more so in times of conflict, when one's clan identity is often a life saving matter.¹³ It goes as far as the clan being considered the most important social factor among Somalis.¹⁴ Clan affiliation manifests itself in the social, political and economic Somali life.¹⁵ The four main clans in Somalia are the Darood, the Dir, the Hawiye and the Rahanweyn.¹⁶ Other big clans are the Isaaq and the Bantus. Lewis classifies the clan system as follows; the major clan families take position at the top of the hierarchy, next come the clans, followed by sub-clans and sub-sub clans.¹⁷ These sub-sub clans take most political actions and own territorial properties. Next in line, constituting the following political level, is the "primary lineage". The basic judicial level however consists of *diya* groups, subdivisions of the primary lineage. They are the smallest social units and consist of various families that are bound by genealogical or marriage ties. They can however comprise hundreds of families.¹⁸ They form a judicial unit and share a general code, called *Xeer*, the Somali name for their local customary law.¹⁹ When one of the *diya* group members has done substantial harm to another clan, they are obliged to pay a blood price (*diya*) based on the principle of collective responsibility, which will be thoroughly explained in paragraph 3.2.2. of this dissertation.²⁰ This strongly anchored clanism in Somali society helps explain why attempts to create a statewide recognised central government have failed up to now. To avoid any confusion, the term 'clan' will be used further on in this dissertation, to indicate the *diya* paying group and thus the basic judicial and political unit of Somali

¹¹ HARPER, M., *Getting Somalia Wrong?*, 11-12

¹² For the most comprehensive analysis on the Somali clan systems, see the various books written by I.M. Lewis, especially: LEWIS, I.M., *A Pastoral Democracy: A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa*, Oxford, Oxford University Press, 320 p.

¹³ HARPER, M., *Getting Somalia Wrong?*, 11

¹⁴ LEWIS, I.M., *A Pastoral Democracy: A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa*, Oxford, Oxford University Press, 1961, 4

¹⁵ BRONS, M.H., *Society, Security, Sovereignty and the State in Somalia: From Statelessness to Statelessness?*, Rotterdam, International Books, 2001, 98

¹⁶ GUNDEL, J., *The Predicament of the 'Oday': The Role of Traditional Structures in Security, Rights, Law and Development in Somalia*, Danish Refugee Council & Oxfam, November 2006, 5

(available at: http://www.logcluster.org/ops/som/infrastructure-communication-various/Gundel_The%20role%20of%20traditional%20structures.pdf)

(Here on after: GUNDEL, J., *The Predicament of the 'Oday'*)

¹⁷ LEWIS, I.M., *A Pastoral Democracy: A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa*, Oxford, Oxford University Press, 1961, 5 (scheme)

¹⁸ BRADBURY, M., *Becoming Somaliland*, in *African Issues*, London, Progressio, 2008, 16
(Here on after: BRADBURY, M., *Becoming Somaliland*)

¹⁹ SAMATAR, A.I., *The Somali Challenge: From Catastrophe to Renewal?*, 109

²⁰ *Diya* is the more frequently used Arabic term for the payment of a bloodprice, while *mag* is the official Somali word for it.

society. Where the word clan is used in its broader sense, per example in order to indicate the four big clans of Somalia, it will be clearly deducible from the context. Close to the entirety of the Somali people (99%) are Sunni Muslims, from the moderate Shafi'ite Sunni school of thoughts.²¹ Therefore, common religious beliefs are some of the country's most uniting factors.²² Islamic beliefs and laws were adopted gradually, as it is believed that they were never imposed by any foreign actor.²³

2.1.3 The Somali Living Situation

Most Somalis living in Somaliland, the Northern region of Somalia, are predominantly nomadic pastoralists, herding camels, while the Southern part of the country consists mainly of agriculturists who combine agriculture with herding cattle.²⁴ Around half the country's territory consists of pasture.²⁵ Up to sixty or seventy per cent of Somalis is estimated to live nomadic.²⁶ Other common livelihoods are fishing and trade, but the bourgeoisie and public servants in towns and cities, mainly in Mogadishu, are an ever growing minority.²⁷ Before the civil war, Somalia was well known as an exporter of agricultural products and seafood.²⁸ Of course the most internationally well-known Somali career opportunities are in piracy. Pirates highjack international vessels and demand ransoms from their hostages' family, state or even from the company that owns the ship or its cargo. These pirates are above all impoverished Somalis executing the commands of organised factions, that mainly consist of insurgents trying to collect some money.

Since the supreme goal of marriage in Somalia is giving birth to descendants, men are allowed to have a maximum of four wives, a vanishing tradition, as it is nowadays particularly practiced by elder generations.²⁹

2.2 Historical Overview

2.2.1 Colonialism

Before Somalia was colonised, the Somali customary law *Xeer* was the only valuable and effective source of law.³⁰ A remarkable and not insignificant fact is that before contact

²¹ MUKHTAR, M.H., "Islam in Somali History: Fact and Fiction", in Ahmed, A.J. (ed), *The Invention of Somalia*, New Jersey, Red Sea Press, 1995, 1 (1)

²² BRONS, M.H., *Society, Security, Sovereignty and the State in Somalia: From Statelessness to Statelessness?*, Rotterdam, International Books, 2001, 96

²³ VAN NOTTEN, M., *The Law of the Somalis: A Stable Foundation for Economic Development in the Horn of Africa*, Trenton, The Red Sea Press, Inc., 2005, 29

(Here on after: VAN NOTTEN, M., *The Law of the Somalis*)

²⁴ See VAN NOTTEN, M., *The law of the Somalis*, Chapter 3: The Somali Mindset

²⁵ UN HABITAT, *Somaliland, Puntland: The Land Legal Framework: Situation Analysis*, UN Human Settlement Programme, November 2006, 11

(available at: http://www.unhabitat.org/downloads/docs/4417_21585_somaliland.pdf)

²⁶ LEWIS, I., *Understanding Somalia and Somaliland*, London, Hurst & Company, 2008, 3

²⁷ BRONS, M.H., *Society, Security, Sovereignty and the State in Somalia: From Statelessness to Statelessness?*, Rotterdam, International Books, 2001, 89

²⁸ SILVA, M., "Somalia: State Failure, Piracy and the Challenge to International Law", *Virginia Journal of International Law*, Spring 2010, 50:3, 557

²⁹ LEWIS, I., *Understanding Somalia and Somaliland*, London, Hurst & Company, 2008, 11

with Europeans, Somalia was actually a quite prosperous nation. But the construction of the Suez-canal brought with it a growing interest of colonisers in strategically situated Somalia. The division of territory into various colonies was something new and rather odd for the Somalis, who up until then had never been confronted with boundaries nor, a central government and certainly not with the concept of state building.³¹ Eventually the country was colonised and divided into five parts ruled by respectively France, Great-Britain, Italy and Ethiopia³² and like almost anywhere else in Africa at that time, colonial authorities imposed their national legal rules on the Somali people. However, there was a big difference between the British and the Italian ruling. The British ruled indirectly and introduced an additional judicial system, based on British common law and the Indian penal and criminal procedure codes.³³ The Somali customary law was still upheld, including the application of Sharia law for some domestic matters.³⁴ The Italian authorities however settled in Somalia and imposed their own civil and penal code.³⁵

2.2.2 Independence: The Somali State

British Northern Somaliland, presently the Republic of Somaliland, became an independent state on June 26th, 1960.³⁶ Five days later, the trusteeship of the UN over Italian Southern Somaliland ended and both legislatures conglomerated into the Republic of Somalia.³⁷ Somalia thus became an independent state on the first of July 1960.³⁸ However, plenty of Somalis were still living in the three other areas: Djibouti, the Ogaden in Ethiopia and the Northern Frontier District (NFD) in the North-East of Kenya. These Somalis felt and still feel strongly connected with the Republic of Somalia, which has led to various secession wars. The Somali flag shows a white star with five points, resembling the various regions that are considered 'the Greater-Somalia': Somalia, Somaliland, Kenya's NFD, the Ogaden and Djibouti.³⁹ Many Somalis believed these 'Somali-dominated' regions would eventually be incorporated in the newly founded Somali state.⁴⁰

³⁰ LE SAGE, A., *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives*, Centre for Humanitarian Dialogue, July 2005, 17

(available at: http://www.ssrnetwork.net/uploaded_files/4397.pdf)

(Here on after: LE SAGE, A., *Stateless Justice in Somalia*)

³¹ HARPER, M., *Getting Somalia Wrong?*, 50

³² The British empire ruled both the Northwest of Somalia (current Somaliland) and the Northern Kenyan region.

³³ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, April 2002, 2

(available at: <http://www.mbali.info/doc178.htm>), last consulted 13/08/2013

(Here on after: ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*)

³⁴ Sharia law was and still is generally applied in family matters (including marriage, divorce, family relationships), inheritance issues and minor civil conflicts.

³⁵ BATTERA, F. and CAMPO, A., "The Evolution and Integration of Different Legal Systems in the Horn of Africa: The Case of Somaliland", *Global Jurist Topics*, 2001, 1:1, 2

(available at: <http://www.mbali.info/doc113.htm>), last consulted 13/08/2013

³⁶ BRONS, M.H., *Society, Security, Sovereignty and the State in Somalia: From Statelessness to Statelessness?*, Rotterdam, International Books, 2001, 157

³⁷ LEWIS, I., *Understanding Somalia and Somaliland*, London, Hurst & Company, 2008, 33

³⁸ US DEPARTMENT OF STATE, *Background Note: Somalia*, Bureau of African Affairs, 2012, December 27, 1

(available at: <http://www.state.gov/r/pa/ei/bgn/2863.htm>), last consulted 13/08/2013

³⁹ HARPER, M., *Getting Somalia Wrong?*, 31

⁴⁰ HARPER, M., *Getting Somalia Wrong?*, 52

The new Somali government desired to create one judicial system for Somali inhabitants.⁴¹ They had the task of integrating four differently operating legal systems; British common law, Italian (continental) law, Islamic Sharia law and Somali customary *Xeer*.⁴² So in 1962, the Somali National Assembly voted a "Law on the Organisation of the Judiciary", which imposed Italian law as the main legal source in civil, commercial and penal matters, while the Anglo-Indian law was preserved for the criminal procedures. Sharia law would still be applied in family, inheritance and minor civil matters, while *Xeer* remained the accepted legal system for resolving clan disputes. Regardless of this unification at a national level, local authorities often still based their rulings on precedents and kept applying their local legal systems, which led to disputes about the courts' jurisdiction and the applicable laws and procedures. The unification of Somali law was cursed to fail and not only for the fact that the majority of Somalis, especially in the rural areas could not read or write, certainly not the 'elite language' the new rules were draught in.⁴³

2.2.3 The Siyvad Barre Era

In 1969, Siyvad Barre and his Supreme Revolutionary Council (SRC) seized power by means of a military coup.⁴⁴ Under this regime, the country was reigned based on the theories of 'scientific socialism', a communist doxy supported by the Soviet Union. Hesse describes Barre's scientific socialism as "*an ideological mix of Lenin, Marx, the Koran, Mao and Mussolini*".⁴⁵ Barre promoted himself to leader of the Somali nation, in which there was no place for clanism. Tribalism and referring to or asking about a person's lineage therefore became forbidden and nationalism was promoted throughout the country, as proved by the following slogan: "Clanism divides, Socialism unites".⁴⁶ As a result, the country was reformed in 1979 into a single-party state, based on the idea that political parties were only an instrument of clanism.⁴⁷ In addition, almost all institutions were nationalised, replacing the traditional clan elders with central government officials.⁴⁸ The new president reformed the Somali judicial system with the sole purpose of maximising his authority. He assigned all legislative, executive and judicial powers to his SRC and established a new unified civil code, which was based on the Italian law system but was practised in a authoritarian way.⁴⁹ Consequently, a National Security Court (NSC) was erected with the authority to arrest and seize civilians and annul the jurisdiction of all lower-level courts.⁵⁰ As protests against the regime started to arise, Barre tried to reinstitute clanism and explicitly favoured the family members of his own clan, the Darod, in economic and political matters, in an attempt to raise conflict

⁴¹ LE SAGE, A., *Stateless Justice in Somalia*, 18

⁴² ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 2

⁴³ MOHAMED, J., "Kinship and Contract in Somali Politics", *Journal of the International African Institute*, 2007, 77:2, 245

⁴⁴ US DEPARTMENT OF STATE, *Background Note: Somalia*, Bureau of African Affairs, 2012, December 27, 4 (available at: <http://www.state.gov/r/pa/ei/bgn/2863.htm>), last consulted 13/08/2013

⁴⁵ HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, 72

⁴⁶ HARPER, M., *Getting Somalia Wrong?*, 54

⁴⁷ HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, 72

⁴⁸ BRONS, M.H., *Society, Security, Sovereignty and the State in Somalia: From Statelessness to Statelessness?*, Rotterdam, International Books, 2001, 157

⁴⁹ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 3

⁵⁰ LE SAGE, A., *Stateless Justice in Somalia*, 20

between the various clans in order to weaken their unified position.^{51 52} As a result, anti-government protests in urban areas increased, brought forth by the Islam as a unifying force, since there were no effectual political parties or civil society movements to oppose the administration.⁵³

Barre furthermore craved a Pan-Somalia: a Greater-Somalia in which all the lost territories would unite under the Somali flag. Therefore he sent troops to the Ogaden in 1977 to support the Somali freedom fighters in Ethiopia. This resulted in a major defeat, mainly due to the Soviet Union's choice to support Ethiopia over Somalia.⁵⁴ Somalia next was flooded by Ogaden refugees. The following departure of the Soviet Union resulted into military and developmental support by the West, particularly from the United States, which was quite limited in comparison to the former support from the Soviet Union.⁵⁵

Since the dictatorial regime of Barre was cruel, fraudulent and unintelligible, it was no surprise that in the 1980's resistance against the regime and the economic degradation it had brought forth had only grown. By the end of the Eighties, the resistance had merged into one opposing movement consisting of militia factions, and eventually the Barre regime was defeated in 1991.⁵⁶ After Barre's defeat, a political vacuum opened in Mogadishu, leading to a violent battle as the unified resistance fell apart and the various factions tried to gain political overweight.⁵⁷ However, in the Northern part of Somalia, the current Somaliland, the Somali National Movement (SNM) managed quite quickly to restore peace and security to a significant degree. They therefore declared independence from the rest of Somalia in May 1991. In Puntland, the Somali Salvation Democratic Front (SSDF) also created a rather stable regional administration.⁵⁸ In the aftermath of Barre's dictatorship, the Somali people are still very distrusting towards national administrations and national laws, since in their perception these instruments will only be used to satisfy personal interests of government personnel and to oppress the domestic population.

2.2.4 International Engagement: UNOSOM I & II

Because of the political chaos, the famine following Barre's defeat and the ensuing struggle for political supremacy, the international community felt a responsibility to help the Somali civilians. Consequently, the UN Security Council voted resolution 751 in 1992, which deployed a mission called UNOSOM I (United Nations Operation in Somalia I), to provide, facilitate, and secure humanitarian relief in Somalia.⁵⁹ However, the mission did not go as planned. The territory got more and more splintered, and humanitarian aid and food could no longer be delivered to those in need. Every day,

⁵¹ IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, 283

⁵² HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, 72

⁵³ LEWIS, I.M., *A Modern History of the Somali: Revised, Updated and Expanded*, Oxford, James Currey Paper, 2002 [1998], 219

⁵⁴ DE TEMMERMAN, E., *De Hoorn van Waanzin*, Leuven, Davidsfonds, 1992, 140

⁵⁵ LEWIS, I., *Understanding Somalia and Somaliland*, London, Hurst & Company, 2008, 44

⁵⁶ STEVENSON, J., "Jihad and Piracy in Somalia", *Survival: Global Politics and Strategy*, 2010, 52:1, 27

⁵⁷ SAMATAR, A.I., *The Somali Challenge: From Catastrophe to Renewal?*, 120-121

⁵⁸ LE SAGE, A., *Stateless Justice in Somalia*, 22

⁵⁹ UN SECURITY COUNCIL, *Resolution 751*, UN Doc., 1992, April 24, S/RES/751 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/751\(1992\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/751(1992))), last consulted 13/08/2013

hundreds of people were dying from famine, but ships and planes providing humanitarian aid were attacked and troops were being shot at. As a result, the UN Security Council voted resolution 794, which authorised the use of all means necessary to establish a secure environment for humanitarian relief purposes, under chapter VII of the UN Charter.⁶⁰ UNITAF (Unified Task Force) was launched, code named Operation Restore Hope. The resolution also called upon all states to provide military forces and additional contributions. The United States offered a significant amount of troops to the UN, under the condition that they would not be commanded by the UN, which led to UNITAF being de facto US led. UNITAF managed to improve the delivery of food and other humanitarian aid and could be considered a success. Since UNITAF was only a transitional body to improve aid delivery, UNOSOM II took over, as stated in resolution 814.⁶¹ Its main goal was to establish a secure zone throughout Somalia. The operation was a milestone in the history of UN peacekeeping, not only because up to 28000 forces were deployed and the annual cost of the mission was estimated at about one and a half billion dollar, but because of the excessive competences UNOSOM II yielded to itself.⁶² With resolution 865, UNOSOM II was authorised to begin the process of nation building in Somalia, which included the reestablishment of the Somali police, judicial and penal systems and the authority to investigate and assist in the prosecution of serious violations against Somali civilians or international assistance workers.⁶³ UNOSOM II tried to reestablish the legal system that was in force before the Somali independence together with the criminal and penal laws of 1962.⁶⁴ UNOSOM II (re)constituted several regional courts, eight prisons and the Somali police force.⁶⁵ In practice, UNOSOM II not only assisted the Somalis in rebuilding their judicial infrastructure, but actually performed as the judicial and legislative power at that time, establishing government infrastructure and deciding on nomination and payment of the Somali administration employees, which rendered them even more powerful than the pre-civil-war government.⁶⁶ Le Sage points out two main reasons why UNOSOM failed in its design, both of them resulting from the above mentioned characteristics of its state building efforts.⁶⁷ First, judges and police officers were selected without consult of local militia-faction leaders and civilian authorities. Second, the 1962 laws were re-implemented top-down, ignoring local rule of law initiatives, resulting in a lack of enforcement capacity and the rise of local political tension due to the new law system. Therefore it is no wonder that the foreign involvement became more and more contested by insurgent groups, especially after US troops erroneously assailed a peaceful gathering of clan elders and killed 73 civilians.⁶⁸ The protests eventually escalated in 1993 with the Battle

⁶⁰ UN SECURITY COUNCIL, *Resolution 794*, UN Doc., 1992, December 3, S/RES/794 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/794\(1992\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/794(1992))), last consulted 13/08/2013

⁶¹ UN SECURITY COUNCIL, *Resolution 814*, UN Doc., 1993, March 26, S/RES/814 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/814\(1993\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/814(1993))), last consulted: 13/08/2013

⁶² OSINBAJO, Y., "Legality in a Collapsed State: The Somali Experience", *International and Comparative Law Quarterly*, 1996, 45:4, 911

⁶³ UN SECURITY COUNCIL, *Resolution 865*, UN Doc., 1993, September 22, S/RES/865 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/865\(1993\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/865(1993))), last consulted: 13/08/2013

⁶⁴ LE SAGE, A., *Stateless Justice in Somalia*, 22

⁶⁵ OSINBAJO, Y., "Legality in a Collapsed State: The Somali Experience", *International and Comparative Law Quarterly*, 1996, 45:4, 911

⁶⁶ For more information about the extent of UNOSOM's intervention and the legality of their state building efforts, see: OSINBAJO, Y., "Legality in a Collapsed State: The Somali Experience", *International and Comparative Law Quarterly*, 1996, 45:4, p. 910-923

⁶⁷ LE SAGE, A., *Stateless Justice in Somalia*, 23

of Mogadishu, in which the corpses of 18 US soldiers, killed by a Somali mob, were dragged throughout the streets of Mogadishu. After this debacle, more commonly known as "Black Hawk Down", the US withdrew all of its troops from Somalia. The UN continued UNOSOM II and with resolution 897 they also set-up protection of the ports, airports and essential infrastructures and provided assistance to achieve disarmament and to make sure the ceasefire was respected.⁶⁹ However, the Somali situation became more and more hopeless. Because numerous insurgent groups were originating, protecting civilians slowly became impossible and with regard to the UN personnel's safety, they decided to end the UNOSOM II mission on March 31st, 1995 with resolution 954.⁷⁰ The resolution also authorised UNOSOM II military forces to take all actions necessary to protect the mission and its withdrawal.

The African Union next deployed a mission, called AMISOM (African Union Mission in Somalia), which will be discussed further on in paragraph 2.5.1.

2.2.5 Renewed Hope for a Somali Government?

Although opinions on the exact number seem to differ, all Somali observers agree that since 1991, there have been more than a dozen attempts to (re)construct a central government. Most transitional governments were only 'virtual' administrations, that controlled almost none of the Somali territory.⁷¹ In August 2000, Abdiqasim Salad Hassam was elected president of the Transitional National Government (TNG).⁷² The TNG never managed to gain significant control over the Somali territory. In 2004, a Transitional Federal Charter was adopted and the Transitional Federal Government (TFG) was established with support of the international community.⁷³ Colonel Abdullahi Yusuf and Ali Mohamaed Geedi were elected as the respective president and prime minister of the TFG.⁷⁴ They never came anywhere near to establishing a comprehensive framework for a transition, as the TFG was malfunctioning due to corruption and personal rivalries between the governmental executives.⁷⁵ The government consequently did not succeed at regaining power over the whole Somali territory. In addition, the TFG was challenged by the ICU (the Islamic Courts Union), a group of Sharia courts.⁷⁶ The US experienced the ICU as a major threat and therefore found an ally in Ethiopia, that, backed by the United States, sent troops to Somalia in 2006 to support the TFG in its fight against the ICU.⁷⁷ ⁷⁸ Because of the invasion, the ICU

⁶⁸ BRUTON, B.E., "In the Quicksands of Somalia: Where Doing Less Helps More", *Foreign Affairs*, November/December 2009, 83 (available at:

<http://www.somalilandtimes.net/sl/2009/408/IntheQuicksandsOfSomalia.pdf>)

⁶⁹ UN SECURITY COUNCIL, Resolution 897, *UN Doc.*, 1994, February 4, S/RES/897 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/897\(1994\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/897(1994)), last consulted 13/08/2013

⁷⁰ UN SECURITY COUNCIL, *Resolution 954*, UN Doc., 1994, November 4, S/RES/954 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/954\(1994\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/954(1994))), last consulted 13/08/2013

⁷¹ HARPER, M., *Getting Somalia Wrong?*, 65

⁷² IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, 284

⁷³ http://unpos.unmissions.org/LinkClick.aspx?fileticket=jY_dosGykQY%3d&tabid=9737&language=en-US, last consulted 13/08/2013 (UNPOS, *Timeline of the Somali Constitutional Process: 2004-2012*)

⁷⁴ LE SAGE, A., *Stateless Justice in Somalia*, 13

⁷⁵ HAMMOND, L., "Somalia Rising; Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 184

⁷⁶ The ICU is also known as Union of Islamic Courts (UIC), Joint Islamic Courts and Supreme Council of Islamic Courts (SCIC)

⁷⁷ BRADBURY, M., *Becoming Somaliland*, 3

splintered, but it also gave rise to two fundamentalist Islamist movements, Al Shabaab and Hizbul Islam. Ethiopia eventually withdrew its last forces from Mogadishu on January 15th, 2009.⁷⁹ In 2008, the Djibouti Peace Agreement was constructed, which was supposed to lead to the revival of the TFG.⁸⁰ Also in January 2008, the moderate wing of the former Islamic Courts Union was included in the TFG and consequently the Transitional Federal Parliament swore in 275 new members.⁸¹ In January 2009, Sheikh Sharif, the former Chairman of the ICU, even was elected as the new TFG president. In September 2011, a "Roadmap to End the Transition" was adopted, but it could not help prevent the failure of several attempts to end the Somali transition period.⁸²

2.2.6 Al Shabaab and Other Insurgent Groups

Al Shabaab has grown from a small group of insurgents into a national movement, despite the fact that their organisation is internally divided. Together with the more nationalist Hizbul Islam, they originated from the Islamist remnants of the former ICU. Due to the withdrawal of Ethiopian forces in early 2009, Islamic insurgents seized anew more power and continually attacked the Somali government. It is proven that the Eritrean government has been delivering financial support and weapons to the Somali opposition groups.⁸³ Consequently, former President Sharif declared a state of emergency and called upon the neighboring countries (Kenya, Ethiopia, Djibouti and Yemen) to deploy troops to Somalia in order to combat the insurgent groups.⁸⁴ In 2010, Al Shabaab officially confirmed that they had joined Al Qaeda's "international *Jihad*".⁸⁵ In July of that year, seventy-four people were killed in Kampala by two suicide bombers of the Al Shabaab movement.⁸⁶ However, it is still unclear if these ties are organisational and practised on by Al Qaeda. In October 2011, Kenya invaded the Southern part of Somalia, backed by American drones, in order to stop the radical Islamist movements and since kept control in the Somali bordering areas.⁸⁷ In August 2011, Al Shabaab was finally forced out of the Somali capital and most of the urban areas.⁸⁸ Nevertheless, in 2012, attacks from Al Shabaab still frequently occurred in Mogadishu, as in other parts of the country.⁸⁹ More on Al Shabaab will be discussed in paragraph 3.3.3 of this dissertation.

⁷⁸ Ethiopia had its own reasons to drive out the ICU, since the courts were considered to be allied with Eritrea, with whom Ethiopia recently fought a war.

⁷⁹ (<http://unpos.unmissions.org/Default.aspx?tabid=9708&language=en-US>), last consulted 13/08/2013 (UNPOS, *Chronology of Events in the Somali Peace Process*)

(Here on after: UNPOS, *Chronology of Events*, (date of the particular event))

⁸⁰ The Djibouti Agreement was an eleven point peace deal with the intent to eventually end all armed confrontation on Somali territory.

⁸¹ http://unpos.unmissions.org/LinkClick.aspx?fileticket=jY_dosGykQY%3d&tabid=9737&language=en-US), last consulted 13/08/2013 (UNPOS, *Timeline of the Somali Constitutional Process: 2004-2012*)

⁸² <http://unpos.unmissions.org/Portals/UNPOS/Repository%20UNPOS/110906%20-%20Initialised%20Roadmap.pdf>) (UNPOS, *Somalia End of Transition Roadmap*)

⁸³ UNPOS, *Chronology of Events*, 2009, May 27

⁸⁴ UNPOS, *Chronology of Events*, 2009, June 20

⁸⁵ <http://news.bbc.co.uk/2/hi/8491329.stm>, last consulted 13/08/2013

⁸⁶ HARPER, M., *Getting Somalia Wrong?*, 66

⁸⁷ HARPER, M., *Getting Somalia Wrong?*, 5

⁸⁸ <http://unpos.unmissions.org/Default.aspx?ctl=Details&tabid=9705&mid=12667&ItemID=19547> (UNPOS, *Year End Letter From SRSR Mahiga*, 2012, December 13)

(Here on after: UNPOS, *Year End Letter*)

2.2.7 Current Somali Situation

Somalia finally seems to be slowly recovering from its catastrophic state of political affairs. Hope and progress have returned to the country and every day, new hotels and restaurants are opening in the Somali capital.⁹⁰ The Somali security has been remarkably improved, due to efforts of AMISOM and the Somali National Forces (SNF), with the financial and logistic support of the UN, but only in a limited part of the Somali territory. The Somalis now have a democratically elected President, Council of Ministers and Parliament. As for Somali politics, some major changes have occurred this year, which will be described and analysed in paragraph 3.1.1 of this dissertation.

As for the humanitarian situation, the UN believes that 3.8 million Somalis are still in need of assistance, of which 2.1 million need life-saving aid, while the other 1.7 million could easily backslide into crisis if livelihood support were no longer sustained.⁹¹

Reports have shown that the food security situation has improved, although acute malnutrition rates are exceeding 20 per cent in certain Somali regions.⁹² In 2011, famine afflicted Somalia, due to perennial drought, which caused a large scale displacement and flight of Somali people, primarily into Kenyan territory where they established refugee camps. However, Kenya's goodwill towards these Somali refugees has significantly dropped, which strengthens the need to urgently build out a local judicial set-up for the regulation of scarcity of livelihood and property rights, in order to provide a secure environment for the Somalis to come home to.⁹³

Somalia still urgently needs the support of the international community in order to establish a framework for improving security in certain areas. The UNSG has also pointed out the need for sustainable support to the development and the reform of the Somali security and justice sector in order to create long-term stability and consequently an exit strategy for AMISOM.⁹⁴

2.3 Somalia: A Failed State

Ever since Siyvad Barre's dictatorial regime was overthrown in 1991 and Somalia was declared to be in a state of civil war, the country has been considered a failed state by the international community. Whenever the concept of a failed state is being discussed, Somalia is automatically brought up as the ultimate example. Even though the country now has a newly elected president, parliament and constitution, it still checks all of the criteria to be considered a failed state according to the Failed State Index, developed by the US non-profit organisation Fund For Peace (FFP). Somalia has been at the top of the Failed States Index since 2008 and unfortunately has also taken this year's top spot, despite its slightly ameliorated score in comparison with last year.⁹⁵ After defining the concept of a failed state, the various factors that have qualified Somalia as a failed state,

⁸⁹ UN SECURITY COUNCIL, *Report of the Secretary-General on Somalia*, UN Doc., 2013, January 31, S/2013/69, 3 (available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2013/69), last consulted 13/08/2013

(Here on after: UNSC, *Report of the SG*)

⁹⁰ UNPOS, *Year End Letter*

⁹¹ UN SECURITY COUNCIL, *Report of the SG*, 9

⁹² UN SECURITY COUNCIL, *Report of the SG*, 9

⁹³ HAMMOND, L., "Somalia Rising; Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 190

⁹⁴ UN SECURITY COUNCIL, *Report of the SG*, 18

⁹⁵ <http://ffp.statesindex.org/rankings-2013-sortable>, last consulted at 13/08/2013

based on the Failed State Index, will briefly be discussed, in order to give a quick introduction on the Somali state's significant social, political and economical shortcomings in protecting its citizens. All these components of state failure will also be thoroughly discussed throughout this dissertation.

2.3.1 Defining Failed States

The concept of the "failed state" covers a very broad range, since it implies not only legal, but also political, economic and social characteristics and deficiencies of the state. Consequently, there is no widely accepted, uniform definition that describes the basic features needed to be qualified as a failed state.⁹⁶

In the early 1990's, shortly after the fall of the Berlin Wall, the US and USSR abruptly ceased their financial support to various developing nations, causing a collapse of governmental administrations in several countries like Haiti, Cambodia, Rwanda and Somalia.⁹⁷ Consequently, in order to provide an adequate definition of the growing amount of states that were facing previously unseen governance problems, the concept of a "failed state" emerged.⁹⁸ Herman and Ratner were the first commentators to use the term, as they expressed their concerns about "*a disturbing new phenomenon*", because of which a state was becoming "*utterly incapable of sustaining itself as a member of the international community*".⁹⁹ Due to its accuracy, the term was quickly endorsed by UN representatives and the American media, and is up until now considered the ultimate reference to collapsed states.¹⁰⁰ Failed states often seem to be linked to internal armed conflicts and not so much to inter-state wars.¹⁰¹

Several definitions have already been assigned to the intricate concept, most of them referring to the broader political and social consequences a failed state entails.

2.3.2 Legal Consequences of State Failure

Although there is no generally agreed on legal definition for the concept of a failed state, all authors seem to agree that the term implies that the state apparatus can no longer fulfill its basic functions and the country has thus lost its capacities to exercise any national or international influence.¹⁰² Thürer has also pointed out that a failed state is

⁹⁶ Apart from failed state, terms like "collapsed state" and "disintegrated state" are also often applied. However, only "collapsed state" describes the actual collapse and absence of governmental institutions, but in practice, all of these terms have been used to indicate state collapse and its consequences. Since "failed state" is the most common used term, it will be used in this dissertation to indicate the Somali state collapse.

⁹⁷ RENDERS, M., *Consider Somaliland: State Building with Traditional Leaders and Institutions*, Leiden, Koninklijke Brill, 2012, p. 7

⁹⁸ KOSKENMAKI, R., "Legal Implications Resulting from State Failure in Light of the Case of Somalia", *Nordic Journal of International Law*, 2004, 73, 1

⁹⁹ HELMAN, G.B. and RATNER, S.R., "Saving Failed States", *Foreign Policy*, Winter 1992-1993, 89, 3

¹⁰⁰ KOSKENMAKI, R., "Legal Implications Resulting from State Failure in Light of the Case of Somalia", *Nordic Journal of International Law*, 2004, 73, 2 (footnote 2)

¹⁰¹ ZUIN, M., "A Model of Transitional Justice for Somalia", *Praxis: The Fletcher Journal of Human Security*, 2008, 23:2, 93

¹⁰² COJANU, V. and POPESCU, A.I., "Analysis of Failed States: Some Problems of Definition and Measurement", *The Romanian Economic Journal*, November 2007, 10:25bis, 115

characterised by "the fact that there is no body which can commit the state in an effective and legally binding way, for example, by concluding an agreement".¹⁰³

Somalia as an example of a failed state, has proven to the international legal community the disconcerting hiatus in legal protection for subjects of states that do not have a working government and effective control over their territory. It seems that the status of failed state indeed entails some broad legal implications, as the state can no longer interact with the international community and therefore fails to enforce any international rights or duties, which obviously affects its nationals. When a state has become utterly incapable of effectuating its obligations, the question arises if the international community is still obliged to respect the basic principle of state sovereignty, wherein each state is the only one to decide on its internal affairs, without any interference.¹⁰⁴ It seems that in those instances, a deliberate trade off has to be made between respecting state sovereignty and the principle of non interference in internal state affairs on the one hand, and the right of people for self-determination on the other hand, both fundamental principles of international law.¹⁰⁵ Another fundamental question in international law concerning failed states, comprises the dilemma whether the concerned state can still be considered a state with all its legal obligations and duties or if it has simply stopped functioning as a legal entity.¹⁰⁶ Several presumptions are embedded in international law to protect the state from losing its statehood, like the practice of not questioning the state's legal identity, simply because the state governments have temporarily lost their effectiveness and continued authority over an important part of the state's territory.¹⁰⁷ If the country however lacks an effective government for a significant amount of time, there is no clear answer on how to address this problem.¹⁰⁸ It is a certainty that an entity can only be considered a state when it fulfills the criteria defined in the 1933 Montevideo Convention on the Rights and Duties of States, which will be discussed further on in this dissertation, when dealing with the qualifications for independence in the case of Somaliland.¹⁰⁹ Since Somalia now has renewed formal administrations, including a government and an elected president, which are not only internationally recognised and considered justified to represent Somalia in international affairs, but are also exercising influence over a growing territory, it can be argued that Somalia can no longer be considered a failed state, at least not in the legal sense of the failed state concept. However, since there is no clear definition of a failed state in international law, nowadays the legal status of Somalia is contested. The Somali legal status does entail several consequences in regard to the accountability of the state before international law, as it for instance defines if the Somali state could be held liable for not complying with human rights standards.

¹⁰³ THURER, D., "The "Failed State" and International Law", *International Review of the Red Cross*, December 1999, 81:836, 732

¹⁰⁴ SILVA, M., "Somalia: State Failure, Piracy and the Challenge to International Law", *Virginia Journal of International Law*, Spring 2010, 50:3, 554

¹⁰⁵ THURER, D., "The Failed State and International Law", *International Review of the Red Cross*, December 1999, 81:836, 734

¹⁰⁶ KOSKENMAKI, R., "Legal Implications Resulting from State Failure in Light of the Case of Somalia", *Nordic Journal of International Law*, 2004, 73, 6

¹⁰⁷ THURER, D., "The "Failed State" and International Law", *International Review of the Red Cross*, December 1999, 81:836, 733

¹⁰⁸ KOSKENMAKI, R., "Legal Implications Resulting from State Failure in Light of the Case of Somalia", *Nordic Journal of International Law*, 2004, 73, 6

¹⁰⁹ See further on, paragraph 2.4 of this dissertation

We can conclude that there certainly is an urgent need for a legal definition and a clarified approach to address the concept of failed states and its legal consequences in international law, especially since there also are other states besides Somalia, facing similar challenges.

2.3.3 The Failed State Index and its Qualifications

The Failed State Index, drafted by Fund For Peace and annually published in the journal *Foreign Policy*, is considered one of the most comprehensive studies on judging if states qualify as failed. However, the index is contested, because of its inherent presumption that the Western state provides the ideal government model and its usage of non-statistic, interpretable determinants, that are highly subjective. Still, given the lack of a valuable alternative, the author will use the Failed State Index indicators as a basis to discuss the Somali collapse and its various ongoing consequences. The Failed State Index distinguishes twelve indicators for state failure, that will each be shortly discussed in order to provide a better understanding of the various problems Somalia is facing and that should urgently be dealt with. These twelve indicators were divided into three separate groups, namely social, economic and political and military indicators.¹¹⁰ To put the outcome of the bad Somali score on the Failed State Index in perspective, it should be kept in mind that the Somali country has always been the victim of disintegrating forces and it would be wrong to think of Somalia as a state that once was a stable democratic state, according to the Western model of statehood.¹¹¹ Consequently, the country will never be able to score as high as various Western states, even if its living conditions and national security were to ameliorate.

Demographic Mounting Pressures

The Somali state has not been able to deal with the demographic pressures that have challenged its citizens, including food scarcity and malnutrition, water scarcity and consequently mortality.¹¹² Somalia has begun its recovery after a severe famine struck the country between late 2010 and early 2012. Meanwhile, the country has seen its malnutrition rates decreased by half, setting the current percentage of malnutrition at a still hallucinatory 14.33 per cent.¹¹³ The famine in Somalia was as a direct result of the persistent drought and the lack of easily accessible water resources, which indicates the urgent need for human and financial sources to set up water supply infrastructures.¹¹⁴ The water and food scarcity, helped by disease and natural disasters, has set the Somali mortality rate estimations for 2013 at 14.22 deaths per 1000 civilians.¹¹⁵

Mass Movement of Refugees and Internally Displaced Persons (IDP)

As pointed out above, fourteen per cent of Somali civilians has fled the country since the beginning of the civil war, a phenomenon also described as the "Somali diaspora". A May 2013 estimate by the UNHCR (United Nations High Commissioner for Refugees) pins IDP's in Somalia at 1.1 million and Somali refugees at over 1 million, most of them

¹¹⁰ See: <http://ffp.statesindex.org/rankings-2013-sortable>, last consulted 05/08/2013

¹¹¹ HARPER, M., *Getting Somalia Wrong?*, 4

¹¹² <http://ffp.statesindex.org/indicators>, last consulted 05/08/2013

¹¹³ WORLD FOOD PROGRAMME, <http://www.wfp.org/countries/somalia/overview>, last consulted 05/08/2013

¹¹⁴ <http://www.faoswalim.org/>, last consulted 05/08/2013

¹¹⁵ <https://www.cia.gov/library/publications/the-world-factbook/fields/2066.html>, last consulted 13/08/2013

harbored in Kenya, Yemen, Egypt, Ethiopia, Eritrea, Djibouti, Tanzania and Uganda.¹¹⁶ These hallucinatory numbers have delivered Somalia a 10 in this category, the highest possible score granted by the FFP.¹¹⁷ The refugee camps, mostly in neighbouring countries, suffer from a lack of access to healthy water and from substandard hygienic circumstances, resulting in the accrual of deadly diseases such as tuberculosis, cholera and currently polio.¹¹⁸

Grievance Groups Seeking Revenge

Somalia is currently challenged with severe forms of violence because of the divided political scene. Several factions and militias have used violent tactics to secure their local power and are following the example of military dictator Barre in fueling clan animosities in order to weaken their unified strength. The best known violent movement is of course Al Shabaab, that has been imposing strict policies, comprising harsh punishments for civilians who do not abide by their severe religious rules.

Chronic and Sustained Human Flight and Brain Drain

As pointed out above, Somalia has suffered a significant brain drain at the beginning of the civil war, leaving a vacuum in its human capital. It is obvious that the country's lack of intellectual elites and their accompanying resources, has been a subsidiary reason for the country's standstill. Educated Somali's are increasingly supporting the Somali country, often from abroad, by setting up rule of law or humanitarian projects, as will be pointed out later on in this dissertation.

Uneven Economic Development

Out of the twelve indicators for state failure, Somalia scores the lowest and thus the best in this category. However, it still attains a relatively high score indicating a huge gap between the income share of the highest 10 per cent and that of the lowest 10 per cent of the Somali working population.¹¹⁹

Poverty and Severe Economic Decline

There is no need to point out that the Somali people have suffered from poverty ever since the beginning of the civil war in 1991, as the various conflicts impeded economic initiatives and there was no state infrastructure or law enforcement that could protect or enforce economic engagements. The rise of piracy comprises only one of the perverse consequences of the widespread Somali impoverishment. Nevertheless the significant lack of state support, the Somali economy has been able to flourish in some sectors, especially the telecommunications and money transfer business, which explains the slightly improved Somali scores for this category.¹²⁰

State Legitimacy

State legitimacy comprises the amount of democratic representation provided by legitimate state administrations, the degree of political corruption and the extent of

¹¹⁶ UNHCR, *Somalia Fact Sheet*, May 16, 2013 (available at: <http://data.unhcr.org/horn-of-africa/regional.php>), last consulted 05/08/2013

¹¹⁷ <http://ffp.statesindex.org/rankings-2013-sortable>, last consulted 05/08

¹¹⁸ <http://www.unhcr.org/51a862296.html> (UNHCR, *Press Release*, 2013, May 31)

¹¹⁹ <http://ffp.statesindex.org/rankings-2013-sortable>, last consulted 05/08

¹²⁰ See further on in this dissertation, paragraph 4.1.1

political participation by the Somali people.¹²¹ Somali state legitimacy had already begun to decrease in the last years of Barre's reign due to his corrupt policies, but as the state's administrations ceased to exist after his defeat and no legitimate political clusters succeeded in filling this gap, state legitimacy sank to an unseen low. Somalia's score on this category slightly improved compared to last year, which is certainly related to the latest political happenings, as the election of a president and related governmental institutions could be seen as a first step in the right direction.

Deterioration of Public Services

The Somali state has not been able to provide any public services since the civil war broke out, which has been reflected by its high score in this category. Public services comprise amongst other things the provision of education, healthy water and sanitation, healthcare and safe roads.¹²² The state has not been able to provide any of these services on a widespread basis. In various regions, local powers have gained control over these public services, but since they are not bound by any control mechanisms, they often fail to ensure basic needs.

Rule of Law and Human Rights Violations

Somalia received the worst score possible for this category, proving once again the urgent need for an enforceable, generally agreed on legal system that incorporates and protects human rights. Since the various deficiencies of the law systems in Somalia and the need for harmonisation are discussed throughout this dissertation, they will not be described here. As for the various human rights violations, these will be discussed further on, in paragraph 4.1.4 of this dissertation.

Security Apparatus

In an ideal situation, the security apparatus of a state should have the monopoly on the legitimate use of force. Somalia officially had a standing police force, that was supported by foreign investors to fight the insurgencies, until the Somali state collapse in 1991, when it ceased its operations. As for today, police forces have been reestablished with international support¹²³, but they are still highly ineffective, not only due to the various militia factions and warlords that have been able to gain local monopolies on the use of force, but also because of their lack of legitimacy, as people living by the *Xeer* code are not familiar with the concept of a standing police force. Troops of AMISOM are currently training and advising the Somali Police Force, with the ultimate purpose of establishing an autonomous unit for the future.¹²⁴

Factionalised Elites

Somalia, yet again, received the highest score possible for this category, which is no surprise, given the divided Somali political scene. Islamist organisations as well as militia factions, warlords and clans have each been trying to seize power, hindering the national leaders in enforcing their reign. Obviously, clashes between these factions are often very violent, causing casualties and internal displacement.

¹²¹ <http://ffp.statesindex.org/indicators>, last consulted 05/08/2013

¹²² <http://ffp.statesindex.org/indicators>, last consulted 05/08/2013

¹²³ <http://www.so.undp.org/index.php/1Law-Enforcement.html>, last consulted 14/08/2013

¹²⁴ <http://amisom-au.org/mission-profile/amisom-police/>, last consulted 14/08/2013

Intervention of External Actors

As statistics show, external intervention is expected to slightly decrease since Somalia now has an elected national government and a president, replacing the TFG administration, which mainly consisted of imposed foreign leaders. Although this is considered a hopeful process, foreign actors are still substantially influencing the Somali politics and future, as Somalia is depending on international resources for its social, economic and political reconstruction. Given the various international interests in the country's political and social development, as described in paragraph 4.3 of this dissertation, international actors will likely continue to determine most of the Somali future.

2.4 Somaliland: Qualifications for Independence

After years of conflict, insecurity and famine, the Republic of Somaliland declared its independence on the 18th of May 1991, by dissolving the Union they once constituted with the former Italian Somaliland in 1960.¹²⁵ The Union that established the Republic of Somalia, was based on the idea that Somalis from the two territories were one people, as they spoke the same language and shared the same religious beliefs and a majority of cultural traditions.¹²⁶ However, the Somaliland people questioned the union from the beginning, as 60 per cent of them voted against a provisional constitution in 1961, as a symbol for their claim of independence, followed by a failed military coup, that promoted the secession from Southern Somalia as one of its main purposes.¹²⁷ Consequently, it should not come as a surprise that Somaliland eventually declared itself an independent state, especially since all of the turmoil that Southern Somalia has had to deal with ever since their independence. Nowadays, the self declared independent state not only has an elected parliament and government but also instituted Hargeisa as its capital and has established its own currency and national anthem, a standing army and a police force. The Somaliland population reaffirmed its desire for independence in a referendum that took place in 2001, with 97 per cent of voters approving the Somaliland constitution, ten years after Somaliland declared its independence.¹²⁸ Although Somaliland recently celebrated its 22nd year of independence, it is still to earn any international recognition, since the Federal Republic of Somalia does not recognise the Somaliland secession. The international community does not seem ready to abandon its principle of inviolability of state borders, as they fear doing so would open a "*pandora's box of secessionist claims*" throughout the African continent. This refusal of international recognition explains why there has been little developmental assistance for the country, as bilateral aid presumes the existence of two internationally recognised states. Somaliland states that it has simply reclaimed its borders of 1960, before it merged with Italian Somaliland, after it had been an independent state for five days. Somaliland thus bases its legal claim for statehood on the revocation of that voluntary merger. Furthermore, the Somaliland government has also claimed that the merger of these two respective independent territories into one Somali union in 1960 cannot be considered

¹²⁵ BRADBURY, M., *Becoming Somaliland*, 1

¹²⁶ SHINN, D.H., *Somaliland: The Little Country that Could*, CSIS: Africa Notes, November 2002, nr.9,1 (available at: http://csis.org/files/media/csis/pubs/anotes_0211.pdf)

¹²⁷ SHINN, D.H., *Somaliland: The Little Country that Could*, CSIS: Africa Notes, November 2002, nr.9, 1-2 (available at: http://csis.org/files/media/csis/pubs/anotes_0211.pdf)

¹²⁸ <http://www.unpo.org/members/7916>, last consulted 14/08/2013

legally binding as an international treaty, as it did not meet the standards defined in the Vienna Convention on the Law of Treaties.¹²⁹

2.4.1 State Criteria

The 1993 Montevideo Convention on the Rights and Duties of States determines four criteria that should be fulfilled by an entity in order to be qualified as a state before international law: *a permanent population, a defined territory, a government and the capacity to enter into relations with other states*.¹³⁰ Each of these qualifications will be discussed for the case of Somaliland, in order to deduce if Somaliland could be considered an independent state, based on this convention.

Permanent Population

Somaliland has a permanent population of approximately 3.5 million, with an average annual growth rate of 3,1 per cent.¹³¹ Part of the Somaliland inhabitants are nomadic pastoralists, who occasionally cross the border, but that does not prevent Somaliland from having a stable, permanent population.¹³²

Defined Territory

Somaliland claims the borders of the former British protectorate Somaliland, spanning an area of 137 600 km². In the West, this territory borders the Republic of Djibouti, in the South the Federal Republic of Ethiopia, in the North the Gulf of Aden and in the East, the Somali Federal Republic.¹³³ Somaliland has some ongoing border disputes with Puntland concerning the Sool, Sanaag and Cayn regions, which are situated within the borders of former British Somaliland. It seems however that the inhabitants of these three regions sympathise more with the Puntland region, because of their clan ties with the Puntland population, which resulted in Puntland claiming the regions.¹³⁴ However, it is believed that this border dispute does not assail the requirement for a defined territory.¹³⁵

Government

As will be thoroughly discussed further on in this dissertation, it cannot be contested that Somaliland has an effective government, established by the Somaliland constitution.¹³⁶ As was mentioned before, Somaliland also has its own flag, a national

¹²⁹ THE INTERNATIONAL CRISIS GROUP, *Somaliland: Time for African Union Leadership*, Africa Report n. 110, 2006, May 23, 4 (footnote 13) (available at: <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somalia/Somaliland%20Time%20for%20African%20Union%20Leadership.pdf>)

¹³⁰ The Montevideo Convention on the Rights and Duties of States, Montevideo, 1933, December 26, art. 1 (available at: http://avalon.law.yale.edu/20th_century/intam03.asp), last consulted 07/08/2013

¹³¹ <http://www.unpo.org/members/7916>, last consulted 14/08/2013

¹³² THE INTERNATIONAL CRISIS GROUP, *Somaliland: Time for African Union Leadership*, Africa Report n. 110, 2006, May 23, 11 (available at: <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somalia/Somaliland%20Time%20for%20African%20Union%20Leadership.pdf>)

¹³³ See map (1) included in Annex

¹³⁴ SHINN, D.H., *Somaliland: The Little Country that Could*, CSIS: Africa Notes, November 2002, nr.9, 3 (available at: http://csis.org/files/media/csis/pubs/anotes_0211.pdf)

¹³⁵ THE INTERNATIONAL CRISIS GROUP, *Somaliland: Time for African Union Leadership*, Africa Report n. 110, 2006, May 23, 11 (available at: <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somalia/Somaliland%20Time%20for%20African%20Union%20Leadership.pdf>)

¹³⁶ See further on in this dissertation, paragraph 3.1.2., *The Somaliland Constitution*

anthem, a currency and a standing police force and army, which can be considered the exterior signs of a legitimate government.

The Capacity to Enter into Relations with Other States

The last qualification in the Montevideo Convention is somewhat contested in the case of Somaliland, as the country has not yet established formal diplomatic relationships of any kind, but it can be argued that it has the capacity to do so.¹³⁷ Eggers states that Somaliland not only has an effective government, that is not challenged by internal turmoil and thus has the actual capacity to involve in international relations, but also that the Somaliland authorities have carried out "*state-like behavior*", when making agreements with other states and visiting other countries to defend their case for independence.¹³⁸

Somaliland thus quite easily meets the Montevideo convention criteria. Fulfilling the qualifications pointed out in the Montevideo Convention however, often does not suffice for a state to be internationally recognised. If a state for instance tries to claim its independence in a violent manner, the international community can deny its claim for statehood, as is the case for Northern Cyprus. However, so far this has not been the situation in Somaliland.

2.4.2 International Disavowal

As pointed out below, the Borama conference, which established Somaliland's basic political infrastructure, was almost entirely funded by financial resources provided by its participants.¹³⁹ The UN also made no efforts to support Somaliland's relatively successful demilitarisation programme, while it did provide unconditional support to the failing demilitarisation campaigns in South-Central Somalia.¹⁴⁰ Somaliland has already called upon the UN several times to acknowledge their claim for independence, without receiving a positive answer so far.¹⁴¹

Nevertheless Somaliland meets all the criteria to qualify as a state according to the Montevideo Convention, the international community takes several other, merely political, factors into account when deciding on recognising statehood. One of the main principles in international law is the territorial jurisdiction of a state, including the prohibition for other states to interfere in the state's internal affairs. Recognising Somaliland, still part of the internationally recognised state Somalia, would therefore be a risky endeavour. The fact that Somaliland is situated in Africa and its recognition could provoke, given the divisive nature of the African continent, a whole series of independence claims resulting in violent territorial conflicts throughout the region, has been a major holdback for international recognition. Nevertheless, several authors have pointed out that this argument should be neglected, since Somaliland has clearly proven to be a unique case on the African continent, as the "country" has managed to establish a

¹³⁷ EGGERS, A.K., "When is a State a State? The Case for Recognition of Somaliland", *Boston College International and Comparative Law Review*, 2007, December 1, 30:211, 219

¹³⁸ EGGERS, A.K., "When is a State a State? The Case for Recognition of Somaliland", *Boston College International and Comparative Law Review*, 2007, December 1, 30:211, 219

¹³⁹ See further on in this dissertation, paragraph 3.1.2., *The Somaliland Constitution*

¹⁴⁰ LEWIS, I., *Understanding Somalia and Somaliland*, London, Hurst & Company, 2008, 94

¹⁴¹ DOORNBOS, M., "Somalia: Alternative Scenarios for Political Reconstruction", *African Affairs*, 2002, 101, 96

relative democracy that provides security throughout its territory and has already claimed its independence for over 22 years now.¹⁴²

2.4.3 De Facto Recognition?

The lack of state recognition by other states, does not hamper state qualification in the case of Somaliland, as the Montevideo Convention on Rights and Duties of States defines that "*the political existence of the state is independent of recognition by the other states*".¹⁴³ The convention does however also define that other states may recognise the state in an expressive or tacit manner, but that provision is not considered an extra condition for state qualification.¹⁴⁴ ¹⁴⁵ This would imply that Somaliland de facto, already is a state, regardless of international recognition. Opinions in the legal doctrine seem to differ, as the declaratory school believes international recognition cannot be regarded as an extra condition for statehood, while the constitutive school claims the contrary.¹⁴⁶

Poore believes that the de facto recognition of Somaliland rendered by several states that desist from granting it official political recognition, is an unfair obstacle to recognition that is embedded in international law.¹⁴⁷ Although Ethiopia has not officially recognised Somaliland up to today, they have established several agreements with Somaliland that define their cooperation.¹⁴⁸ They have also appointed an ambassador, who is seated in the Somaliland capital Hargeisa, to maintain diplomatic relations with Somaliland.¹⁴⁹ Djibouti and Ethiopia have allowed Somaliland to open liaison offices on their territory.¹⁵⁰

2.4.4 What the Future Holds

The future will have to point out if Somaliland's claim for independence will ever be recognised by the international community. Some observers believe that the UK, as the former colonial ruler of British Somaliland and the state that ultimately granted its independence, should play a prominent role in the acknowledgement of Somaliland's independence.¹⁵¹

¹⁴² EGGERS, A.K., "When is a State a State? The Case for Recognition of Somaliland", *Boston College International and Comparative Law Review*, 2007, December 1, 30:211, 220

¹⁴³ The Montevideo Convention on the Rights and Duties of States, Montevideo, 1933, December 26, art. 3 (available at: http://avalon.law.yale.edu/20th_century/intam03.asp), last consulted 07/08/2013

¹⁴⁴ The Montevideo Convention on the Rights and Duties of States, Montevideo, 1933, December 26, art.7 (available at: http://avalon.law.yale.edu/20th_century/intam03.asp), last consulted 07/08/2013

¹⁴⁵ EGGERS, A.K., "When is a State a State? The Case for Recognition of Somaliland", *Boston College International and Comparative Law Review*, 2007, December 1, 30:211, 214-215

¹⁴⁶ For more information on this topic, see: THE INTERNATIONAL CRISIS GROUP, *Somaliland: Time for African Union Leadership*, Africa Report n. 110, 2006, May 23, 12 (available at:

<http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somalia/Somaliland%20Time%20for%20African%20Union%20Leadership.pdf>)

¹⁴⁷ POORE, B., "Somaliland: Shackled to a Failed State", *Stanford Journal Of International Law*, 2009, 45, 118

¹⁴⁸ DOORNBOS, M., "Somalia: Alternative Scenarios for Political Reconstruction", *African Affairs*, 2002, 101, 105

¹⁴⁹ TURITTO, J., *Interview with Ambassador Brook Hailu Beshah*, *International Affairs Review*, 2008, November 8 (available at: <http://www.iar-gwu.org/node/49>), last consulted 14/08/2013

¹⁵⁰ THE INTERNATIONAL CRISIS GROUP, *Somaliland: Time for African Union Leadership*, Africa Report n. 110, 2006, May 23, 2 (available at: <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somalia/Somaliland%20Time%20for%20African%20Union%20Leadership.pdf>)

The European Union and several Western donors have already pointed to the African Union to make a final decision on Somaliland's fate.¹⁵² The African Union Constitutive Act defines that all members should respect the borders "*existing on achievement of independence*".¹⁵³ This principle is known in international law as the "*uti possidetis principle*" and the International Court of Justice has already acknowledged the general application of this principle in the Frontier Dispute Case.¹⁵⁴ Since Somaliland at its independence, possessed the exact same borders it nowadays claims and these borders are officially registered in treaties between the UK and respectively France, Ethiopia and Italy, it would be hard for the African Union to deny this fact.¹⁵⁵ The African Union does however, more than any other international actor, deeply fear the wave of secession claims the Somaliland independence could bring along with it.

2.5 International Engagement

Several international players have contributed in various manners to state building efforts in Somalia. They have primarily focused on developing centralised structures to combat insecurity and lawlessness, instead of supporting local governance initiatives. The Somalis throughout the years have however created some aversive sentiments towards these international political initiatives, experiencing them as assaults on their right of self-determination and as an exponent of foreign imperialistic design.¹⁵⁶

2.5.1 AMISOM

In 2006, the African Union set-up a peace mission in Somalia named AMISOM.¹⁵⁷ AMISOM has provided political and military support to the Somali Federal Government.¹⁵⁸ AMISOM comprises a force of mainly Ugandan, Burundian and Kenyan troops. Djibouti, Nigeria and Sierra Leone have also provided either troops, police or equipment. The number of troops is currently set at 17731.¹⁵⁹ The United Nations Security Council supports AMISOM, as pointed out in several resolutions.¹⁶⁰ Hammond points out that a majority of Somalis would prefer the exodus of AMISOM troops,

¹⁵¹ DOORNBOS, M., "Somalia: Alternative Scenarios for Political Reconstruction", *African Affairs*, 2002, 101, 106

¹⁵² THE INTERNATIONAL CRISIS GROUP, *Somaliland: Time for African Union Leadership*, Africa Report n. 110, 2006, May 23, 13 (available at: <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somalia/Somaliland%20Time%20for%20African%20Union%20Leadership.pdf>)

¹⁵³ AFRICAN UNION, *African Union Constitutive Act*, 2000, July 11, Lome, art. 4 (b) (available at: http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm#Article4), last consulted 03/08/2013

¹⁵⁴ INTERNATIONAL COURT OF JUSTICE, The Frontier Dispute Case (Burkina Faso v. Republic of Mali), *ICJ Reports 1986*, 565-569 (available at: <http://www.icj-cij.org/docket/files/69/6447.pdf>)

¹⁵⁵ THE INTERNATIONAL CRISIS GROUP, *Somaliland: Time for African Union Leadership*, Africa Report n. 110, 2006, May 23, 11 and 16 (available at: <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somalia/Somaliland%20Time%20for%20African%20Union%20Leadership.pdf>)

¹⁵⁶ HAMMOND, L., "Somalia rising; Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 184

¹⁵⁷ PLOCH.L.; BLANCHARD, C.M.; O'ROURKE, R., *Piracy off the Horn of Africa*, Congressional Research Service, 2011, R40528, 3 (available at: <http://www.fas.org/sgp/crs/row/R40528.pdf>)

¹⁵⁸ http://www.africa-union.org/root/au/auc/departments/psc/amisom/AMISOM_Background.htm, last consulted 05/08/2013

¹⁵⁹ UN SECURITY COUNCIL, *Resolution 2073*, UN doc., 2012, November 7, S/RES/2073 (available at: (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2073\(2012\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2073(2012))), last consulted 13/08/2013

¹⁶⁰ See further on, paragraph 2.4.2. of this dissertation.

although the country is not yet ready to defend itself against Al Shabaab and other warlord militia factions.¹⁶¹

2.5.2 United Nations in Somalia

During the last two decades, the UN Security Council has taken various resolutions regarding Somalia. An attempt will be made to give a short overview of the most significant measures taken, on the basis of some of the most important resolutions carried out by the UNSC to improve the Somali political and security problems. The resolutions that carry out rules to combat piracy on the sea were left out, so focus can be laid on the measures taken to affect problems on Somali shore.

Resolution 733: A general and complete embargo on all deliveries of arms and military equipment was imposed.¹⁶²

Resolution 1356: An obligation for all states to take the necessary steps to ensure full implementation and enforcement of the embargo. Authorisation for non lethal military equipment for humanitarian or protective use.¹⁶³

Resolution 1407: Establishment of a team of experts, in preparation of a Panel of Experts, in order to improve the enforcement of the embargo.¹⁶⁴

Resolution 1425: The embargo will include all direct or indirect supply to Somalia of technical advice, financial and other assistance, and training related to military activities. A Panel of Experts will be established to generate independent information on violations and for improving the enforcement of the embargo.¹⁶⁵

Resolution 1519: Establishment of a Monitoring Group for the embargo.¹⁶⁶

Resolution 1725: The TFC and TFI present the only route for achieving peace and stability in Somalia. Authorisation to members of the African Union to establish a protection and training mission in Somalia (IGASOM).¹⁶⁷

Resolution 1744: Authorisation of AMISOM (African Union Mission in Somalia), replacing IGASOM.¹⁶⁸

Resolution 1814: The UN shall enhance its support to the TFI with the aim of developing a constitution and holding a constitutional referendum and free democratic elections in 2009. The UNSC urges states and regional organisations to protect the World Food Program maritime convoys, in order to bring humanitarian assistance to the affected Somali population.¹⁶⁹

¹⁶¹ HAMMOND, L., "Somalia Rising; Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 191

¹⁶² UN SECURITY COUNCIL, *Resolution 733*, UN Doc., 1992, January 23, S/RES/733 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/733\(1992\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/733(1992))), last consulted 13/08/2013

¹⁶³ UN SECURITY COUNCIL, *Resolution 1356*, UN Doc., 2001, June 19, S/RES/1356 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1356\(2001\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1356(2001))), last consulted 13/08/2013

¹⁶⁴ UN SECURITY COUNCIL, *Resolution 1407*, UN Doc., 2002, May 3, S/RES/1407 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1407\(2002\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1407(2002))), last consulted 13/08/2013

¹⁶⁵ UN SECURITY COUNCIL, *Resolution 1425*, UN Doc., 2002, July 22, S/RES/1425 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1425\(2002\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1425(2002))), last consulted 13/08/2013

¹⁶⁶ UN SECURITY COUNCIL, *Resolution 1519*, UN Doc., 2003, December 16, S/RES/1519 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1519\(2003\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1519(2003))), last consulted 13/08/2013

¹⁶⁷ UN SECURITY COUNCIL, *Resolution 1725*, UN Doc., 2006, December 6, S/RES/1725 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1725\(2006\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1725(2006))), last consulted 13/08/2013

¹⁶⁸ UN SECURITY COUNCIL, *Resolution 1744*, UN Doc., 2007, February 20, S/RES/1744 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1744\(2007\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1744(2007))), last consulted 13/08/2013

Resolution 1816: States cooperating with the TFG in the fight against piracy may enter the territorial waters of Somalia to repress acts of piracy at sea and may use, within the territorial waters of Somalia, all necessary means to repress acts of piracy and armed robbery.¹⁷⁰

Resolution 1844: Refinement of the arms embargo: States need to prevent entry into or transit through their territories for individuals, in certain circumstances.¹⁷¹

Resolution 1851: Authorisation for states to use land-based operations in Somalia. States and regional organisations cooperating in the fight against piracy can undertake all necessary measures "appropriate" in Somalia.¹⁷²

Resolution 1972: Freezing of Somali assets to facilitate urgently needed humanitarian assistance.¹⁷³

Resolution 1976: Decision to urgently consider the establishment of special Somali courts operating in the country, for prosecution of pirates.¹⁷⁴

Resolution 2002: Tightening of the sanction regime on political or military leaders recruiting or using child soldiers and targeting civilians or committing attacks against schools and hospitals.¹⁷⁵

Resolution 2036: Requests the African Union to increase the number of uniformed personnel for AMISOM from 12 000 to a maximum of 17 731.¹⁷⁶

Resolution 2067: The Security Council welcomes the end of the transition in Somalia and the newly created parliament.¹⁷⁷

Resolution 2093: The UNSC has extended the mandate of AMISOM until February 28 2014. They also concluded that the mandate of UNPOS should come to an end, since it fulfilled its goals. UNPOS particularly coordinated the international donor support and ameliorated the justice system by providing training for judges and lawyers, technical assistance on policies and legislation and promoted human rights in the military justice system.¹⁷⁸

UNSOA (the United Nations Support Office for AMISOM) shall be integrated in the new UN mission (which will be UNSOM, as decided in resolution 2012).¹⁷⁹

Resolution 2102: The establishment of a United Nations Assistance Mission in Somalia (UNSOM), which will replace the United Nations Political Office for Somalia (UNPOS).

¹⁶⁹ UN SECURITY COUNCIL, *Resolution 1814*, UN Doc., 2008, May 15, S/RES/1814 (available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1814\(2008\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1814(2008)))

¹⁷⁰ UN SECURITY COUNCIL, *Resolution 1816*, UN Doc., 2008, June 2, S/RES/1816, available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1816\(2008\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1816(2008)), last consulted 13/08/2013

¹⁷¹ UN SECURITY COUNCIL, *Resolution 1844*, UN Doc., 2008, November 20, S/RES/1844, available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1844\(2008\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1844(2008)), last consulted 13/08/2013

¹⁷² UN SECURITY COUNCIL, *Resolution 1851*, UN Doc., 2008, December 16, S/RES/1851, available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1851\(2008\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1851(2008)), last consulted 13/08/2013

¹⁷³ UN SECURITY COUNCIL, *Resolution 1972*, UN Doc., 2011, March 17, S/RES/1972, available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1972\(2011\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1972(2011)), last consulted 13/08/2013

¹⁷⁴ UN SECURITY COUNCIL, *Resolution 1976*, UN Doc., 2011, April 11, S/RES/1976, available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1976\(2011\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1976(2011)), last consulted 13/08/2013

¹⁷⁵ UN SECURITY COUNCIL, *Resolution 2002*, UN Doc., 2011, July 29, S/RES/2002, available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2002\(2011\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2002(2011)), last consulted 13/08/2013

¹⁷⁶ UN SECURITY COUNCIL, *Resolution 2036*, UN Doc., 2012, February 22, S/RES/2036, available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2036\(2012\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2036(2012)), last consulted 13/08/2013

¹⁷⁷ UN SECURITY COUNCIL, *Resolution 2067*, UN Doc., 2012, September 18, S/RES/2067, available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2067\(2012\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2067(2012)), last consulted 13/08/2013

¹⁷⁸ UNPOS, *Year End Letter*

¹⁷⁹ UN SECURITY COUNCIL, *Resolution 2093*, UN Doc., 2013, March 6, S/RES/2093, available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2093\(2013\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2093(2013)), last consulted 13/08/2013

UNSOM's core role will be to help create a stable political environment, by supporting the Federal Government of Somalia, in order to facilitate its peace building process.¹⁸⁰

Möller concludes that, even though the Security Council has made several resolutions concerning Somalia, the body has not done anything substantial since the end of the peacekeeping mission in 1995, except concerning the piracy problem, as this has been a problem with an international range.¹⁸¹ It is indeed true that the UNSG seems to have been dealing with the Somali situation in a very arbitrary, stubborn manner, as it unconditionally supported the highly dysfunctional TNG and TFG, meanwhile neglecting the operational political administrations in Somaliland and Puntland and the various local, traditional political and judicial set-ups. It is common knowledge that the corrupt TFG leaders were puppets of the international community, rather than representatives of the Somali people, rendering the central government no credibility and aggravating the Somali distrust of formal administrations. The Somali question has proven once again that the UNSC is above all a political body, with its members reassuring their own political interests.

Given the debacle of their previous peacekeeping mission, the UNSC has abstained from deploying any troops on Somali territory again. On several occasions, UNSG Ban-Ki Moon has expressed his wish for a Somali Peacekeeping Mission in the nearby future, when the Somali circumstances condone operating in a safe manner. In resolution 1772, he requests the further development of existing planning for the possible deployment of this UN Peacekeeping operation, that would replace AMISOM.¹⁸² In Resolution 1863, the UN Security Council expressed anew its intention to establish a UN Peacekeeping operation in Somalia and called upon the UN Secretary General to develop a mandate for the proposed mission.¹⁸³ However, voting a Peacekeeping mission or even a humanitarian intervention is never a simple matter. Taking into account the previous interventions of UNOSOM I & II and the Black Hawk Down debacle, factoring in the Russian and Chinese tendency to hold on to the principle of non intervention and given the as yet unsecure Somali environment, it is unlikely to happen for Somalia anytime soon.

UNSG Ban-Ki Moon recently selected a new special representative for Somalia, Mr. Nicholas Kay from the United Kingdom on the 3rd of June 2013.¹⁸⁴ Kay thereby replaced Mr. Mahiga from the United Republic of Tanzania who had been occupying this important function since 2010.

The UN has also deployed six of its organisations to deliver humanitarian aid to Somalia in whatever manner possible. The World Food Programme (WFP) seems to have been a

¹⁸⁰ UN SECURITY COUNCIL, *Resolution 2102*, UN Doc., 2013, May 2, S/RES/2102, available at:

[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2102\(2013\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2102(2013)), last consulted 13/08/2013

¹⁸¹ MÖLLER, B., "Somalia after the Ethiopian Withdrawal", *Danish Institute for International Studies*, January 2009, 3 (available at: http://www.diis.dk/graphics/Publications/Briefs2009/bmo_somalia_2.pdf)

¹⁸² UN SECURITY COUNCIL, *Resolution 1772*, UN Doc., 2007, August 8, S/RES/1772, available at:

[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1772\(2007\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1772(2007)), last consulted 13/08/2013

¹⁸³ UN SECURITY COUNCIL, *Resolution 1863*, UN Doc., 2009, January 16, S/RES/1863, available at:

[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1863\(2009\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1863(2009)), last consulted 13/08/2013

¹⁸⁴ <http://www.un.org/News/Press/docs/2013/sga1401.doc.htm>, last consulted 13/08/2013

central UN actor in the Somali field.¹⁸⁵ The other five primary UN organisations operating in Somalia are FAO, UNDP, UNICEF, UNHCR and WHO.¹⁸⁶

2.5.3 State Actors

Somalia's legacy has definitely, amongst other factors, been constituted by some prominent state actors and their policies towards this failed state.

The US is certainly the main state actor involved in the Somali crisis, because of its belief that a failed state like Somalia is the ideal breeding ground for terrorists.¹⁸⁷ It also is no secret that the US supported the armed Ethiopian invasion in Somalia.¹⁸⁸ Several Somali analysts believe that the United States through their foreign policies, have played an important role in the Somali deterioration, although not deliberately, but more as a result of their lack of nuance and informed sources.¹⁸⁹ In the past, the US failed to see the difference between moderate and radical initiatives carried out by political Islam movements several times. As for their state building policy, they have been focusing on rebuilding functioning administrations in Somalia by means of a central government, deliberately ignoring several decentralised operational administrations, backed by the UN for a long time. Although likely too late, the US seems to have recently changed its state building policy towards Somalia by applying a "dual-track policy", which implies that they will continue support to the Somali government, but they will increase assistance in several decentralised regions, especially Somaliland and Puntland.¹⁹⁰ Various regional actors, especially neighbouring countries including Ethiopia, Kenya and Eritrea, have also interfered in Somali politics.

2.5.4 NGO's

There are numerous humanitarian agencies, that have tried to diminish the Somali crisis, but the prevalent insecurity has often made their noble work nearly impossible. These agencies include Western NGO's as well as Islamic charities. The organisation for Islamic Cooperation has played an important role in serving the Somali interests, such as the delivery of food in the 2011 famine.¹⁹¹ It must be noted though, that the concept of NGO's is unknown to Somalis, especially in the rural areas, and therefore their legitimacy is often questioned.¹⁹² The primary step in more effective aid delivery, certainly would be to harmonise the numerous programmes of these NGO's, in order to reach the Somali people on a larger scale and in a more effective manner.¹⁹³ Coordination between NGO projects and local governments policies should also be improved to avoid conflicts, especially since NGO's are often delegated legal powers by

¹⁸⁵ <http://www.wfp.org/countries/somalia/operations>, last consulted 13/08/2013

¹⁸⁶ <http://www.unsomalia.net/History-of-UN-in-Somalia.htm>, last consulted 13/08/2013

¹⁸⁷ STEVENSON, J., "Jihad and Piracy in Somalia", *Survival: Global Politics and Strategy*, 2010, 52:1, 28

¹⁸⁸ MOLLER, B., "Somalia after the Ethiopian Withdrawal", *Danish Institute for International Studies*, January 2009, 3 (available at: http://www.diis.dk/graphics/Publications/Briefs2009/bmo_somalia_2.pdf)

¹⁸⁹ This issue will be discussed further throughout this dissertation. For an analysis on the US' impact on the rise of Al-Shabaab and its growing connections with Al Qaeda, see: IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, p. 283-295

¹⁹⁰ HARPER, M., *Getting Somalia Wrong?*, 179

¹⁹¹ HAMMOND, L., "Somalia Rising; Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 191-192

¹⁹² GUNDEL, J., *The Predicament of the 'Oday'*, 1

¹⁹³ LE SAGE, A., *Stateless Justice in Somalia*, 12

the central government, causing the local administrations to feel like their authority is being undermined.¹⁹⁴

3. The Somali Legal Systems: An Overview of Somali Law

Describing and analysing the Somali judicial system is no sinecure, since authors on and observers of the Somali law do not even seem to agree which legal systems must be taken into account when doing so. Some authors claim that the Somali customary law *Xeer* is the only law considered righteous by the Somali people.¹⁹⁵ In their opinion, the formal judicial systems have no jurisdiction, since they are either imposed by foreign stakeholders or used as a way to oppress the Somali customary traditions. Therefore, they believe that complying with local customary law is the only practicable track in restoring the Somali rule of law. Other authors claim that the different justice systems have each contributed to a degree of security in Somalia and all of them should be taken into account when creating one judicial system.¹⁹⁶ In this dissertation, a classification made by Le Sage will be used, as it is believed to be the most advanced and integrated classification made on the various Somali legal systems so far, but some adjustments will be made in order to comply with recent developments in Somali politics. The aim will be to create a comprehensive overview of current law systems in Somalia, instead of focusing on or promoting one specific Somali judicial system.¹⁹⁷ By doing so, agreement with every point of view or the solutions proposed by Le Sage concerning the Somali future is not implied. The question which law system is the most advanced and accepted by Somali people and thus should be used as a basis to enhance the Somali law, is a disputed issue, on which author's opinions seem to vary. This matter will be discussed further on in chapter 4 of this dissertation.

To this day, Somalia knows three different major law systems.¹⁹⁸ An overview of each of these systems will be offered and their strengths and weaknesses will be analysed. Most of the time, these systems coexist in the same area and they are often contradictory. As a result, the Somali people can choose which law they apply in any given case, a decision made on the basis of self interest, while bearing in mind the security and peace the decision will provide for the inter-clan relations.¹⁹⁹ Consequently, there is a widespread Somali distrust regarding these various systems, since it cannot be guaranteed that all people will be treated equally before the law, which can be seen as a violation of article 7 of the Universal Declaration on Human Rights.²⁰⁰ Le Sage distinguishes four different

¹⁹⁴ PILLARS OF PEACE SOMALI PROGRAMME, *Puntland Note: Mapping the Foundations of Peace; Challenges to Security and Rule of Law, Democratisation Process and Devolution of Power to Local Authorities*, November 2010, 63 (available at: http://www.interpeace.org/publications/doc_download/67-puntland-note-mapping-the-foundations-of-peace-english)

¹⁹⁵ See: VAN NOTTEN, M., *The Law of the Somalis*

¹⁹⁶ LE SAGE, A., *Stateless Justice in Somalia*, 8

¹⁹⁷ As an example, M. Van Notten describes Somali customary law in a very comprehensive manner and promotes it as the ideal basis for law activities, but fails to integrate the other law systems that have rendered rule of law in Somalia.

¹⁹⁸ Le Sage has also distinguished a fourth legal system: civil society initiatives & ad hoc mechanisms. In order to give a comprehensive overview, this fourth category was added in this disquisition. However, most authors only recognise three Somali legal systems.

¹⁹⁹ LE SAGE, A., *Stateless Justice in Somalia*, 7

law systems: formal judiciary structures, traditional clan based *Xeer*, Sharia law and civil society initiatives and ad hoc mechanisms. As the research made by Le Sage on these various legal systems is very comprehensive, his most important findings will be set out and completed with results by other authors and personal opinions.

3.1 Formal Judicial Structures

In August last year, Somalia welcomed a newly established national government, parliament and judiciary branch. The country now has a constitution that guarantees the independence of the judiciary and establishes a judicial infrastructure. However, in some Somali regions, formal judicial systems have been established by militia factions that claimed a significant territorial surface and started to control the area. The Republic of Somaliland claims its independence and Puntland has declared itself an autonomous region until Somalia obtains a functioning national government. Despite the fact that the Somali central administrations established a Federal Republic of Somalia, which was the main condition for Puntland to reaccept the administration's legitimacy, up to today, the status of Puntland is not clear. Somaliland has already distanced itself from the new constitution, which establishes a Somali Federal Republic. The constitution itself does not mention the various regions of Somalia comprised in the new federal structure, but we can assume it foresees the integration of the Republic of Somaliland and Puntland, certainly in the long run. Both states however, already have a president, a constitution and formal administrations. The judicial infrastructures of these three formal administrations, including their several significant shortcomings, will be thoroughly discussed.

3.1.1 The Federal Government of Somalia

The international community was rather surprised when in August 2012, after years of transitional periods and failed state building attempts, Somalia finally announced the establishment of the Federal Republic of Somalia, with a federal administration that seemed to be elected in a democratic manner. Getting there certainly was everything but an easy process, since Somalia had seen more than a dozen unsuccessful attempts at creating a stable national administration. The creation of this new administration does however not imply, in contrary to what media sources sometimes suggest, that the Somali conflict is over and the country now suddenly can be labeled as a 'stable state'.²⁰¹ The future will have to point out if this new government will be able to bring a significant amount of security and lawfulness back to the Somali state.

The Somali Battle: Rebuilding State Infrastructure

Before the TFG was established, the TNG (Transitional National Government) was Somalia's first internationally recognised government. The TNG was not very successful, since it never managed to gain control outside of the Somali capital. The justice system as set out by the TNG did not succeed at all in its judicial design and ironically stopped

²⁰⁰ Article 7 of the Universal Declaration of Human Rights states that all people are equal before law and entitled to equal protection of the law, see: UN GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, 1948, December 10, 217 A (III), art. 7 (available at: <http://www.un.org/en/documents/udhr/>), last consulted 13/08/2013

²⁰¹ Stable states are considered the opposite of 'failed states'.

receiving financial support from the TNG itself in 2004.²⁰² A remarkable fact is that the TNG judiciary system first amalgamated with the Sharia courts, but the cooperation ended when in 2002 a law was adopted that obliged all the current judges to be legally qualified, which they had to prove by means of an exam.²⁰³ Many Sharia judges refused to take the exam and thereby quit the TNG judiciary system.²⁰⁴

In November 2004, the Transitional Federal Institutions (TFI) were created, functioning as the new key government foundations for Somalia. These institutions comprised the following: the Transitional Federal Charter (TFC), the Transitional Federal Parliament (TFP) and the Transitional Federal Government (TFG). As stated above in this dissertation, they never managed to create a framework for transition and the politicians involved were highly corrupt. The composition of the TFG was based on the 4.5 formula, which assured the division of power between the four most important clans. The minority clans were represented by the remaining 0.5. This division was quite contentious since there is no general agreement on numerical clan representation throughout the country. Therefore, some clans stated they had not been equally represented by the 4.5 formula and were convinced that the composition of the TFG was highly offensive to their clan and that the formula institutionalised discrimination.²⁰⁵ The formula ultimately was considered to have created more conflicts than it had been able to solve or prevent.²⁰⁶ As the name of the TFI denounces, they were only a temporary project, in abidance of permanent Somali institutions. Consequently, their mandate ended in August 2012, when the Federal Government of Somalia was created. The new federal government and parliament were however not created in one day, but were the outcome of a, though rather hasty, process of negotiations. The Garowe Process can be seen as a milestone in the creation of the new administration, comprising various meetings between representatives of the TFG and several regional states, that tried to set up a framework for ending the transitional period.²⁰⁷ Apart from the London Conference in February 2012, that attempted to further establish the outcome of a transitional framework, the Istanbul Conference in May-June 2012 set a landmark in the Somali state building process, gathering over 400 civil society leaders from both the Somali country and the Somali diaspora to negotiate the Somali future.²⁰⁸

Composition of the Somali Federal Institutions

The conference in Istanbul insisted on a quick establishment of new federal Somali institutions, which untangled the Somali political deadlock in a very rapid manner, but unfortunately also led to a rather haphazard nomination of members for the Constituent Assembly, which later on would be imposed with the task of selecting the new parliament.²⁰⁹ The International Crisis Group declares that some elders unknowingly

²⁰² LE SAGE, A., *Stateless Justice in Somalia*, 30

²⁰³ LE SAGE, A., *Stateless Justice in Somalia*, 30

²⁰⁴ Dr. Le Sage, who lives in Somalia, believes the Sharia judges refused to take these exams either due to their pride, due to the fact they could not read or write or because they were likely to fail.

²⁰⁵ HARPER, M., *Getting Somalia Wrong?*, 39

²⁰⁶ IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, p. 293 (footnote 2)

²⁰⁷ HAMMOND, L., "Somalia Rising: Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 184

²⁰⁸ HAMMOND, L., "Somalia Rising: Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 184-185

²⁰⁹ HAMMOND, L., "Somalia Rising: Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 185

nominated uneducated candidates, while others gave their support to the highest bidder or to family members.²¹⁰ In August 2012 the National Constituent Assembly approved a new constitution, after a week of discussion, which was actually more of a formality than a thorough debate on the constitution's contents.²¹¹ A federal parliament was next to be selected out of competent and qualified Somalis, representing all the Somali clans. On the 10th of September 2012, this new parliament elected Hassan Sheikh Mohamud, who was known as the founder of Somalia's first political party, the Peace and Development Party, as their president.²¹² His election actually was quite unexpected, especially since former TFG president Sheikh Sharif was also in the running and initially enjoyed more support.²¹³ The choice for Mohamud however seems to be backed by a majority of the Somali people, since he, unlike most politicians, had stayed in the Somali country during the state's collapse and formerly worked as a teacher and a manager of a civil society organisation promoting peace.²¹⁴ In October, businessman Abdi Farah Shirdon was, also quite unexpected, selected as Somalia's new Prime Minister instead of one of the former TFG representatives.²¹⁵ Shortly thereafter, a numerically rather small Council of Ministers was established, with representatives from all of the Somali clans and representing various political interests.²¹⁶ Thereby, the eight year long transition formally ended.

Remarkable is the unprecedented female participation in Somali politics. For the very first time, two women now hold a top ministerial position, one of them responsible for social services and development, while the other is combining the portfolios of both Minister of Foreign Affairs and Deputy Prime Minister.²¹⁷ Also, the new federal parliament comprises fourteen per cent women while more than one fifth of the new cabinet consists of females.²¹⁸ This percentage still does not reach the required quota of thirty per cent for both the parliament and the cabinet though.²¹⁹

The Somali Constitution

As for the content of the constitution, the author believes that the most prominent articles, in regard to the legal infrastructure of the new Somali Republic, are the following.

Art. 2.3 dictates that all the enacted laws of the Somali Republic should comply with the Sharia general principles.²²⁰

²¹⁰ THE INTERNATIONAL CRISIS GROUP, *Somalia: From Troubled Transition to a Tarnished Transition?*, 2012, August 20, (available at: <http://www.crisisgroup.org/en/publication-type/media-releases/2012/africa/somalia-from-troubled-transition-to-a-tarnished-transition.aspx>)

²¹¹ HAMMOND, L., "Somalia Rising: Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 185

²¹² UNPOS, *Chronology of Events*, 2012, September 10

²¹³ HAMMOND, L., "Somalia Rising: Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 186

²¹⁴ MENKHAUS, K., *The Somali Spring: Is the Poster Child of Failed States Finally Getting its Act Together?*, Foreign Policy, 2012, September 24 (available at: http://www.foreignpolicy.com/articles/2012/09/24/the_somali_spring), last consulted 14/08/2013

²¹⁵ HAMMOND, L., "Somalia Rising: Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 186

²¹⁶ UNPOS, *Year End Letter*

²¹⁷ HAMMOND, L., "Somalia Rising: Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 187

²¹⁸ UNPOS, *Year End Letter*

²¹⁹ UNSC, *Report of the SG*, 4

Art. 3.3 points out that Somalia now is a federal Republic, based on the fundamental principle of power sharing.²²¹ By establishing federalism as a political infrastructure, the new Somali administration recognises that there are several regional actors executing administrative functions, such as Puntland and Somaliland. The future will have to point out how relations between the three governments evolve, but all parties have already agreed to uphold their relations and the Somaliland president even attended the London Conference, which was a landmark in ending Somali transition, although it must be said, he was there more as a independent observer than a contributing representative.^{222 223} Hammond believes that the Somali minister of Foreign Affairs, who was formerly a well known Somaliland nationalist, could play an important role in bridging the gap between the Somali Federal Republic and the Republic of Somaliland.²²⁴

Art. 11.1 guarantees equal protection of Somali people before the law without any discrimination.²²⁵ This article incorporates article 7 combined with article 3 of the Universal Declaration of Human Rights.²²⁶ The Somali constitution also explicitly adds the prohibition of discrimination before law on the basis of clan or dialect.

Art. 39.1 dictates there shall be adequate procedures to redress violations of human rights.²²⁷

Art. 41 obliges the establishment of a Human Rights Commission, independent of government control and provided with adequate resources.²²⁸ This commission is competent to investigate compliance to human rights law and to educate the public and state officials on international standards, relating to human rights.²²⁹

Chapter 3 of the Constitution foresees the establishment of a national land policy, which will amongst other things ensure the resolution of property disputes.²³⁰ Since land is the basis of livelihood for the majority of Somali people and plenty of property disputes have arisen throughout the years, due to various non harmonised legal systems, this is a very crucial, yet challenging purpose. The newly elected administration will have to come up with a legal framework that defines to what extent Somali refugees still hold property rights over their former lands, which will also be a basic condition for them to ever return to their homeland.²³¹

Art. 106 guarantees the judicial independence of the Somali judiciary.²³²

Art. 108 confirms a three-tier national court structure that consists of a constitutional court, federal government level courts and federal member state level courts.²³³

²²⁰ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, Mogadishu, 2012, August 1, art. 2.3 (available at: <http://unpos.unmissions.org/LinkClick.aspx?fileticket=CqsW6PVY-C4%3d&tabid=9708&language=en-US>), last consulted 14/08/2013 (Here on after: THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*)

²²¹ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, art. 3.3

²²² HAMMOND, L., "Somalia Rising; Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 189

²²³ This can however be analysed as a step in the right direction since Somaliland declined to participate in former state building conferences, as with the creation of the TFG

²²⁴ HAMMOND, L., "Somalia Rising; Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 189

²²⁵ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, art. 11.1

²²⁶ UN GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, 1948, December 10, 217 A (III), art. 3 and art. 7 (available at: <http://www.un.org/en/documents/udhr/>), last consulted 13/08/2013

²²⁷ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, art. 39.1

²²⁸ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, art. 41

²²⁹ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, art. 111b

²³⁰ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, chapter 3

²³¹ HAMMOND, L., "Somalia Rising; Things are Starting to Change for the World's Longest Failed State ", *Journal of Eastern African Studies*, 2013, 7:1, 190

²³² THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, art. 106

Art. 109a establishes a judicial service commission, which shall advise the federal government on the administration of justice including recruitment and dismissal of judges.²³⁴

Art. 111c establishes an Anti-Corruption Commission that shall investigate accusations of corruption in which the public sector is involved.²³⁵

Art. 120 declares that the establishment of legislative and executive governmental bodies for the Federal Member States are a matter of concern for the Federal Member States themselves.²³⁶ This article legally refrains the Somali government from interfering in some important political matters in Puntland and Somaliland, which can only be seen as a first step towards reconciliation.

Art. 121 premises the harmonisation between the constitution of the Federal Republic of Somalia and the constitution of its Federal Member States.²³⁷ Such a harmonisation would be a landmark in the process of harmonising Somalia's various legal systems.

Somali National Courts

Few state courts have been established in the South of Somalia, due to the fact that most of the territory is controlled by either Al Shabaab, militia factions or warlords. The courts that have been constructed are mostly underfinanced and not considered legitimate due to corruption.²³⁸

Evaluation of the Somali Formal Judicial System

Given the significant adjustments the Somali constitution foresees to carry out in its judicial branch and the little time that has passed since its implementation, it would be wrong to just point out all the challenges the Somali national judiciary is still facing and to conclude that the newly elected government and parliament have failed in their mission to restore lawfulness. The constitution certainly is a stable basis for further reestablishment of the national administrations, but time will have to tell to which extent the new government has succeeded in its mission. No comprehensive evaluations of the Somali judiciary have been made since the implementation of the new constitution. However, assuming few adjustments to the judicial branch were made in this small time period, the author refers to the general shortcomings of the formal judicial structures, as described in paragraph 3.1.4 of this dissertation.

3.1.2 The Republic of Somaliland

Since its independence, Somaliland has been gradually developing a relatively secure environment for its people, despite or because of the fact that Somaliland was the most extensively destroyed Somali region during the 1980's and 1990's.²³⁹ Since over 40 000 Somaliland inhabitants had been killed and 500 000 were labeled as refugees, the Somaliland people unified themselves to fight the war together.²⁴⁰ The country has been

²³³ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, art. 108

²³⁴ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, art. 109a and 111a, 3

²³⁵ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, art. 111c

²³⁶ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, art. 120

²³⁷ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, art. 121

²³⁸ SCHLEE, G., "Customary Law and the Joys of Statelessness: Idealised Traditions versus Somali Realities", *Journal of Eastern African Studies*, 2013, 7:2, 266

(Here on after: SCHLEE, G., "Customary Law and the Joys of Statelessness")

²³⁹ HARPER, M., *Getting Somalia Wrong?*, 127

able to create a constitution, establish a public administration and rebuild its infrastructure, including local schools and hospitals.²⁴¹ Somaliland has not received any substantial bilateral aid from foreign actors to help rebuild its political and judicial infrastructure, since it has not been recognised by the international community as an independent state.²⁴² Many authors have considered Somaliland as the ultimate example that the international community should revise their current policies towards the Republic of Somalia and other collapsed African states, since they believe that the region's success is due to the fact that there had almost been no foreign involvement and the Somaliland government therefore became self-reliant in reconstructing its administrations. Somaliland is moving towards a functioning democratic state, but still has some significant political improvements to make, including the thorough reform of its judicial system.

Since 2001, Somaliland has a constitution and even a legal code, that consists of British common law, Italian civil law, Sharia law and *Xeer*. Due to the merger with South Somalia when Somalia became an independent state, the British common law got almost completely absorbed by the Italian civil law.²⁴³ Apart from the formal judicial system, the people of Somaliland still apply the *Xeer* traditional law and often rely on the mediation of clan elders for their legal disputes.²⁴⁴ Consequently, these various law systems are frequently contradictory and often still applied randomly, in a non consistent way, which of course does not provide an equal protection before law for the Somaliland people.²⁴⁵

Somaliland State Building

The combination of these various law systems is a result of the specific historical evolution of Somaliland's legal systems. Like the other Somali regions, Somaliland had to rebuild its judicial infrastructure from the ground up after the Somali civil war. Consequently, seventeen elders from all Somaliland regions signed a resolution that declared Somaliland's independence and established some primary steps in the process of rebuilding the judicial and political systems.²⁴⁶ In 1993, the Somaliland Charter got approved at the Borama Grand Conference of the Somaliland communities, while four years later a provisional text of the Somaliland constitution was drafted. The conference was an important turning point for Somaliland's politics as the voting council consisted of 150 elders who represented all of the Somaliland clans, while approximately 2000 people attended, including Somaliland nationals from the diaspora, to advocate their interests during five months of negotiations.²⁴⁷ The fact that the conference was almost entirely funded by the Somaliland communities, implies that the agenda only contained matters of interest for the Somaliland people and local stakeholders.²⁴⁸ The provisional

²⁴⁰ HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, 73

²⁴¹ BRADBURY, M., *Becoming Somaliland*, 4

²⁴² HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, 73

²⁴³ HERSI, M.F., *Research Guide to the Somaliland Legal System*, Globalex, February 2009, 3 (available at: <http://www.nyulawglobal.org/globalex/somaliland.htm>), last consulted 14/08/2013 (Here on after: HERSI, M.F., *Research Guide to the Somaliland Legal System*)

²⁴⁴ BRADBURY, M., *Becoming Somaliland*, 229

²⁴⁵ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 1

²⁴⁶ http://www.somalilandlaw.com/constitutional_developments.html, last consulted 14/08/2013

²⁴⁷ BRADBURY, M., *Becoming Somaliland*, 98

²⁴⁸ BRADBURY, M., *Becoming Somaliland*, 98

charter established a decentralised Somaliland, where each clan could design its own regional administration, including the control of their militias, the settlement of disputes, etc..²⁴⁹ Hesse describes the Somaliland political system as "*a system that fuses Western-style institutions of government with traditional forms of Somali social and political organisation*" and compares it with the current US government structure and the British Parliament set-up.²⁵⁰ The traditional elders of Somaliland also got to play a role in the upper most political level, as they were seated in the upper house of elders, to supervise matters of peace and security.²⁵¹ They also have the power required to prevent and resolve political conflict within the government by means of their traditional mechanisms.²⁵² In 2000 the definite text of the Constitution of the Republic of Somaliland was drafted and one year later it was ratified by means of a public referendum.

The Somaliland Constitution

Conform the disquisition on the constitution of the Federal Republic of Somalia, a sum up of the most significant articles of the Republic of Somaliland's charter will be made. Art. 1.1 confirms the independence of the Republic of Somaliland²⁵³

Art. 5.2 declares that "*The laws of the nation shall be grounded on and shall not be contrary to Islamic Sharia*"²⁵⁴ This article was absorbed in the constitution due to a current trend in the Islamic world to do so and to distance Somaliland from its former socialist regime.²⁵⁵ In practice however, the role of Sharia law is limited to personal statute matters such as family law and inheritance.

Art. 8 promotes the equal rights and obligations of the Somaliland inhabitants before the law and declares that laws shall not be based on the grounds of colour, ethnicity, gender, etc..²⁵⁶ Similar to the constitution of the Federal Republic of Somalia, article 8 also explicitly incorporates the prohibition to discriminate on grounds of clan affiliation.

Art. 9.2 states that there can only be three political parties in the Somaliland Republic.²⁵⁷ This rule may appear as undemocratic but actually has rational reasons for its existence, since it encourages clan affiliation and cooperation for a broader, "nationalistic" goal.²⁵⁸

Art. 9.3 moreover prohibits the existence of any political party that is based on regionalism or clanism, for the same reason as stated above in art. 9.2.²⁵⁹

²⁴⁹ BALTHASAR, D., "Somaliland's Best Kept Secret: Shrewd Politics and War Projects as Means of State-Making", *Journal of Eastern African Studies*, 2013, 7:2, 221

²⁵⁰ HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, 74

²⁵¹ ABDURAHMAN, A.O.S., *Order Out of Chaos: Somali Customary Law in Puntland and Somaliland*, Accord, 2010, 21, 59 (available at: http://www.c-r.org/sites/c-r.org/files/Accord%2021_17Order%20out%20of%20chaos_Somali%20customary%20law_2010_ENG.pdf)

²⁵² GUNDEL, J., *The Predicament of the 'Oday'*, v

²⁵³ THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, April 2000, art. 1.1 (available at: http://somalilandlaw.com/Somaliland_Constitution_Text_only_Eng_IJSL.pdf), (Here on after: THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*)

²⁵⁴ THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, art. 5.2

²⁵⁵ BATTERA, F. and CAMPO, A., "The Evolution and Integration of Different Legal Systems in the Horn of Africa: The Case of Somaliland", *Global Jurist Topics*, 2001, 1:1, 20 (available at: <http://www.mbali.info/doc113.htm>), last consulted 13/08/2013

²⁵⁶ THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, art. 8

²⁵⁷ THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, art. 9.3

²⁵⁸ HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, 74

²⁵⁹ THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, art. 9.2

Art. 10.2 declares that *"the Republic of Somaliland recognises and shall act in conformity with the United Nations Charter and with International law, and shall respect the Universal Declaration of Human Rights"*.²⁶⁰ We should however read this article together with art. 5.2 of the constitution, which implies that universal human rights will not be respected when they conflict with Sharia law. The controversial example of female genital mutilation comes to mind.

Art. 37 recognises the separation of the three administrative branches (the legislative, the executive and the judiciary). These three branches shall operate independently from one another.²⁶¹

Art. 97.2 states that *"the judicial branch shall be independent of the other branches of the state"*.²⁶²

Art. 100 sums up all the Somaliland courts including the supreme court, the appeals courts of the regions, the regional courts, the district courts and the courts of the National Armed Forces.²⁶³ The supreme court is actually a constitutional court that has jurisdiction in the whole Somaliland area.²⁶⁴

Art. 130 discusses the implementation of the constitution, upon which article 130.5 stipulates that *"all the laws which were current [laws before 1991] and which did not conflict with the Islamic Sharia, individual rights and fundamental freedoms shall remain in force in the country of the Republic of Somaliland until the promulgation of laws which are in accord with the Constitution of the Republic of Somaliland. At the same time, laws which conform to the Constitution shall be prepared and each such law shall be presented within minimum time scales set by the house"*.²⁶⁵

Despite this quite extensive and promising Constitution, in practice multiple legal codes are still being applied and laws are still being interpreted in a non uniform, ad hoc and highly subjective manner, non consistent with the current constitution.²⁶⁶

Structure of the Somaliland Judicial System

The outline of the Somaliland judicial system was created by two legal documents: the Somaliland constitution and the law on the Organisation of the Judiciary. Unfortunately, the latter is only available in its original language, so the author's findings rely on secondary law sources. The judiciary is organised as a three-tier system, consisting of first instance courts, including district and regional courts, appeals courts and the supreme courts.²⁶⁷ The district courts only deal with claims based on Sharia law and civil and criminal matters up to a certain amount of Somaliland Shillings or duration of imprisonment.²⁶⁸ Regional courts then deal with all the cases not under the jurisdiction of the district courts and are divided into four sections, including civil matters, criminal matters, juvenile crimes and finance and taxation matters.²⁶⁹ Self-evidently, the appeals courts deal with appeals to all lower courts' rulings, while the supreme court investigates appeals to the appeals courts.

²⁶⁰ THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, art. 10.2

²⁶¹ THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, art. 37.2

²⁶² THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, art. 97.2

²⁶³ THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, art. 100

²⁶⁴ BRADBURY, M., *Becoming Somaliland*, 230

²⁶⁵ THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, art. 130

²⁶⁶ HERSI, M.F., *Research guide to the Somaliland Legal System*, 7

²⁶⁷ HERSI, M.F., *Research guide to the Somaliland Legal System*, 5

²⁶⁸ HERSI, M.F., *Research guide to the Somaliland Legal System*, 5

²⁶⁹ HERSI, M.F., *Research guide to the Somaliland Legal System*, 5

Evaluation of the Somaliland Judicial System

The Somaliland administration has been able to create a significantly higher amount of security and compliance to law and order than the other parts of Somalia. Nevertheless, their judicial system still upholds a lot of shortcomings and by enhancing its infrastructure, peace and security in the larger region of Somaliland may be improved.²⁷⁰

Most of these judicial deficiencies are similar to those appearing in the other formal judiciary structures of Somalia. These will be discussed in paragraph 3.1.4 of this dissertation. However, the Somaliland administration has a few judicial lacks of its own. An attempt will be made to sum up some of the most substantive shortcomings of the Somaliland judiciary system. The author has to point out to readers that these shortcomings may be slightly detained, since most available sources date back to the early 2000's due to the originating interest in the newly self declared independent state of Somaliland back then. Nevertheless, no substantial changes have been made to the judicial system in Somaliland recently. In 2002, president Riyale did carry through a minor reform, replacing thirty-five judges, but this move mostly proved the judiciary's shortcomings on the level of independence from the executive branch.²⁷¹

First, the judicial independence of the Somaliland judiciary is restricted by the executive branch even though the Constitution of the Republic of Somaliland recognises the independence of the judiciary branch.²⁷² That same constitution however, makes the president responsible for the appointment of the chairman and the judges of the Supreme Court.²⁷³ He also has the power to dismiss the chairman, giving him unrestrained influence in the judiciary branch in practice.²⁷⁴ According to the constitution, the president can only appoint judges after consultation of the Judicial Commission and the Parliament, but Bradbury points out that this is not the case in reality.²⁷⁵ Also, it is the Ministry of Justice that administers the administrative decisions of the judiciary branch, including the court's budgets and the judges' salaries.²⁷⁶

Secondly, as everywhere else in Somalia, qualified judges are hard to find. In Somaliland, this problem is even more accentuated, since experienced judges tend to stay in the lower courts, while the less experienced are appointed to the higher courts.²⁷⁷ Furthermore, the judges are not being encouraged to do their job correctly, since their remuneration is still quite low, largely due to the fact that most of them started out as volunteers when the judiciary system had to be built from scratch in 1992.²⁷⁸ The few judges that are qualified or experienced often make contradictory judgments, since their legal background was either constituted by traditional or Sharia law.²⁷⁹

²⁷⁰ BATTERA, F. and CAMPO, A., "The Evolution and Integration of Different Legal Systems in the Horn of Africa: The Case of Somaliland", *Global Jurist Topics*, 2001, 1:1, 26

(available at: <http://www.mballi.info/doc113.htm>), last consulted 13/08/2013

²⁷¹ BRADBURY, M., *Becoming Somaliland*, 231

²⁷² BRADBURY, M., *Becoming Somaliland*, 230

²⁷³ THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, art. 105.1

²⁷⁴ THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, art. 105.3

²⁷⁵ BRADBURY, M., *Becoming Somaliland*, p. 230

²⁷⁶ THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, art. 106.1

²⁷⁷ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 7

²⁷⁸ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 13

²⁷⁹ BRADBURY, M., *Becoming Somaliland*, 230

Thirdly, the judiciary personnel has pointed out that the constitution, the penal and civil codes and the family code should be amended in order to be adapted to the Somaliland society.²⁸⁰ They also point out that there is a legislative gap in the areas of: commercial law, traffic law, administrative law, juvenile law and judicial administrative law. Most important is the need for commercial law legislation, since Somaliland has a growing international commerce and market, but is often still vulnerable on the international market due to lack of legal knowledge and enforcement in this particular branch of law.²⁸¹ Not only should there be a comprehensive set of commercial laws, but training of the Somaliland judges in commercial law will be a necessity for the economic growth of this region.

Fourthly, Somaliland has been proven guilty of violating some specific human rights. The National Security Committee has the power to arrest and detain people without charge for ninety days, a right that has been used to retain political dissidents.²⁸² This is a violation of article 9 of the Universal Declaration of Human Rights which states that "*no one shall be subjected to arbitrary arrest, detention or exile*".²⁸³ The Somaliland correctional services' conditions are also violating some basic human rights considering their poor hygienic circumstances, the overcrowding and the minimal medical treatment.²⁸⁴

Beside these shortcomings, research has pointed out that the three-tier structure of the court system seems to be considered adequate.²⁸⁵

Somaliland has been able to create a stable environment for its people, but its government has remained small and weak, due to the fact that it has not been internationally recognised and thus received no international loans for the construction of governmental and other infrastructure.²⁸⁶ However, a lot of Somaliland's peace and economic growth is attributed to the establishment of private initiatives and economic enterprises.²⁸⁷ Authors on Somaliland have various opinions when it comes to the need for recognition, since international acceptance could incite some typical statehood traps, which would eventually provoke conflicts of power.^{288 289}

Various authors see Somaliland as a scholar example of state building, proclaiming that Somalia should follow Somaliland's patterns in rebuilding its state. Somaliland has been able to evolve from a political and judicial system that initially was based on clan politics to a more modern multi-party democracy.²⁹⁰ In literature, it is often referred to as

²⁸⁰ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 8

²⁸¹ BATTERA, F. and CAMPO, A., "The Evolution and Integration of Different Legal Systems in the Horn of Africa: The Case of Somaliland", *Global Jurist Topics*, 2001, 1:1, 28 (available at: <http://www.mballi.info/doc113.htm>), last consulted 13/08/2013

²⁸² ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 11

²⁸³ UN GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, 1948, December 10, 217 A (III), art. 9 (available at: <http://www.un.org/en/documents/udhr/>), last consulted 13/08/2013

²⁸⁴ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 12

²⁸⁵ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 7

²⁸⁶ HARPER, M., *Getting Somalia Wrong?*, 131

²⁸⁷ HARPER, M., *Getting Somalia Wrong?*, 128

²⁸⁸ HARPER, M., *Getting Somalia Wrong?*, 80

²⁸⁹ For more information on the issue of Somaliland's international recognition, see BRADBURY, M., *Becoming Somaliland*, in *African Issues*, London, Progressio, 271 p.

²⁹⁰ HARPER, M., *Getting Somalia Wrong?*, 133

'Africa's best kept secret', but the authors seem to differ when trying to reveal why Somaliland has been able to recover from a civil war on its own.²⁹¹

3.1.3 The Puntland State of Somalia

Puntland State Building Efforts

"The Puntland State of Somalia" declared itself an autonomous state in 1998, after the clan elders of North-East Somali region had met in Garowe to initiate a regional building block process.²⁹² Unlike the Republic of Somaliland, the region does not claim to be an utterly independent state and was formed with the intent of eventually being a part of a Somali federal state.²⁹³ The Somali Salvation Democratic Front (SSDF) first was founded to combat the Barre regime but later on came to settle in Puntland, to promote the idea of decentralised governance with the ultimate goal to one day amalgamate these regional administrations into one central government.²⁹⁴ Puntland had not always been a unified territory, but was formed out of the three regions Bari, Nugal and North Mudug, which had been establishing several agreements and partnerships with each other, under influence and guided by the SSDF.²⁹⁵ The clan elders also adopted a provisional charter in which they constituted a parliament that would be represented by members of all Puntland clans.²⁹⁶ As in Somaliland, local customary law, Sharia law and formal law sources are applied at the same time, in a non consistent manner. The Puntland administration has come a long way, since a decade ago, governmental institutions were considered to be penetrated by corruption and were even believed to be informal supporters of piracy.²⁹⁷ As for today, the Puntland administration is considered far from an utopist government but it has managed to bring a significant degree of security and rule of law to the region. While still struggling to eradicate pirates operating from their territory, they have managed to expel most of the radical political Islamists.

The Puntland Constitution

After the 1998 Provisional Charter and the 2001 Transitional Constitution, Puntland's representatives adopted a permanent constitution in 2012. An impact assessment report by the PDRC revealed that a majority of the queried Puntland people approved the new constitution and even deemed it suitable as the main Puntland source of law.²⁹⁸ Up to today, the new constitution has not been published anywhere, so the author's analysis is unfortunately limited to the little research made by other authors on Puntland's main legal document. The new constitution has ameliorated the power of the

²⁹¹ BALTHASAR, D., "Somaliland's Best Kept Secret: Shrewd Politics and War Projects as Means of State-Making", *Journal of Eastern African Studies*, 2013, 7:2, 218

²⁹² PHAM, J.P., "Putting Somali Piracy in Context", *Journal of Contemporary African Studies*, 2010, 28:3, 335

²⁹³ UN HABITAT, *Somaliland, Puntland: The Land Legal Framework: Situation Analysis*, UN Human Settlement Programme, November 2006, 10

(available at: http://www.unhabitat.org/downloads/docs/4417_21585_somaliland.pdf)

²⁹⁴ HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, 77

²⁹⁵ DOORNBOS, M., "Somalia: Alternative Scenarios for Political Reconstruction", *African Affairs*, 2002, 101, 101

²⁹⁶ PHAM, J.P., "Putting Somali Piracy in Context", *Journal of Contemporary African Studies*, 2010, 28:3, 335

²⁹⁷ HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, 78

²⁹⁸ PUNTLAND DEVELOPMENT RESEARCH CENTER, *Understanding Democracy in Puntland: Impact Assessment Report*, Pillars of Peace Programme: Phase 1, June 2012, 8 (available at: <http://pdrcsomalia.org/wp-content/uploads/2012/10/Democratization-Campaign-Impact-Assessment-Puntland.pdf>)

Puntland Parliament but has constricted the president's powers.²⁹⁹ Together with this constitution, Puntland also made an effort to support the process of democratisation by adopting several legislations like an electoral law, a political parties law and the Puntland Electoral Commission law.³⁰⁰ For the political parties law, Puntland followed the example of Somaliland and built in the rule that a maximum of three parties may be active simultaneously, for the same reasons the Somaliland government instituted the rule.³⁰¹ The constitution also endeavours to incorporate traditional leaders in the judiciary, but at the same time however determines that their verdicts can only apply if no other resolution can be found within the constitution or the state laws.³⁰² They further cannot participate in any religious or political movement. Traditional elders were also entrusted with political functions, as they also have a say on the nomination of parliamentary candidates.³⁰³

Legal Status of Puntland?

With the creation of the Federal Republic of Somalia, Puntland saw the construction of a Federal State, an evolution they had been anticipating for years. However, it is not sure up until today what exact status Puntland holds within this federal structure. Throughout the years, Puntland had been promoting itself more and more as an independent region, as shown by the adoption of a separate flag, an anthem and a coat of arms in 2009.³⁰⁴ Puntland representatives have made contradictory statements, which seems to reflect their indecisive attitude towards their position in the Somali state structure. As an example, Puntland has described itself in its constitution as "an independent integral part of Somalia", which seems to be a *contradictio in terminis*.³⁰⁵ The future will have to point out the exact political relationship between Puntland and the Federal Republic of Somalia. As pointed out above, the constitution of the Federal Government of Somalia does state that the Federal Members of Somalia must each establish their own political infrastructure.

Evaluation of the Puntland Judicial System

A report on the Puntland rule of law indicates that most legal insufficiencies match those present in all Somali legal administrations, as described below.³⁰⁶ According to the report, the Puntland region in particular, should officially define the boundaries of its

²⁹⁹ HESSE, B.J., "Lessons in Successful Somali Governance ", *Journal of Contemporary African Studies*, 2010, 28:1, 80-81

³⁰⁰ PUNTLAND DEVELOPMENT RESEARCH CENTRE , *Annual Report 2010*, January-December 2010, 5 (available at: [http://pdrcsomalia.org/wp-content/files/reports/PDRC%20Annual%20Report%202010%20\(D2\).pdf](http://pdrcsomalia.org/wp-content/files/reports/PDRC%20Annual%20Report%202010%20(D2).pdf))

³⁰¹ HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, 81

³⁰² HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, 81

³⁰³ ABDURAHMAN, A.O.S., *Order Out of Chaos: Somali Customary Law in Puntland and Somaliland*, Accord, 2010, 21, 59 (available at: http://www.c-r.org/sites/c-r.org/files/Accord%2021_17Order%20out%20of%20chaos_Somali%20customary%20law_2010_ENG.pdf)

³⁰⁴ PHAM, J.P., "Putting Somali Piracy in Context", *Journal of Contemporary African Studies*, 2010, 28:3, 336

³⁰⁵ HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, 81

³⁰⁶ PILLARS OF PEACE SOMALI PROGRAMME, *Puntland Note: Mapping the Foundations of Peace; Challenges to Security and Rule of Law, Democratisation Process and Devolution of Power to Local Authorities*, November 2010, 8 (available at: http://www.interpeace.org/publications/doc_download/67-puntland-note-mapping-the-foundations-of-peace-english)

legal districts, as conflicts often arise on the extent of these local administrations' jurisdiction and their inherent right to collect municipal tax.³⁰⁷

3.1.4 General Evaluation of the Formal Judicial Structures

Nevertheless Somalia knows three different formal judiciary structures and each of them has its own specific shortcomings, most of the judicial limitations are identical, due to similarities in their judicial structure.³⁰⁸ An attempt was made to sum up and categorise the most significant shortcomings mentioned in studies and reports, that withhold each formal judiciary system from functioning effectively.

Conflict with other Somali Law Sources

The interrelation between Sharia law, Somali customary law and the formal judicial system of Somalia has not been formally traced out in a distinct manner.³⁰⁹

While there are formal legal codes that should be used by the judges, all too often their verdicts are based on beliefs and assumptions, that find their roots in Somali customary law.³¹⁰ Laws that conflict with Sharia law are often still applied, although this is prohibited by the constitution. Consequently, there is a huge lack of legal protection, since one can never be sure which law will be applied in a certain situation.

Furthermore, the jurisdiction of the formal judiciary is frequently undermined, especially in rural areas, by settlements based on *Xeer*, reached outside of court.³¹¹ Clan elders often pressure members of their clan to drop their charges and settle outside of court, even when the case was already brought before a judge. People also prefer settlements based on *Xeer* instead of state law because of its swift and inexpensive nature.³¹²

In parallel, courts that apply Sharia law are often preferred over state courts, since they are able to render verdicts much faster.³¹³

Arbitrary Application

Due to the lack of written guidelines on its practice, judges' rulings are often guided by their own judicial instinct, political views, philosophy and legal experience.³¹⁴ This arbitrary ruling violates the internationally accepted principle of legality, which dictates that a judge's ruling can only be based on rules that are 'prescribed by law'. This principle assures that all people are treated equal before the law, but is often violated because of the arbitrary judging and application of various law systems, even though it is incorporated in the Universal Declaration of Human Rights.³¹⁵

³⁰⁷ PILLARS OF PEACE SOMALI PROGRAMME, *Puntland Note: Mapping the Foundations of Peace; Challenges to Security and Rule of Law, Democratisation Process and Devolution of Power to Local Authorities*, November 2010, 9 (available at: http://www.interpeace.org/publications/doc_download/67-puntland-note-mapping-the-foundations-of-peace-english)

³⁰⁸ LE SAGE, A., *Stateless Justice in Somalia*, 31

³⁰⁹ LE SAGE, A., *Stateless Justice in Somalia*, 32

³¹⁰ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 6

³¹¹ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 5

³¹² SCHLEE, G., "Customary Law and the Joys of Statelessness", 266

³¹³ SCHLEE, G., "Customary Law and the Joys of Statelessness", 266

³¹⁴ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 6

³¹⁵ UN GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, 1948, December 10, 217 A (III), art. 7 (available at: <http://www.un.org/en/documents/udhr/>), last consulted 13/08/2013

Especially in criminal cases this principle should be abided by, as international law determines that one cannot be guilty of any act that is not prescribed by national or international law.³¹⁶

Legal Personnel: Low Qualification Standards

The formal judiciaries all lack qualified legal professionals, such as judges, attorneys, registrars and civil servants.³¹⁷ The current judges are selected by way of low qualification standards and their operations are not judged in an adequate manner. Most Somali judges lack important knowledge of existing legal codes.³¹⁸ The achievements of judges are not evaluated in a proper manner, since they are often promoted or demoted based on the numbers of cases in appeal they have won or lost.³¹⁹ Even if a judge's rulings are manifestly illegal due to incompetence or corruption, it is hard to dismiss them because his clan will cover for him.³²⁰

Judicial Equipment

The judicial facilities are not sufficient; there is a lack of resources, legal documents, technology, judicial training and salary for the judicial personnel.³²¹

Correctional Facilities

The correctional facilities are overcrowded, unhygienic and are not adapted to juvenile and mentally impaired prisoners.³²²

Accessibility

Formal courts are mostly established in the regional capitals, with the detrimental consequence that the rural population is hardly able to use the Somali national formal judiciary system.³²³ Therefore, they almost entirely rely on their local legal infrastructures and the judgment of their traditional and religious leaders. Most of the Somali people lack significant knowledge of the existing legal codes, no surprise considering the fact that most people professionally occupied with Somali law are unaware of the legal codes in their entirety. This problem is even harder to overcome since the legislation has not been published anywhere and thus is unavailable to the public and even to the judiciary personnel.³²⁴

Judicial Independence

In practice, judicial independence is not guaranteed, while it is protected in formal laws.³²⁵ Politicians, well-off persons and prominent clan communities interfere in high interest cases.³²⁶ This process, especially in the Somali Federal Government, is likely to

³¹⁶ UN GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, 1948, December 2010, 217 A (III), art. 11(2) (available at: <http://www.un.org/en/documents/udhr/>), last consulted 13/08/2013

³¹⁷ LE SAGE, A., *Stateless Justice in Somalia*, 31

³¹⁸ LE SAGE, A., *Stateless Justice in Somalia*, 31

³¹⁹ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 7

³²⁰ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 7

³²¹ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 8

³²² LE SAGE, A., *Stateless Justice in Somalia*, 32

³²³ LE SAGE, A., *Stateless Justice in Somalia*, 31

³²⁴ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 8

³²⁵ THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, art. 97.2

³²⁶ LE SAGE, A., *Stateless Justice in Somalia*, 31

be perennial, given the fact that corruption has been institutionalised in government administrations since the state's independence.³²⁷

Legal Reform

The legislative branch has fallen short of its responsibilities to address the current problems in Somalia with new legislation. The Somali civil codes date back to the mid-20th century and almost no significant new laws have been effectuated since then.³²⁸ This is due to the fact that members of the parliament are laymen when it comes to judicial issues.³²⁹

Compliance between the Three Formal Judiciary Systems

The different regional judiciaries should more or less try to progress in the same direction, in order to guarantee a better legal protection for their inhabitants, despite political differences.³³⁰ In an ideal situation, they should even try to develop according with neighboring countries (mainly Kenya, Ethiopia, Yemen and the Emirates). Harmonisation is the single most important factor in order to create efficacious and transparent legal enforcement.

3.2 Xeer: Clan Based Customary Law

Xeer is the Muslim name developed to describe the local customary law that was applied by the Somali clans, before they were confronted with the formal law system imposed by their colonial occupiers.³³¹ This set of rules is believed to be developed in the Horn of Africa, since no evidence has been found that it originated outside the region or was influenced by another judicial system, a premonition that is strengthened by the fact that all *Xeer* terminology is expressed in the Somali language.³³² Nowadays, *Xeer* is still applied throughout the whole Somali state, including the urban centers, but it has remained more intact in rural areas and Somaliland, since the British occupiers, unlike the Italian colonists, did not try to uproot this legal system.³³³ A rough estimate points out that it is applied in 80 or even up to 90 per cent of all the Somali people's disputes and criminal cases.³³⁴ The Somali clan system has been used as the basis for various judicial systems in Somalia.³³⁵ This local customary law is usually not a written legal code, but more a traditional code of conduct, passed on orally from one generation to the next. *Xeer* is used to regulate both intra-clan conflicts as well as inter-clan conflicts, like

³²⁷ HAMMOND, L., "Somalia Rising; Things Are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 191

³²⁸ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 7

³²⁹ ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, 8

³³⁰ BATTERA, F. and CAMPO, A., "The Evolution and Integration of Different Legal Systems in the Horn of Africa: The Case of Somaliland", *Global Jurist Topics*, 2001, 1:1, 28

(available at: <http://www.mballi.info/doc113.htm>), last consulted 13/08/2013

³³¹ *Xeer* can also be written as 'Heer' or 'Shir', which is the result of the Somali pronunciation of the word and the lack of a unified *Xeer* code. Shir can however also indicate the meetings between clan elders.

³³² MACCALLUM, S.H., *The Rule of Law Without the State*, Mises Daily, 2007, September 12

(available at: <http://mises.org/daily/2701>, last consulted 14/08/2013)

³³³ MACCALLUM, S.H., *The Rule of Law Without the State*, Mises Daily, 2007, September 12

(available at: <http://mises.org/daily/2701>, last consulted 14/08/2013)

³³⁴ ZUIN, M., "A Model of Transitional Justice for Somalia", *Praxis: The Fletcher Journal of Human Security*, 2008, 23:2, 94

³³⁵ HARPER, M., *Getting Somalia Wrong?*, 40

the entitlement to water, resources and grazing land.³³⁶ Since almost all Somali people are Muslim, a significant amount of Sharia law has been integrated in *Xeer* throughout the years. Not a lot of authors have researched Somali customary law, let alone analysed its contributions and shortcomings. This introduction on Somali *Xeer* thus unfortunately will be based on a limited amount of sources, most importantly works of Van Notten³³⁷ and Le Sage.³³⁸ Bradbury also refers to these authors as the main sources in discussions on *Xeer*.³³⁹

3.2.1 The Concept of Somali Customary Law

Nowadays, most nations, particularly the Western states, apply statutory law, which is based on legislation and designed by politicians. Somali local customary law however is based on the customary behaviour of people, emerged spontaneously and eventually grew into a code of conduct, which is respected without formal agreement. Mohamed, Van Notten en Lewis have pointed out that Somali law and politics are built upon two main principles: *tol iyo Xeer* (kinship and contract).³⁴⁰ Clanship indicates the various political rules and judicial ties abided by Somali population. However, these rules of clanship are set out by social contract, a judicial system that is generally agreed on and makes clanship relations work.³⁴¹ Mohamed even believes that kinship was not the legal basis for the establishment of *Xeer*, but that *Xeer* as a social contract was indeed the foundation for kinship.³⁴² This social contract must be seen as a (mostly oral) inter-and intra-clan agreement on obligations that each party has to abide by and that can be enforced when they fail to meet the 'legal' conditions pointed out in the contract. Local customary law as established in *Xeer*, can also be found in other Muslim communities, with which it shares the same core concepts of collective payment of compensation in order to prevent retaliation by the damaged clan or group.³⁴³ When the Somali state collapsed in 1991, the areas that were not under control of any working regional formal administration, returned to their local customary law.³⁴⁴ Van Notten points out that the Somali customary law differs from the national customary law, applied in societies that are ruled by a state administration, since, in those countries, the expression only refers to "*certain enforceable rules*" applied by judges.³⁴⁵ Bradbury compares the Somali customary law to the "*Western political notion of a social contract*", since it defines the political pacts between clans.³⁴⁶ As a result, the Somali judges who rule local customary law, differ thoroughly from these ruling statutory law. Judges of *Xeer* are chosen by the two conflicting parties from their own clan. In regions that comply to Somali customary

³³⁶ HARPER, M., *Getting Somalia Wrong?*, 40

³³⁷ Michael van Notten is a Dutch lawyer who married into the Samaron Clan in Somaliland and therefore got familiar with the Somali way of life and the practice of *Xeer*.

³³⁸ See VAN NOTTEN, M., *The Law of the Somalis* and LE SAGE, A., *Stateless Justice in Somalia*

³³⁹ BRADBURY, M., *Becoming Somaliland*, 17

³⁴⁰ MOHAMED, J., "Kinship and Contract in Somali Politics", *Journal of the International African Institute*, 2007, 77:2, 226

³⁴¹ MOHAMED, J., "Kinship and Contract in Somali Politics", *Journal of the International African Institute*, 2007, 77:2, 227

³⁴² MOHAMED, J., "Kinship and Contract in Somali Politics", *Journal of the International African Institute*, 2007, 77:2, 242

³⁴³ SCHLEE, G., "Customary Law and the Joys of Statelessness", 258

³⁴⁴ VAN NOTTEN, M., *The Law of the Somalis*, 3

³⁴⁵ VAN NOTTEN, M., *The Law of the Somalis*, 16

³⁴⁶ BRADBURY, M., *Becoming Somaliland*, 17

law, there is no standing police force nor a standing army, to ensure the enforcement of *Xeer*.³⁴⁷

3.2.2 Characteristics of Xeer

Compensatory Nature

Unlike Western statutory law, *Xeer* does not predominantly carry out a punitive goal. More important than punishing the perpetrator of acts against the law, *Xeer* aims to compensate and reimburse the injured. This is a direct result of the fact that Somalis address crimes as a violation of their property rights, for which a compensation must be paid when their rights are infringed.³⁴⁸ The most prominent example of this principle is the collective payment of *diya*, a blood compensation that has to be paid by the clan in case one of its members is guilty of committing murder, physical harm, theft, rape or defamation.³⁴⁹ Most clans adhere to the principle that the *diya* blood price for murder equals one hundred camels if the victim was a man, fifty camels if the victim was a woman and twenty-five if it was a baby.³⁵⁰ From a Western point of view, this may seem peculiar, but it is a very rational procedure according to Somalis, since the perpetrator may not have enough individual resources to pay the compensation and therefore would risk to be killed by the victim's clan, which could easily escalate in a series of inter-clan conflicts or even killings.³⁵¹ Furthermore, since they are not at all familiar with the concept of individual property, it is only logical that judicial claims are considered 'collective property'.³⁵² Other proof of the compensatory and restitutionary nature of *Xeer* is its lack of criminal rules. Perpetrators of crimes against *Xeer* law cannot get a prison sentence, since it is the clan's responsibility to reeducate their lawbreaking members.³⁵³ The *diya* compensation must be paid directly to the victim or the victim's family and not to any court or administration.³⁵⁴

Clan Insurance

"He who does not own a camel lives under the protection of others"
-Somali expression³⁵⁵

Somalis are automatically 'insured' against accountabilities before the law. Given the compensatory nature of *Xeer*, the perpetrator's family will be held responsible for his law violations. The concept of individuality is almost unknown in *Xeer*, which can be very easily explained by the fact that nomadic individuals simply do not have enough individual resources to pay their obliged compensations.³⁵⁶ Consequently, guilt and the

³⁴⁷ VAN NOTTEN, M., *The Law of the Somalis*, 21

³⁴⁸ MACCALLUM, S.H., *The Rule of Law Without the State*, Mises Daily, 2007, September 12, (available at: <http://mises.org/daily/2701>), last consulted 14/08/2013

³⁴⁹ SOMALIA JOINT NEEDS ASSESSMENT, *Governance, Security and the Rule of Law: Cluster Report*, August 2006, 22 (available at: http://www.somali-jna.org/downloads/Somali%20JNA1_Gov-Sec-Rule%20of%20Law%20-%20I.pdf)

³⁵⁰ LE SAGE, A., *Stateless Justice in Somalia*, 33

³⁵¹ GUNDEL, J., *The Predicament of the 'Oday'*, 9

³⁵² LE SAGE, A., *Stateless Justice in Somalia*, 34

³⁵³ VAN NOTTEN, M., *The Law of the Somalis*, 56

³⁵⁴ MACCALLUM, S.H., *The Rule of Law Without the State*, Mises Daily, 2007, September 12, (available at: <http://mises.org/daily/2701>), last consulted 14/08/2013

³⁵⁵ BRADBURY, M., *Becoming Somaliland*, 12

question if a crime was committed on purpose or by accident are matters that are not essential in *Xeer*, but rather considered aggravating circumstances.³⁵⁷ However, if a family member keeps infringing *Xeer*, his family can decide to end their responsibility towards the perpetrator's future law liabilities and the culprit becomes an 'outlaw', which usually means he will have to leave the clan and seek clan insurance elsewhere.³⁵⁸ Clan insurance implies that the reeducation of criminals is a family matter, instead of a governmental affair, as stated above. The family will ensure he will not commit similar violations in the future, for instance by forbidding him to keep a weapon.³⁵⁹ However, some observers experience the concept of clan insurance as a way for individual perpetrators to evade their judicial responsibilities, which could be considered a violation of international human right standards.³⁶⁰

Oral Tradition of a General Set of Rules

Xeer is still passed on orally through generations, but there have been several attempts to codify or write down the Somali customary law.³⁶¹ These mostly failed, because of the political turmoil and the fact that *Xeer* constantly evolves and is open to interpretation by clan elders. The Somali customary law consists of broad general principles, rather than detailed specific rules for certain situations and is therefore subject to interpretation and cultural evolution.³⁶² *Xeer* is not a strict legal system and thus its application may vary given the parties' political and military strength, as will be pointed out below.³⁶³ The usage of *Xeer* is not mandatory, since the parties are free to settle their case outside the Somali customary law.³⁶⁴ In order to be in compliance with international law standards, *Xeer* will need to be codified, to ensure equal protection before law, especially its criminal laws, given the principle of *nulla poena sine lege stricta*.³⁶⁵

Universal Character?

It is unclear if *Xeer* can be considered a universal legal system within Somalia. Some authors believe *Xeer* has a local nature and varies from region to region, while others claim that there is a set of general principles, representing one single Somali customary law system.³⁶⁶ Other authors believe that, even though the application of *Xeer* shows various regional differences, there are some fundamental, uniform principles that are incorporated in all Somali clan laws, called *Xissi adkaaday*, including the *diya* payment and the rules between clans on security and protection.³⁶⁷ Besides the *Xissi adkaaday*, we can distinguish two types of *Xeer* between clans: *Xeer guud*, which comprises a set of rules applied by several clans that regulates their daily actions and interclan relations,

³⁵⁶ SOMALIA JOINT NEEDS ASSESSMENT, *Governance, Security and the Rule of Law: Cluster Report*, August 2006, 22 (available at: http://www.somali-jna.org/downloads/Somali%20JNA1_Gov-Sec-Rule%20of%20Law%20-%20I.pdf)

³⁵⁷ SCHLEE, G., "Customary Law and the Joys of Statelessness", 261

³⁵⁸ VAN NOTTEN, M., *The Law of the Somalis*, 40

³⁵⁹ VAN NOTTEN, M., *The Law of the Somalis*, 41

³⁶⁰ See GUNDEL, J., *The Predicament of the 'Oday'*, 62 p.

³⁶¹ LE SAGE, A., *Stateless Justice in Somalia*, 34

³⁶² VAN NOTTEN, M., *The Law of the Somalis*, 36

³⁶³ See paragraph 3.2.5, *Minority Clans and the Bargaining of Power*

³⁶⁴ VAN NOTTEN, M., *The Law of the Somalis*, 37

³⁶⁵ UN GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, 1948, December 10, 217 A (III), art. 7 and 11 (2) (available at: <http://www.un.org/en/documents/udhr/>), last consulted 13/08/2013

³⁶⁶ LE SAGE, A., *Stateless Justice in Somalia*, 32

³⁶⁷ GUNDEL, J., *The Predicament of the 'Oday'*, 9

while *Xeer tolnimo*³⁶⁸ comprises very specific norms, only adopted by a particular clan and established by a contract.³⁶⁹ Because of the various applications of *Xeer*, unlike Sharia and secular law³⁷⁰, a harmonisation effort would be challenging, unless one would concentrate on registering only *xissi adkaaday*.

Xeer Incriminations

In order to understand the significance of local customary law in Somali communities and its functionality in practice, some examples of rights that are protected by *Xeer* will be offered. Violations of rights protected by *Xeer* can be classified into different categories. Somalis do not make a distinction between civil and penal rules, since there are no real criminal laws to punish the perpetrator and compensation is required in both cases.

Xeer regulates compensation in case of homicide and physical or psychological assault. In homicide cases, it is agreed upon that the perpetrator must give his own life as a compensation for his crime.³⁷¹ However, it is more likely that the victim's family asks for *diya* compensation, expressed in a certain number of camels.³⁷² A striking custom comprises the right to sentence two people of the culprit's clan to death if the murderer has managed to escape.³⁷³ This rule is often alleviated, especially when the two clans manage a good relationship, but it urges the murderer's family to capture him and hold him responsible for his acts. Assault on anyone's physical integrity is reimbursed with a compensation, which is often higher for women, especially if the psychical harm has decreased her chances for marriage.³⁷⁴ Each body part that could be damaged matches an amount of camels; each teeth is worth five camels, a finger or a toe is worth ten camels, while each joint of a finger or toe must be reimbursed by three and one-third camels.³⁷⁵ Psychological harm is considered a serious crime in Somalia, given the importance of honour in Somali society. This *Xeer* rule could be considered somewhat excessive since it sometimes violates the perpetrator's right of free speech, as protected by article 19 of the Universal Declaration on Human Rights.³⁷⁶

The basic rule in case of damaged property, is that the violator of *Xeer* must replace the damaged or alienated objects and should this be no longer possible, he must give a compensation to the rightful owner.³⁷⁷ *Xeer* further provides a set of rules that can be applied whenever a contract, that constructs a sale or promises to render specific services, is infringed.³⁷⁸ This also includes the marriage contract, which is negotiated by the parents of the couple and sometimes foresees the opportunity to remarry with one

³⁶⁸ *Xeer tolnimo* can also be called *Xeer gaar*

³⁶⁹ VAN NOTTEN, M., *The Law of the Somalis*, 33

³⁷⁰ ABDURAHMAN, A.O.S., *Order out of Chaos: Somali Customary law in Puntland and Somaliland*, Accord, 2010, 21, 58 (available at: http://www.c-r.org/sites/c-r.org/files/Accord%2021_17Order%20out%20of%20chaos_Somali%20customary%20law_2010_ENG.pdf)

³⁷¹ VAN NOTTEN, M., *The Law of the Somalis*, 55

³⁷² See paragraph 3.2.2, *Compensatory Nature*

³⁷³ VAN NOTTEN, M., *The Law of the Somalis*, 55

³⁷⁴ VAN NOTTEN, M., *The Law of the Somalis*, 56

³⁷⁵ MOHAMED, J., "Kinship and Contract in Somali Politics", *Journal of the International African Institute*, 2007, 77:2, 244

³⁷⁶ UN GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, 1948, December 2010, 217 A (III), art. 19 (available at: <http://www.un.org/en/documents/udhr/>), last consulted 13/08/2013

³⁷⁷ VAN NOTTEN, M., *The Law of the Somalis*, 57

³⁷⁸ VAN NOTTEN, M., *The Law of the Somalis*, 58

of the husband's brothers, should the husband have died and one of his brother is still alive and unmarried.³⁷⁹

Xeer historically also comprised a series of local customary laws that should be applied in times of war, but these laws have been ignored systematically since the Somali civil war. These laws state that violence against women, children or elders is forbidden and protects economic assets of the Somalis during wartimes.³⁸⁰ Observers believe they resemble a younger, more basic version of the Geneva conventions.³⁸¹

Relation to Sharia Law

Since almost all Somalis are Muslim, they are obliged as any other Islamic nation to base their legal system on the Islam code of conduct, Sharia. In practice, Sharia is often considered more a general inspiration for the draft of legal rules, while state law or traditional *Xeer* can still be applied when it does not contradict Sharia.³⁸² Most of the time, Sharia is applied as a complementary source of law and does not replace *Xeer*.³⁸³ Schlee points out that the Western world is often startled when the media claims that Sharia has been 'introduced' in an Islamic country, but given the general obligation for Muslim countries to employ Sharia law as a primary legal source and the practical implementation of this rule, such a statement is meaningless.³⁸⁴ Somali law has been separated from politics and even from religion, except for cases of family and inheritance matters, which are sometimes conducted by a religious leader applying Sharia law.³⁸⁵ In these matters, Sharia was almost completely absorbed by *Xeer*.³⁸⁶ In rural areas, it is believed that for a long time, most Somalis were not aware their rules originated from two various law systems.³⁸⁷ Should there be an irreconcilable difference in the application of these two law systems, it is generally agreed upon in practice, to give priority to the local customary law, except for cases in which the Sharia rule would be more in line with the community's habitual customs.³⁸⁸ However, most of the time, the elders affirm that their practices are somehow in line with Sharia.³⁸⁹ The rise of Sharia courts and Islamist groups throughout the country, somewhat replaced the importance of clan affiliation for religious ties.³⁹⁰ The most fundamental difference between Sharia and *Xeer* comprises the fact that in the former, the individual is held responsible for his deeds, while in the latter, the whole clan is considered responsible for the perpetrated crime.³⁹¹ Furthermore, the main goal

³⁷⁹ VAN NOTTEN, M., *The Law of the Somalis*, 60

³⁸⁰ ABDURAHMAN, A.O.S., *Order out of Chaos: Somalia Customary Law in Puntland and Somaliland*, Accord, 2010, 21, 58 (available at: http://www.c-r.org/sites/c-r.org/files/Accord%2021_17Order%20out%20of%20chaos_Somali%20customary%20law_2010_ENG.pdf)

³⁸¹ LOMBARD, L., *Elder Counsel: How Somalia's Aged Tribal Justice*

System Keeps the Peace in a Country Known for Chaos, Legal Affairs, October 2010, 2

(available at: <http://www.legalaffairs.org/prINTERfriendly.msp?id=891>), last consulted 14/08/2013

³⁸² SCHLEE, G., "Customary Law and the Joys of Statelessness", 259

³⁸³ MENKHAUS, K., "State Collapse in Somalia: Second Thoughts", *Review of African Political Economy*, 2003, 30:97, 411

³⁸⁴ SCHLEE, G., "Customary Law and the Joys of Statelessness", 260

³⁸⁵ VAN NOTTEN, M., *The Law of the Somalis*, 35

³⁸⁶ LE SAGE, A., *Stateless Justice in Somalia*, 33

³⁸⁷ SCHLEE, G., "Customary Law and the Joys of Statelessness", 260

³⁸⁸ VAN NOTTEN, M., *The Law of the Somalis*, 37

³⁸⁹ SCHLEE, G., "Customary Law and the Joys of Statelessness", 259 (footnote 6)

³⁹⁰ HARPER, M., *Getting Somalia Wrong?*, 40

³⁹¹ BRONS, M.H., *Society, Security, Sovereignty and the State in Somalia: From Statelessness to Statelessness?*, Rotterdam, International Books, 2001, 120

of Sharia is to punish the perpetrator of the crime, while in *Xeer* compensation is essential in order to prevent retaliation.³⁹²

3.2.3 Applying Xeer

The Xeer Procedure

The procedures in Somali customary law clearly reflect the importance of kinship and family ties in the pastoral democracies. Justice is being dealt with on the level of the extended family, instead of individually as we are used to in Western civilisation. For instance, in case of conflict, the families of the conflicting parties take upon them the responsibility to each point out one of the judge(s) assigned to represent their clan members, so these judges can form a court of law.³⁹³ These judges are called the *oday* and represent all the members of their *jilib*, which is the group responsible for paying *diya* compensation, and they are appointed by the clan elders after an intensive selection procedure that can take weeks or even months.³⁹⁴ Given the fact that in *Xeer*, the extended family is responsible for the acts of its members, it is self-evident they have a say in the process. Only the victim or his family can start this procedure, not the victim's clan or a third party.³⁹⁵ Subsequently, there are no permanent courts of law. The main principle in *Xeer* is the right to be reimbursed when someone violates your rights, unless restitution is no longer possible in which case a compensation must be paid.³⁹⁶ If someone's rights were intentionally violated, the payment of a fine is compulsory. The procedure is very traditional, even ceremonial and usually takes place under a tree, open to the public, or in more urban communities in the house of one of the clan members.³⁹⁷ ³⁹⁸ The parties must share the burden of proof and therefore each party has to defend its case, or if need be, they can appoint one or several lawyers.³⁹⁹ Since all of the parties' argumentation must be stated orally, without deposition of written documents, rhetoric plays an important role in Somali judiciary.⁴⁰⁰ Disputed facts can only be considered valuable evidence if there are three witnesses that have officially stated its reliability.⁴⁰¹ A guiding principle of Somali customary law is that the verdict must be ruled by means of unanimity. This implies that the two judges of the respective families must come to a consensus when rendering a verdict. If they cannot reach an agreement, Somali customary law premises that they appoint a judge from a neighboring family, who must adjudge a final conclusion.⁴⁰² Verdicts are not written down, but stated orally.⁴⁰³ If one

³⁹² SCHLEE, G., "Customary Law and the Joys of Statelessness", 264

³⁹³ VAN NOTTEN, M., *The Law of the Somalis*, 39 and 66

³⁹⁴ MACCALLUM, S.H., *The Rule of Law Without the State*, Mises Daily, 2007, September 12 (available at: <http://mises.org/daily/2701>), last consulted 14/08/2013

³⁹⁵ VAN NOTTEN, M., *The Law of the Somalis*, 48

³⁹⁶ VAN NOTTEN, M., *The Law of the Somalis*, 49

³⁹⁷ LE SAGE, A., *Stateless Justice in Somalia*, 35

³⁹⁸ ABDURAHMAN, A.O.S., *Order out of Chaos: Somalia Customary Law in Puntland and Somaliland*, Accord, 2010, 21, p. 59 (available at: http://www.c-r.org/sites/c-r.org/files/Accord%2021_17Order%20out%20of%20chaos_Somali%20customary%20law_2010_ENG.pdf)

³⁹⁹ MOHAMED, J., "Kinship and Contract in Somali Politics", *Journal of the International African Institute*, 2007, 77:2, 228

⁴⁰⁰ MOHAMED, J., "Kinship and Contract in Somali Politics", *Journal of the International African Institute*, 2007, 77:2, 228

⁴⁰¹ MACCALLUM, S.H., *The Rule of Law Without the State*, Mises Daily, 2007, September 12 (available at: <http://mises.org/daily/2701>), last consulted 14/08/2013

⁴⁰² VAN NOTTEN, M., *The Law of the Somalis*, 64

of the parties does not agree with the judges' ruling, they have the right to appeal and a new court with different judges has to be constructed, under the condition both parties agree to it.⁴⁰⁴ The moment at which a verdict is final and appeal is no longer possible, seems to differ among clans, from two up to as much as twelve appeals.⁴⁰⁵

Xeer Judges

The Somali *Xeer* judges do not have more power than the other clansmen, since there is no monopoly of the judiciary. On the contrary, when a judge violates the law, he will be punished harder or pay higher fines than the other clansmen, because of his exemplary function.⁴⁰⁶ The judges are not allowed to make their judgment on the basis of new rules, but have to apply the local customary law, that the clan community generally has approved. The courts' jurisprudence is no source of law according to the Somalis, since all law must be found in the community's customs.⁴⁰⁷ Somali judges are not trained or educated to be judges, but are generally the chosen head of their extended family because of their wisdom and comprehensive knowledge of law.⁴⁰⁸ The *oday* also knows each clan member personally and therefore will anticipate any escalating conflicts by mediation and counseling in order to prevent any future crimes.⁴⁰⁹ If the judge has a close personal relationship or a personal grievance, for any reason, against one of the parties, he is excluded from the position in this peculiar case.⁴¹⁰

Enforcement of the Verdict

In general, verdicts are voluntarily abided by, given the responsibility of the convict's family in the ruling's enforcement. Still, if the perpetrator's party does not pay the compensation required in the court's verdict, the victim's family may either enforce the adjudication itself or the court can request the composition of a police force, put together out of "able-bodied villagers".⁴¹¹ These law enforcers must comply to the court's request, as they otherwise risk to be considered cooperating with the perpetrator's family and can be sentenced to help pay for the decided upon compensation.⁴¹² In the same way there are no *Xeer* courts, there also is no permanent police force and thus no monopoly of the police.⁴¹³

3.2.4 Xeer Accomplishments

Now that some of the most prominent rules in *Xeer* have been described, several contributions of the customary law system to the Somali rule of law can be distinguished. Authors' opinions on the accomplishments of *Xeer* as a legal system,

⁴⁰³ VAN NOTTEN, M., *The Law of the Somalis*, 65

⁴⁰⁴ VAN NOTTEN, M., *The Law of the Somalis*, 65-66

⁴⁰⁵ VAN NOTTEN, M., *The Law of the Somalis*, 66

⁴⁰⁶ MACCALLUM, S.H., *The Rule of Law Without the State*, Mises Daily, September 12, 2007 (available at: <http://mises.org/daily/2701>), last consulted 14/08/2013

⁴⁰⁷ VAN NOTTEN, M., *The Law of the Somalis*, 40

⁴⁰⁸ MACCALLUM, S.H., *The Rule of Law Without the State*, Mises Daily, September 12, 2007 (available at: <http://mises.org/daily/2701>), last consulted 14/08/2013

⁴⁰⁹ MACCALLUM, S.H., *The Rule of Law Without the State*, Mises Daily, September 12, 2007 (available at: <http://mises.org/daily/2701>), last consulted 14/08/2013

⁴¹⁰ GUNDEL, J., *The Predicament of the 'Oday'*, 11

⁴¹¹ VAN NOTTEN, M., *The Law of the Somalis*, 49-50

⁴¹² VAN NOTTEN, M., *The Law of the Somalis*, 66

⁴¹³ MACCALLUM, S.H., *The Rule of Law Without the State*, Mises Daily, September 12, 2007 (available at: <http://mises.org/daily/2701>), last consulted 14/08/2013

strongly differ. Van Notten for instance, strongly believes *Xeer* can provide a substantial form of justice, as it is established by the clan communities themselves, rendering justice in an unforced manner. Others, like Schlee, strongly contravene the romanticised practice of *Xeer*, asserting that the law system does not provide justice in the universal meaning of the term, but has only managed to settle some local matters of conflict.⁴¹⁴

Immunity to Manipulation and Corruption

Given their past experiences with corrupt administrations, the Somalis have built in some protective measures to rule out any possible situations, where manipulation or corruption could be derived from political power.

Since the clan community has complete control in appointing a judge, judges are unlikely to be biased or to rule a verdict that is not in line with the community's customary habits. If they do render a verdict that deviates from the generally agreed on rules in the community, the judge will lose the clan's confidence and there will be little chance he will be asked to judge again.⁴¹⁵ This strongly inhibits corruption.

Furthermore, no one has the political authority to introduce rules that are not backed by a majority of the clan. Van Notten makes a striking remark, comparing the *Xeer* rule-making with the internet, since this system also is not owned by anyone, is open for every kind of contribution and the support of its contents therefore depends on the customer's appreciation.⁴¹⁶ Another protective measure against manipulation can be found in the fact that there are no permanent courts or police forces and that policemen only work on a voluntary basis, at the behest of a judge.⁴¹⁷

It is important to recognise that the elders and judges are not offered permanent or intrinsic authority. This principle has been ignored in several state building efforts, giving the elders and judges "*artificial positions of leadership*", which ultimately led to clan conflicts and corrupted elders, as stated below in paragraph 3.2.5, *Corruption of Xeer Judges*.⁴¹⁸ In areas reigned by warlords, the immunity of *Xeer* judges is still often subverted, as militia leaders are known to bribe them to receive favourable rulings.

Natural Development of Xeer

Since judges can only apply rules that are actually recognised by the Somali clan community, *Xeer* developed naturally along with the community's insights and values.⁴¹⁹ However, Le Sage points out that *Xeer* adaptations have been rather rudimentary and they have not been able to keep up with society's recent developments.⁴²⁰ Some state that *Xeer* is becoming more and more contested as a legal code of conduct, especially since the youth no longer seems to comply to some of its rules, such as the archaic tradition of arranged marriage.⁴²¹ *Xeer* also does not provide a solution for the recognition of private property, as will be discussed in paragraph 3.2.5, *No Recognition of Private Property*.

⁴¹⁴ SCHLEE, G., "Customary Law and the Joys of Statelessness", 258-271

⁴¹⁵ VAN NOTTEN, M., *The Law of the Somalis*, 38

⁴¹⁶ VAN NOTTEN, M., *The Law of the Somalis*, 96

⁴¹⁷ VAN NOTTEN, M., *The Law of the Somalis*, 97

⁴¹⁸ MOHAMED, J., "Kinship and Contract in Somali Politics", *Journal of the International African Institute*, 2007, 77:2, 230

⁴¹⁹ VAN NOTTEN, M., *The Law of the Somalis*, 99

⁴²⁰ LE SAGE, A., *Stateless Justice in Somalia*, 37

⁴²¹ SOMALIA JOINT NEEDS ASSESSMENT, *Governance, Security and the Rule of Law: Cluster Report*, August 2006, 23 (available at: http://www.somali-jna.org/downloads/Somali%20JNA1_Gov-Sec-Rule%20of%20Law%20-%20I.pdf)

Accessibility and Speed of the Xeer Procedure

Unlike formal courts, the informal *Xeer* judiciary provides a large accessibility to people living in rural areas.⁴²² Standard procedure in *Xeer* dictates that conflicts should be settled on the same day the conflict has befallen or the day the perpetrator has been arrested.⁴²³ In practice, conflicts are generally dealt with in a few days at most.⁴²⁴

Efficaciousness of Xeer

Since for Somali pastoralists, rules are not enforced or imposed by lawmakers or law-enforcers, but created and enforced by the community itself, they experience the concept of law more as rules of conduct, that need to be lived by in order to keep peace and security within their own clan and in relations with other clans. Consequently, their judicial system is very efficacious and rules are not often infringed upon, since all Somalis actually believe these rules are justified and must not be broken for their own sake and for the sake of their family, which would bear responsibility for their deeds. The efficaciousness of this law system has also been demonstrated by their choice to hang on to local customary law in times when other judicial systems were imposed on them.⁴²⁵ ⁴²⁶ The most significant attempt to eradicate clanism and *Xeer*, came with Barre's attempt to unify Somalia into a socialist country, kept together by the worship of Barre himself as the "father of the Somali nation", when clanism was obviously considered a hindrance for modern state building.⁴²⁷ Samatar believes that Somalis have been able to survive in such a dysfunctional environment thanks to a perseverant believe in certain ethical and religious principles, such as: *respect for the wise, honesty, fairness, reciprocity, piety, kindness and discipline*.⁴²⁸ These principles have served as a basis in the evolution of *Xeer*.

Nevertheless, Le Sage lists some cases in which *Xeer* was rejected by clan members, for instance by militia leaders or when refugees returned to their clan after being exposed to Western law systems.⁴²⁹

3.2.5 Xeer Shortcomings

Despite *Xeer*'s numerous contributions as a judicial system, some substantive shortcomings, which should be taken into account when evaluating Somali customary law, have to be noted.

Inequalities before Xeer

Non-Somalis are often treated differently before *Xeer*, as are women and younger generations.⁴³⁰ This violates the universal right of equality before the law.⁴³¹

⁴²² ZUIN, M., "A Model of Transitional Justice for Somalia", *Praxis: The Fletcher Journal of Human Security*, 2008, 23:2 96

⁴²³ VAN NOTTEN, M., *The Law of the Somalis*, 100

⁴²⁴ ZUIN, M., "A Model of Transitional Justice for Somalia", *Praxis: The Fletcher Journal of Human Security*, 2008, 23:2, 97

⁴²⁵ VAN NOTTEN, M., *The Law of the Somalis*, 102

⁴²⁶ For instance when colonial rules were imposed; with the constitution of 1960; with the current constitution so far.

⁴²⁷ HARPER, M., *Getting Somalia Wrong?*, 41

⁴²⁸ SAMATAR, A.I., *The Somali Challenge: From Catastrophe to Renewal?*, 134

⁴²⁹ LE SAGE, A., *Stateless Justice in Somalia*, 37

⁴³⁰ BRADBURY, M., *Becoming Somaliland*, 17

⁴³¹ UN GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, 1948, December 10, 217 A (III), art. 7 (available at: <http://www.un.org/en/documents/udhr/>), last consulted 13/08/2013

Foreigners do not have a legal personality according to *Xeer* and therefore need a patron to defend their legal rights.⁴³² Thus they depend on the goodwill of a Somali clan in order to receive legal protection.

In theory men of all ages should be able to participate in the political process, but in practice only those who are married, who have already established a household and thus have acquired some prestige and influence, can practice political authority.⁴³³

The rights of women are often violated when abiding *Xeer*. Female circumcision around the age of seven is a common practice, as is being forced to marry whomever the girl's parents have chosen as their daughter's future husband.⁴³⁴ Also, if a woman's husband dies, she is often forced to marry one of her husband's brothers and if she should be raped, she can be forced to marry her attacker.⁴³⁵ Though *Xeer* also envisions punishments in case a woman is raped, these rules are hardly ever applied in practice, which is probably a result of the integration of Sharia law and Islamic principles in *Xeer*.⁴³⁶ Women's inheritance rights are far more limited than men's and the inheritance of camels is even reserved solely for male heirs.⁴³⁷ One of the main reasons why women's rights are represented less in *Xeer*, is the fact that women are not allowed to occupy any formal political, judicial or religious function.⁴³⁸ Also, they cannot participate in discussions before a *Xeer* court, even if they are the victim and thus the reason why the court convened.⁴³⁹ Sadly, many Somali clan men seem to think they have greater intellectual capacities than women, as is proven by the following Somali expression: "*Knowledge cannot come to reside in a bosom that has contained milk*".⁴⁴⁰ In earlier days, Somali women still had an important economic function and were indispensable in clan societies, as they were responsible for the growth of livestock and were trusted with caring for the family's sheep and goats.⁴⁴¹ Since men nowadays fulfill all economic functions in the Somali household, including trading and the incrementing of their capital, women have become less 'valuable' for the Somali clan societies and are even considered marginal clan members.⁴⁴² The new constitution of the Federal Republic of Somaliland has made a significant effort to improve the position of women, but we will have to await the results of this legislation. Bearing in mind the limited effect of these national rules in Somali rural areas, changes in the status of women are probably extremely rare up to now.

⁴³² VAN NOTTEN, M., *The Law of the Somalis*, 50

⁴³³ SAMATAR, A.I., *The Somali Challenge: From Catastrophe to Renewal?*, 215

⁴³⁴ VAN NOTTEN, M., *The Law of the Somalis*, 104

⁴³⁵ LE SAGE, A., *Stateless Justice in Somalia*, 38

⁴³⁶ LOMBARD, L., *Elder Counsel: How Somalia's Aged Tribal Justice System Keeps the Peace in a Country Known for Chaos*, Legal Affairs, October 2010, 2

(available at: <http://www.legalaffairs.org/printfriendly.msp?id=891>), last consulted 14/08/2013

⁴³⁷ LEWIS, I., *Understanding Somalia and Somaliland*, London, Hurst & Company, 2008, 13

⁴³⁸ SOMALIA JOINT NEEDS ASSESSMENT, *Governance, Security and the Rule of Law: Cluster Report*, August 2006, 23 (available at: http://www.somali-jna.org/downloads/Somali%20JNA1_Gov-Sec-Rule%20of%20Law%20-%20I.pdf)

⁴³⁹ ZUIN, M., "A Model of Transitional Justice for Somalia", *Praxis: The Fletcher Journal of Human Security*, 2008, 23:2, 97

⁴⁴⁰ SAMATAR, A.I., *The Somali Challenge: From Catastrophe to Renewal?*, 217

⁴⁴¹ SAMATAR, A.I., *The Somali Challenge: From Catastrophe to Renewal?*, 215

⁴⁴² SAMATAR, A.I., *The Somali Challenge: From Catastrophe to Renewal?*, 229

Minority Clans and the Bargaining of Power ⁴⁴³

Some clans have more members than others, entailing the detrimental effect that they have more political influence.⁴⁴⁴ Indeed, minority clans will sometimes find themselves unable to enforce a judge's verdict when the other party is a numerically larger clan that refuses to comply to its judicial obligations.⁴⁴⁵ If the bigger clan believes the numerically weaker group will not try to retaliate the perpetrated crime, it will likely not pay the compensation, which undermines the effectiveness of *Xeer*.⁴⁴⁶ A Puntland minority clan member stated that: "*we (minority) are people who work to survive for life and we tolerate everything that happens to us for the sake of our safety*".⁴⁴⁷ In order to not be identified as a minority clan, the *diya* paying group must consist of approximately 200 to 300 men.⁴⁴⁸ Examples of minority clans, that are often not treated equally before law, are those of Bantu or Arab origin.⁴⁴⁹ Schlee therefore concludes that *Xeer* is not so much the ideal and unaffected judicial system that many authors believe it to be, since its application is not based on negotiations characterised by "brotherliness" and "bargaining skills".⁴⁵⁰ Quite the contrary, the outcome seems already to be determined and is based on the clan's "bargaining powers", defined by the clan's amount of (important) members. Clans are not considered to be treated equal and the clan system does seem to be hierarchically divided. The extent of compensation also varies according to the inter-clan's good relationships, based on friendship or lineage.⁴⁵¹ Clans that are considered neighbours, friends or family often get a 'discount' on the blood price.⁴⁵² Schlee therefore claims that *Xeer* cannot be seen as a form of justice, but rather is an expression of injustice.⁴⁵³

However, Menkhaus points out that, in order to solve this inequality before *Xeer*, the militarily weaker and numerically smaller clans must try to ally with a more powerful clan, so they too can enforce their legal rights.⁴⁵⁴ Since this is the most logical and simple solution to this problem, it is already administered in practice, as pointed out by Van Notten.⁴⁵⁵ However, the minority clan in this client-patron relationship will still not have

⁴⁴³ SCHLEE, G., "Customary Law and the Joys of Statelessness", 263

⁴⁴⁴ BRADBURY, M., *Becoming Somaliland*, 17

⁴⁴⁵ LE SAGE, A., *Stateless Justice in Somalia*, 36

⁴⁴⁶ SCHLEE, G., "Customary Law and the Joys of Statelessness", 262

⁴⁴⁷ JAMA HASSAN FARAH, *Focus Group Discussion with Minorities*, Garowe, 21 January 2010 in PILLARS OF PEACE SOMALI PROGRAMME, *Puntland Note: Mapping the Foundations of Peace; Challenges to Security and Rule of Law, Democratisation Process and Devolution of Power to Local Authorities*, November 2010, 63 (available at: http://www.interpeace.org/publications/doc_download/67-puntland-note-mapping-the-foundations-of-peace-english)

⁴⁴⁸ GUNDEL, J., *The Predicament of the 'Oday'*, 7

⁴⁴⁹ SOMALIA JOINT NEEDS ASSESSMENT, *Governance, Security and the Rule of Law: Cluster Report*, August 2006, 23 (available at: http://www.somali-jna.org/downloads/Somali%20JNA1_Gov-Sec-Rule%20of%20Law%20-%20I.pdf)

⁴⁵⁰ SCHLEE, G., "Customary Law and the Joys of Statelessness", 263

⁴⁵¹ SCHLEE, G., "Customary Law and the Joys of Statelessness", 266

⁴⁵² SCHLEE, G., "Customary Law and the Joys of Statelessness", 266

⁴⁵³ SCHLEE, G., *Regularity in Chaos: the Politics of Difference in the Recent History of Somalia*, Max Planck Institute for Anthropology, Halle/Saale, 2001, 10 (available at:

http://www.eth.mpg.de/cms/en/publications/working_papers/pdf/mpi-eth-working-paper-0018.pdf)

⁴⁵⁴ MENKHAUS, K., "State Collapse in Somalia: Second thoughts", *Review of African Political Economy*, 2003, 30:97, 412

⁴⁵⁵ VAN NOTTEN, M., *The law of the Somalis*, 50

equal rights before *Xeer*, since they are often not even allowed to participate in or observe *Xeer* hearings.⁴⁵⁶

Corruption of Xeer Judges

Since colonial times, the respective Somali governments have been bribing *Xeer* judges, so they would respect and impose rules that serve the state's interests in return.⁴⁵⁷ As a result, judges started asking financial compensation, even of their own clan members, for their assignments, which ultimately ruined their acknowledged impartiality and created a growing distrust towards their competences.⁴⁵⁸ Religious leaders on the other hand have never been paid by any government and thus hold higher esteem.⁴⁵⁹

Corruption of *Xeer* judges has strongly decreased in the regions of Somaliland and Puntland, but it still remains a major issue in the South-Central area of Somalia, where warlords and faction leaders continue to bribe and manipulate clan elders.⁴⁶⁰ The authority of elders urgently needs to be restored, given their important role in conflict mediation.⁴⁶¹

The Non Existence of Private Property Recognition

This problem could be solved by establishing committees on land at Somali district levels, with a strong local representation.⁴⁶² The new constitution of the Federal Republic of Somalia envisages the establishment of a national land policy, that should also engage in resolving property disputes.⁴⁶³ Up to today, no data can be found that proves the establishment of such a committee.

3.3 Sharia Law ⁴⁶⁴

Traditionally, religion and politics in Somalia have been separated from each other, as religious leaders occupy almost no top political functions.⁴⁶⁵ However, when the civil war broke out in 1991 and the state administrations diminished, political Islam and its practices were rebounded, as it provided a remedy for the political and economical interstice.⁴⁶⁶

Yet, in Somaliland, political Islam has had less influence.⁴⁶⁷

⁴⁵⁶ LOMBARD, L., *Elder Counsel: How Somalia's Aged Tribal Justice System Keeps the Peace in a Country Known for Chaos*, Legal Affairs, October 2010, 2

(available at: <http://www.legalaffairs.org/printfriendly.msp?id=891>), last consulted 14/08/2013

⁴⁵⁷ LE SAGE, A., *Stateless Justice in Somalia*, 36

⁴⁵⁸ SOMALIA JOINT NEEDS ASSESSMENT, *Governance, Security and the Rule of Law: Cluster Report*, August 2006, 12 (available at: http://www.somali-jna.org/downloads/Somali%20JNA1_Gov-Sec-Rule%20of%20Law%20-%20I.pdf)

⁴⁵⁹ LE SAGE, A., *Stateless Justice in Somalia*, 36

⁴⁶⁰ GUNDEL, J., *The Predicament of the 'Oday'*, iv

⁴⁶¹ MENKHAUS, K, "State Collapse in Somalia: Second Thoughts", *Review of African Political Economy*, 2003, 30:97, 411

⁴⁶² SOMALIA JOINT NEEDS ASSESSMENT, *Governance, Security and the Rule of Law: Cluster Report*, August 2006, 14 (available at: http://www.somali-jna.org/downloads/Somali%20JNA1_Gov-Sec-Rule%20of%20Law%20-%20I.pdf)

⁴⁶³ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, Chapter 3

⁴⁶⁴ Sharia is the Arabic name for all the Islamic laws and code of conducts derived from the Koran, that must be adhered to by all Muslims.

⁴⁶⁵ See supra paragraph 3.2.2, *Relation to Sharia Law*

⁴⁶⁶ BRADBURY, M., *Becoming Somaliland*, 20

⁴⁶⁷ BRADBURY, M., *Becoming Somaliland*, 181

3.3.1 Characteristics of Sharia Law

Sharia law often seems to impose cruel punishments, though in reality it also focuses on the principles of patience and forgiveness, saving room for parties to come to an agreement on compensation outside of court.⁴⁶⁸ So unlike in Western countries, where the state holds the monopoly to press criminal charges based on its penal code, crime victims can decide to settle the dispute.⁴⁶⁹

As for the relation between Sharia law and *Xeer* law, see paragraph 3.2.2, *Relation with Sharia law*.

3.3.2 Sharia Courts

Uprise and Demise

Since almost all Somalis are Muslim, Islamic law is incorporated in customary and formal law. Unsurprisingly then, Sharia has been the legal basis for the national constitution of every Islamic country in the world. In practice though, Sharia is only applied in inheritance and family matters, such as divorce and marriage.⁴⁷⁰ According to a Somali state law of 1962 on the Organisation of the Judiciary, Sharia could not be applied for criminal matters.⁴⁷¹

However, two decades ago, Sharia courts started to appear across the Somali country, following the example of a newly founded Sharia court in Mogadishu.⁴⁷² They established Sharia law as an autonomous judicial system and enforced their court decisions throughout the region. Since the South of Somalia lacked any form of working government, Islamic courts predominantly arose in this particular Somali region in order to improve local security and to pad the hiatus of lawlessness, working together with Islamic charities and militant Islamist groups.⁴⁷³ At the beginning, these courts worked independently from one another, each practising control over a limited territory.⁴⁷⁴ But since, through the years, no working solution had emerged to fill the judicial vacuum, the courts' powers were slowly merged and an Islamic Courts Union would eventually arise.⁴⁷⁵ With the creation of the TNG in 2000, the Islamic Courts Union lost significant enforcement capacity and public support due to attempts by the TNG to undermine the ICU's operations.⁴⁷⁶ In 2004 though, Sharia courts revived, establishing eleven Islamic courts in Mogadishu alone.⁴⁷⁷ In June 2006, the ICU had managed to do what no other transitional government or militia faction had been able to

⁴⁶⁸ SCHLEE, G., "Customary Law and the Joys of Statelessness", 260

⁴⁶⁹ SCHLEE, G., "Customary Law and the Joys of Statelessness", 260

⁴⁷⁰ LE SAGE, A., *Stateless Justice in Somalia*, 38

⁴⁷¹ SOMALIA JOINT NEEDS ASSESSMENT, *Governance, Security and the Rule of Law: Cluster Report*, August 2006, 17 (available at: http://www.somali-jna.org/downloads/Somali%20JNA1_Gov-Sec-Rule%20of%20Law%20-%20I.pdf)

⁴⁷² BARNES, C. and HASSAN, H., *The Rise and Fall of Mogadishu's Islamic Courts*, Chatham House and the Horn of Africa Group, April 2007, 2 (available at: <http://www.chathamhouse.org/sites/default/files/public/Research/Africa/bpsomalia0407.pdf>), last consulted 14/08/2013

(Here on after: BARNES, C. and HASSAN, H., *The Rise and Fall of Mogadishu's Islamic Courts*)

⁴⁷³ BRADBURY, M., *Becoming Somaliland*, 21

⁴⁷⁴ HARPER, M., *Getting Somalia Wrong?*, 79

⁴⁷⁵ HARPER, M., *Getting Somalia Wrong?*, 80

⁴⁷⁶ LE SAGE, A., *Stateless Justice in Somalia*, 46

⁴⁷⁷ LE SAGE, A., *Stateless Justice in Somalia*, 47

do in fifteen years; they succeeded in bringing security back to the Somali capital and ousted the warlords.⁴⁷⁸ They removed the roadblocks, reopened air-and seaports and essentially cleaned up the streets of Mogadishu.⁴⁷⁹ The ICU also reduced crime rates by directly addressing street crime by means of patrols on the main roads and in the largest warehouses.⁴⁸⁰

They only came to identify themselves as a union however, when the US started to see them as a threat for international security and funded the Alliance for the Restoration of Peace and Counter Terrorism (ARPCT)⁴⁸¹, an alliance of warlords, that tried to drive Sharia courts out of the Somali capital.⁴⁸² The ARPCT's main goal was to reestablish a safe environment for the TFG and it accorded itself the authority to capture and deport suspected terrorists.⁴⁸³ This move did not carry public support and effected once again the US's reputation in Somalia, since the ARPCT consisted primarily of warlords who had reigned terror on and effectuated economic corruption in Somali societies, practices that now seemed to be supported by the US government.⁴⁸⁴ Consequently, the existing Sharia courts collaborated and unified in the ICU to defeat the ARPCT. They succeeded in their goal, after four months, with the support of clan leaders, Mogadishan businessmen and the public.⁴⁸⁵ Instead of radicals pushing forward an extremist version of Sharia law, the courts were primarily trying to put forward Sharia law as a shared legal basis for all Somalis, in order to improve efficacious law enforcement.⁴⁸⁶ Various authors, such as Harper, believe the US itself, by its accusations, has encouraged the ICU to form a unified organisation and to impose their authority.⁴⁸⁷ The fact that several ICU members next went missing or died without probable cause, moved radical activists within the ICU to accuse the US of targeting their members, giving rise to the extremist organisation Al Shabaab that operated autonomous from the ICU.⁴⁸⁸ At that time, the TFG was still operating from Baidoa and had little to no control over the state.⁴⁸⁹

By the time the ICU had taken control over large parts of the Somali country in 2006, Ethiopian troops, backed by US unmanned reconnaissance aircrafts, satellite observation and gunships⁴⁹⁰, invaded Somalia in an attempt to oust the ICU, a mission in which they succeeded after only three weeks. This proved the lack of coordination and

⁴⁷⁸ SAMUELS, S., "Constitution-Building during the War on Terror: The Challenge of Somalia", *New York University Journal of International Law and Politics*, 2008, 40:2, 601

⁴⁷⁹ BARNES, C. and HASSAN, H., *The Rise and Fall of Mogadishu's Islamic Courts*, 4

⁴⁸⁰ MENKHAUS, K., "State Collapse in Somalia: Second Thoughts", *Review of African Political Economy*, 2003, 30:97, 417

⁴⁸¹ Also known as ATA: Anti-Terrorist Alliance

⁴⁸² SAMUELS, S., "Constitution-Building during the War on Terror: The Challenge of Somalia", *New York University Journal of International Law and Politics*, 2008, 40:2, 600

⁴⁸³ BRUTON, B.E., *In the Quicksands of Somalia: Where Doing Less Helps More*, Foreign Affairs, November/December 2009, 84

(available at: <http://www.somalilandtimes.net/sl/2009/408/IntheQuicksandsOfSomalia.pdf>)

⁴⁸⁴ IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, 287

⁴⁸⁵ BRUTON, B.E., *Somalia: A New Approach*, Council on Foreign Relations: Centre for Preventive Actions, March 2010, Council Special Report no. 52, 7

(available for download at: <http://www.cfr.org/somalia/somalia/p21421>)

⁴⁸⁶ SCHLEE, G., "Customary Law and the Joys of Statelessness", 263

⁴⁸⁷ HARPER, M., *Getting Somalia Wrong?*, 80

⁴⁸⁸ BARNES, C. and HASSAN, H., *The Rise and Fall of Mogadishu's Islamic Courts*, 3

⁴⁸⁹ SAMUELS, S., "Constitution-Building during the War on Terror: The Challenge of Somalia", *New York University Journal of International Law and Politics*, 2008, 40:2, 601

⁴⁹⁰ IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, 287

actual unification of the courts.⁴⁹¹ The ICU leaders fled the first night, either to Southern Somalia or to Eritrea, that had supported the ICU.⁴⁹² The intervention was triggered by a statement from the ICU that they would recapture the Ethiopian Ogaden in an attempt to restore the "Greater Somalia", which provided Ethiopia with the ideal opportunity to go to war with the ICU.⁴⁹³ Ethiopia indeed feared the resurrection of the Ogaden National Liberation Front, but was also agitated by the fact that Eritrea, with whom Ethiopia had recently experienced some regional tensions, was supporting the ICU's opposing groups.⁴⁹⁴ Opinions on the necessity of the Ethiopian-US intervention seem to differ. It should be said that the Sharia courts had been able to provide a significant amount of order and security in certain Somali regions and represented various kinds of political Muslims, including a majority of moderate believers as well as some radicalists. The US and several of its allies however, believed the ICU had profiled the Somali state as the ideal breeding ground for militant Islamism. This probably was a misinterpretation of the ICU's objectives, which were actually limited to providing a secure environment by means of political Islam, instead of stimulating and promoting violent, militant Islamism.⁴⁹⁵ Nevertheless, the radical wing of the ICU gained strength and increasingly profiled itself as militant *Jihadist*, which caused major internal conflicts and withheld the ICU from carrying out a unified policy or ideology.⁴⁹⁶ Given these internal differences the ICU could impossibly follow a single unified strategy, which led them to engage in matters unprepared, often resulting in unsuccessful outcomes.⁴⁹⁷ Most likely the US was alarmed by the often harsh penalties imposed by Sharia law, including amputations, torture and inhumane death penalties. The restrictions on foreign media and the obligation to abide by the imposed Islamic traditions did not ease the US's worries.⁴⁹⁸ Barnes and Hassan point out that the US government believed that several Al Qaeda members were hiding out in Somalia and were directly engaged in the ICU.⁴⁹⁹ Opinions on the likeliness of terrorist threats coming from the ICU seem to differ and mostly remain speculation due to the courts' non transparent organisation. However, by battling the ICU, the countries actually created their own worst nightmare, since, following the ICU's expulsion, the fundamentalist Islamist organisation Al Shabaab, that first represented a minor militant faction of the Union, now arose as a full grown militant organisation.⁵⁰⁰ Somali public support for Islamist movements increased, during a more than two year long Ethiopian intervention, that was considered unfair, unnecessary and violent.⁵⁰¹ In an effort to back up the TFG, Ethiopia had no choice but to occupy the Somali capital, but its presence was not welcomed by the Somali people, especially given their lack of respect for human rights and the amount of casualties that

⁴⁹¹ IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, 284

⁴⁹² BRUTON, B.E., *In the Quicksands of Somalia: Where doing less helps more*, Foreign Affairs, November/December 2009, 84
(available at: <http://www.somalilandtimes.net/sl/2009/408/IntheQuicksandsOfSomalia.pdf>)

⁴⁹³ HARPER, M., *Getting Somalia Wrong?*, 83

⁴⁹⁴ BARNES, C. and HASSAN, H., *The Rise and fall of Mogadishu's Islamic Courts*, 4-5

⁴⁹⁵ HARPER, M., *Getting Somalia Wrong?*, 4-5

⁴⁹⁶ BARNES, C. and HASSAN, H., *The Rise and Fall of Mogadishu's Islamic Courts*, 5

⁴⁹⁷ BARNES, C. and HASSAN, H., *The Rise and fall of Mogadishu's Islamic Courts*, 5

⁴⁹⁸ SCHLEE, G., "Customary Law and the Joys of Statelessness", 264

⁴⁹⁹ US DEPARTMENT OF STATE, *Somalia: Eliminating the Terrorist Threat (Fact Sheet)*, African Affairs, 2007, January 2005 (available at: <http://2001-2009.state.gov/p/af/rls/fs/2007/79383.htm>), last consulted 14/08/2013

⁵⁰⁰ HARPER, M., *Getting Somalia Wrong?*, 5

⁵⁰¹ HARPER, M., *Getting Somalia Wrong?*, 85

followed their arbitrary bombings.⁵⁰² The fact that the US government regularly caused civilian casualties when targeting fleeing terrorists with missile attacks, also did not benefit its reputations.⁵⁰³ The deterioration of security that followed the Ethiopian intervention and the reestablishment of the ineffective TFG in Mogadishu, made the Somali people praise the short period when the ICU had brought some security and it is now sometimes referred to as 'the Golden Age', despite the courts' deficiencies and controversial policies.⁵⁰⁴

The Sharia Courts' Operations

The courts declared they wanted to establish a new type of governance, based on Sharia law that would replace the factional clan policies.⁵⁰⁵ Sharia courts used a prevalingly bottom-up approach to restore order in Somali society.⁵⁰⁶ They enforced basic law, including contracts, which made the Somali civil life and commercial business much easier.⁵⁰⁷ An important progressive principle that was employed by the Sharia courts is named *suluh*, which more or less means 'resolution' and allowed Sharia courts to apply *Xeer*, Sharia and state laws all together in order to create a decision that is acceptable for all parties.⁵⁰⁸

The courts were able to restore a significant degree of security, provided social services and carried out some charitable works. Therefore, they enjoyed a majority of public support and were backed by the Somali businessmen.⁵⁰⁹

Menkhaus believes that, if not for the Ethiopian invasion, the courts could have established rule of law that provided equal protection for all male Somalis, since the courts increasingly operated towards a neighbourhood based jurisdiction instead of a clan or lineage based one.⁵¹⁰

3.3.3 Militant and Violent Political Islam: Al Shabaab ⁵¹¹

Areas that are controlled by Al Shabaab do not have a unified centralised Islamist administration, as enforcement of law varies depending on region and militant group.⁵¹² One thing Al Shabaab has been able to accomplish, is a significant degree of security within its territory, which implies people have been free to move around the region.⁵¹³ However, Al Shabaab has infringed almost all of the other forms of freedom, like

⁵⁰² BRUTON, B.E., *In the Quicksands of Somali: Where doing less helps more*, Foreign Affairs, November/December 2009, 85 ((available at:

<http://www.somalilandtimes.net/sl/2009/408/IntheQuicksandsOfSomalia.pdf>)

⁵⁰³ BRUTON, B.E., *In the Quicksands of Somali: Where doing less helps more*, Foreign Affairs, November/December 2009, 85 (available at:

<http://www.somalilandtimes.net/sl/2009/408/IntheQuicksandsOfSomalia.pdf>)

⁵⁰⁴ BARNES, C. and HASSAN, H., *The Rise and Fall of Mogadishu's Islamic Courts*, 6

⁵⁰⁵ BARNES, C. and HASSAN, H., *The Rise and Fall of Mogadishu's Islamic Courts*, 4

⁵⁰⁶ HARPER, M., *Getting Somalia Wrong?*, 9

⁵⁰⁷ HARPER, M., *Getting Somalia Wrong?*, 82

⁵⁰⁸ SOMALIA JOINT NEEDS ASSESSMENT, *Governance, Security and the Rule of Law: Cluster Report*, August 2006, 12 (available at: http://www.somali-jna.org/downloads/Somali%20JNA1_Gov-Sec-Rule%20of%20Law%20-%20I.pdf)

⁵⁰⁹ BARNES, C. and HASSAN, H., *The Rise and Fall of Mogadishu's Islamic Courts*, 4

⁵¹⁰ MENKHAUS, K., "The Crisis in Somalia: Tragedy in Five Acts", *African Affairs*, 2007, 106:24, 375

⁵¹¹ Al Shabaab is the Arabic word for 'The Youth' and the more common name for the movement Harakat al-Shabaab al-Mujahideen (HSM), meaning 'Mujahideen Youth Movement'.

⁵¹² HARPER, M., *Getting Somalia Wrong?*, 71

⁵¹³ HARPER, M., *Getting Somalia Wrong?*, 72

freedom of speech and has set up a very severe regime with an enormous amount of prohibitions.⁵¹⁴ It is certain that Al Shabaab has already violated various human rights and humanitarian law principles, but it is contested if the Somali state could be held responsible for their deeds, upon the generally agreed on principle in international law that the acts of de facto state agents are attributable to the state.⁵¹⁵ It is however not sure if Al Shabaab has claimed significant Somali territory and has provided public services to the Somali people, to that extent that it could be considered a de facto state agent.

Rise of Al Shabaab

Religious groups started to emerge after the defeat of Barre's military regime in order to provide an answer for the vacuum left by the central administration.⁵¹⁶ The most influential religious movement was called 'Al-Itihaad al-Islamiya',⁵¹⁷ a group that would be the precursor of the Islamist organisations Al Shabaab and Hizbul Islam.⁵¹⁸ Al-Itihaad had already emerged in the late years of Barre's regime, but only showed public activity after the military dictator's defeat and ultimately seemed to have joined the ICU in 2006.⁵¹⁹ Al Shabaab originally was a small militia associated with the Sharia courts, but with the defeat of the ICU, it arose as a movement even more militant and violent. The US's hunt for Al Shabaab's leaders, carried out with drone attacks, seems to have radicalised the organisation even further and encouraged it in combating foreign occupation and interference.⁵²⁰ The fundamentalist organisation now drew international attention and like minded individuals arrived in Somalia to contribute to Al Shabaab's fight.⁵²¹ The other major Islamist insurgent group, Hizbul Islam⁵²², that carried out a more pragmatic and nationalist ideology, was defeated by Al Shabaab in December 2010 and therefore joined the terrorist organisation, but the groups separated in September 2012, because of irreconcilable ideological differences. Nowadays, Al Shabaab has been expelled from most of the major Somali towns and urban areas, anticipating military actions against it carried out by AMISOM.⁵²³ However, significant parts of the country, especially rural areas, still remain under Al Shabaab's influence.⁵²⁴ Since 2009, Al Shabaab has started practicing a new strategy, by promoting itself as a political movement rather than a military organisation, that could provide a valuable alternative for the Somali central administration.⁵²⁵ In times the TFG was still

⁵¹⁴ HARPER, M., *Getting Somalia Wrong?*, 73

⁵¹⁵ VARK, R., "State Responsibility for Private Armed Groups in the Context of Terrorism", *Juridica International*, 2006, 11:1, 185

⁵¹⁶ HARPER, M., *Getting Somalia Wrong?*, 77

⁵¹⁷ Also known as 'AIAI' or even 'Islamic Union', they wanted to create a Greater Somalia and eventually gather all Muslims in the Horn of Africa into a political union.

⁵¹⁸ HARPER, M., *Getting Somalia Wrong?*, 77

⁵¹⁹ BARNES, C. and HASSAN, H., *The Rise and Fall of Mogadishu's Islamic Courts*, 3

⁵²⁰ IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, 288

⁵²¹ IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, 280

⁵²² Hizbul Islam is Arabic for "The Islamic Party"

⁵²³ AYNTÉ, A., *Al Shabaab and Post-Transition Somalia*, African Arguments, 2012, September 3 (available at: <http://africanarguments.org/2012/09/03/al-shabaab-and-post-transition-somalia-by-abdi-aynte/>), last consulted: 14/08/2013

⁵²⁴ UNSC, *Report of the SG*, 14

⁵²⁵ AYNTÉ, A., *Al Shabaab and Post-Transition Somalia*, African Arguments, 2012, September 3, (available at: <http://africanarguments.org/2012/09/03/al-shabaab-and-post-transition-somalia-by-abdi-aynte/>), last consulted: 14/08/2013

the main actor representing Somalia's national interests, they could quite easily convince the Somali people that the central government was inefficient, corrupt and ruled by the puppets of foreign policy makers, who only pursued personal interests.⁵²⁶ They also made use of the Somali people's exasperation with both the Ethiopian troops and later the AMISOM forces.⁵²⁷ Despite the fact that most Somalis did not support Al Shabaab's ideologies, they did appreciate their attempts at bringing back security to the streets. As with the creation of a new federal government, it is believed that Al Shabaab factions are concealing themselves in Somali rural areas, waiting for the ideal opportunity to take revenge, whenever the new government should fail at gaining public support.⁵²⁸ The way Al Shabaab will be approached by the newly elected government is likely to affect their further activities.⁵²⁹

Over the past few years, Al Shabaab has been challenged by a movement called Ahlu Sunna Waljama'a⁵³⁰, that protects the country's Sunni traditions, defending a more moderate religious ideology and strongly condemning the strict Sharia interpretations carried out by Al Shabaab.⁵³¹ The movement originated in 1991 but has become more prominent in 2008 as it picked up its weapons against Al Shabaab and has conquered some of their territory in Central and South Somalia. However, the movement's ties with Ethiopia are undermining public support.⁵³²

Since past efforts by the international community, especially by the US, to eradicate fundamentalist organisations, only seem to have strengthened their capacities, it is believed that the best way to root out these fundamental organisations is to approach them from a neutral position.⁵³³

Organisation and Activities

Al Shabaab seems to be internally divided, as they are suffering from ideological differences, conflicting military tactics and the lack of distinct leadership.⁵³⁴ Although its leaders and probably a majority of its members are radical fundamentalists, many of their supporters have also disapproved of terrorist acts carried out by the movement and have tried to facilitate, although for remuneration, the delivery of international humanitarian aid.⁵³⁵ In several areas, Al Shabaab obliges and manipulates Somali people,

⁵²⁶ AYNTE, A., *Al Shabaab and Post-Transition Somalia*, African Arguments, 2012, September 3, (available at: <http://africanarguments.org/2012/09/03/al-shabaab-and-post-transition-somalia-by-abdi-aynte/>), last consulted: 14/08/2013

⁵²⁷ IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, 285

⁵²⁸ HAMMOND, L., "Somalia Rising; Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 189

⁵²⁹ HAMMOND, L., "Somalia Rising; Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 190

⁵³⁰ Often abbreviated by ASWJ and meaning "The Majority"

⁵³¹ IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, 292

⁵³² BRUTON, B.E., *Somalia: A New Approach*, Council on Foreign Relations: Centre for Preventive Actions, March 2010, Council Special Report N. 52, 11 (available for download at: <http://www.cfr.org/somalia/somalia/p21421>)

⁵³³ BRUTON, B.E., *Somalia: A New Approach*, Council on Foreign Relations: Centre for Preventive Actions, March 2010, Council Special Report N. 52, 26 (available for download at: <http://www.cfr.org/somalia/somalia/p21421>)

⁵³⁴ HARPER, M., *Getting Somalia Wrong?*, 86

⁵³⁵ BRUTON, B.E., *In the Quicksands of Somali: Where Doing Less Helps More*, Foreign Affairs, November/December 2009, 88 (available at: <http://www.somalilandtimes.net/sl/2009/408/IntheQuicksandsOfSomalia.pdf>)

especially the younger generations, to join them in their holy war and once they have joined, it seems almost impossible to leave.⁵³⁶ The militant organisation has been able to recruit members living abroad, especially Somali nationals from the diaspora and the movement has also attracted an alarmingly high number of non Somalis, including South Asians, Arabs and non-Somali Africans.⁵³⁷ They have set up training camps to prepare their members for the *Jihad* they must fight and have made Somalia into a safe haven for likeminded radical organisations and individuals.⁵³⁸

The fact that Eritrea has been providing weapons and financial support for Al Shabaab, in order to boycott the Ethiopian support for the Somali national administrations, is a public secret.⁵³⁹

Al Shabaab carried out its first suicide attack on September 18th 2006, which seemed to be only the beginning of a new trend of suicide terrorism in Somalia, targeting Ethiopian and AMISOM troops together with central government members or supporters.⁵⁴⁰

Link with Piracy?

It is often claimed that Somali pirates are working for Al Shabaab. It is believed that 20 or even 50 per cent of the pirates' income, which comprises ransom money being paid by the family or state of the hostages, flows back to Al Shabaab.⁵⁴¹ However, until now, no proof has indicated that Al Shabaab has set-up an organisational network to coordinate the pirates.⁵⁴² The pirates are driven primarily by the prospect of financial gain in order to survive, indifferent about the source of their income, and are therefore not operating to carry out an ideological or religious belief of any kind. On the occasional times when pirates do work together with Al Shabaab, the organisation offers them protection from violence or other benefits in return for a share of revenues.⁵⁴³

Link with Al Qaeda?

Although Al Shabaab has declared to be directly joining Al Qaeda in their *Jihad*, as stated above, up to today there is no decisive proof that both groups share significant organisational ties or that Al Qaeda members are regularly using Somali territory as an operational base for carrying out their international attacks.⁵⁴⁴ Furthermore, given Al Shabaab's internal conflicts, we can conclude that not all members support Al Qaeda's

⁵³⁶ HARPER, M., *Getting Somalia Wrong?*, 92 & 95

⁵³⁷ HARPER, M., *Getting Somalia Wrong?*, 96

⁵³⁸ PHAM, J.P., "Putting Somali Piracy in Context", *Journal of Contemporary African Studies*, 2010, 28:3, 325

⁵³⁹ BRUTON, B.E., *Somalia: A New Approach*, Council on Foreign Relations: Centre for Preventive Actions, March 2010, Council Special Report N. 52, 17

(available for download at: <http://www.cfr.org/somalia/somalia/p21421>)

⁵⁴⁰ IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, 286

⁵⁴¹ IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, 290

⁵⁴² STERIO, M., *Piracy off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, the Seychelles and Mauritius*, Cleveland State University, 2012, 4 (available at: http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1631&context=fac_articles)

⁵⁴³ HANSEN, S.J., *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group, 2005-2012*, London, Hurst & Co., 2013, 109

⁵⁴⁴ BRUTON, B.E., *Somalia: A New Approach*, Council on Foreign Relations: Centre for Preventive Actions, March 2010, Council Special Report N. 52, 16
(available for download at: <http://www.cfr.org/somalia/somalia/p21421>)

ideology and its goals. Ibrahim though believes that US actions in battling Al Shabaab have actually tightened relationships between both organisations.⁵⁴⁵

Al Shabaab: A Unified Rule of Law?

There is no unified judicial system applied by all Islamist groups controlling parts of Southern Somalia. Despite their often dreadful politics, we cannot say that these regions are lawless or anarchic, since they are ruled under strict regulations. Also, most of these areas have reached a higher amount of security than other Somali regions.⁵⁴⁶ Al Shabaab's relatively successful law enforcement is believed to be the main reason why the organisation initially received some local support, especially in areas that were first controlled by corrupt militia factions.⁵⁴⁷ Harper states that several of her friends and colleagues have moved to Al Shabaab controlled areas, since they provide a more secure environment for their families.⁵⁴⁸ Al Shabaab also seems to have well organised administrations, demonstrated by their invention and use of a progressive tax system.⁵⁴⁹

3.4 Civil Society Initiatives and Ad Hoc Mechanisms Established by Somali Militia-Factions

Despite the fact that these categories of initiatives have made contributions to the local restoration of peace and order, they cannot be classified as a comprehensive autonomous Somali judicial system. Le Sage has however pointed out that, despite their temporary nature, these initiatives could be useful in the process of understanding how Somalis have restored their justice and security through local efforts.⁵⁵⁰ These enterprises are often created to resolve local disputes and are mostly temporary. They comprise very dissimilar forms, from warlord-bases to business cartels and religious groups, but almost all of them are very unstable and only control a part of Somali territory.⁵⁵¹ Le Sage has classified these diverse initiatives into warlord administrations, vigilante groups (*madani*), private arbitrations, lawyers' associations and civil society initiatives; a very comprehensive classification that is no longer up to date. This classification will still be used as a basis, but some adjustments and additions were made, in order to shortly set out the degree of importance of each of these initiatives in the build-up of Somali justice.⁵⁵² Some of these initiatives no longer exist, but are still incorporated in the classification, in order to provide a comprehensive overview of all alternative legal systems that were once created to restore order and security in Somalia. The enumeration of these local initiatives is only exemplary, as there are infinite forms of factional groups, especially in the South of Somalia, that have each built

⁵⁴⁵ IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, 285

⁵⁴⁶ HARPER, M., *Getting Somalia Wrong?*, 111

⁵⁴⁷ HANSEN, S.J., *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group, 2005-2012*, London, Hurst & Co., 2013, 84

⁵⁴⁸ HARPER, M., *Getting Somalia Wrong?*, 111

⁵⁴⁹ AYNTÉ, A., *Al Shabaab and Post-Transition Somalia*, African Arguments, 2012, September 3 (available at: <http://africanarguments.org/2012/09/03/al-shabaab-and-post-transition-somalia-by-abdi-aynte/>), last consulted: 14/08/2013

⁵⁵⁰ LE SAGE, A., *Stateless Justice in Somalia*, 49

⁵⁵¹ HARPER, M., *Getting Somalia Wrong?*, 111

⁵⁵² See LE SAGE, A., *Stateless Justice in Somalia*, 49-53

out a sort of governance.⁵⁵³ Examples of significant regional administrations in South-Central Somalia are Himan and Heeb, Khatumo and Jubbaland, a region that is currently controlled by forces allied to the Kenyan Defence Forces.⁵⁵⁴

3.4.1 Warlord Administrations

Groups of warlords sometimes settle down in one of the areas they are terrorising and next impose their own arbitrary rules on the local people. Militia factions sometimes, although rarely, succeed at establishing judicial administrations, which are primarily based on Sharia law for private civil matters and state law for penal and commercial cases.⁵⁵⁵ Judicial authority however is preserved for the warlords and the leaders of the militia factions.

3.4.2 Vigilante Groups

These groups were created primarily in Mogadishu in order to prevent crime in the late 1990's and early 2000's, at the initiative of local businessmen and freelance militias.⁵⁵⁶ These "neighbourhood watches", also called *madani*, were often composed of youngsters, who formerly worked as armed bandits and got paid to go on these protection patrols.⁵⁵⁷ Since Mogadishu is now under the control of the Federal Government of Somalia, which has been able to provide a more secure environment for its citizens, these vigilante groups have vanished.

3.4.3 Private Arbitration

In regions that lack a working judicial system or where the judiciary is considered corrupt, businessmen or local communities often feel the need for an arbitration committee to rule their legal disputes. Former governmental judges and lawyers are sometimes hired to rule a decision based on a pre-agreed law system.⁵⁵⁸ The practice of Sharia law seems to be attractive for business disputes, since its jurisdiction is agreed on by all Somalis and, unlike *Xeer*, it does recognise private property.⁵⁵⁹

3.4.4 Civil Society Initiatives

Several initiatives, including NGO's, developmental or educational organisations, often sponsored by Somali nationals from the diaspora, have attempted to improve the Somali security situation.⁵⁶⁰ The major influence of Somalis operating and setting up disinterested initiatives from all over the world cannot be neglected since they have

⁵⁵³ SOMALIA JOINT NEEDS ASSESSMENT, *Governance, Security and the Rule of Law: Cluster Report*, August 2006, 10 (available at: http://www.somali-jna.org/downloads/Somali%20JNA1_Gov-Sec-Rule%20of%20Law%20-%20I.pdf)

⁵⁵⁴ HAMMOND, L., "Somalia Rising: Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 188

⁵⁵⁵ LE SAGE, A., *Stateless Justice in Somalia*, 49

⁵⁵⁶ LE SAGE, A., *Stateless Justice in Somalia*, 49-50

⁵⁵⁷ MENKHAUS, K., "State Collapse in Somalia: Second Thoughts", *Review of African Political Economy*, 2003, 30:97, 412

⁵⁵⁸ LE SAGE, A., *Stateless Justice in Somalia*, 50

⁵⁵⁹ LE SAGE, A., *Stateless Justice in Somalia*, 50

⁵⁶⁰ SCHLEE, G., "Customary Law and the Joys of Statelessness", 266

been able to make some important contributions to the Somali judicial infrastructure. However, they have imposed an additional load on the Somali government, that now has to strike a balance between supporting both local and foreign initiatives, without undermining both their authorities.⁵⁶¹ Some of them have concentrated on rebuilding the Somali judicial infrastructure, such as the International Horn University in Hargeisa (Somaliland), founded by Somali diaspora members living in Finland and Pakistan.⁵⁶² Like the Mogadishu university, it provides a formal judicial education programme.⁵⁶³ The Danish Refugee Council (DRC) is a private Danish humanitarian organisation, that has developed a programme for Somalia that focuses on long term Somali recovery and development, including the reform of Somali justice systems.⁵⁶⁴ Le Sage quotes an example of their work in Somaliland, where they initiated dialogues between clan elders on ineffectiveness within their legal systems and on interests of the community that had up until now not been addressed in *Xeer*.⁵⁶⁵ This initiative led to the creation of a declaration on the modified and generally accepted *Xeer*, which ultimately resulted in a 90 per cent reduction of murder cases throughout the region in the next months.⁵⁶⁶ The Puntland Development Research Centre (PDRC) and the Academy for Peace and Development (APD) in Somalia also contributed with their reports and workshops in the field, which were even used in research for this dissertation. The Somali law council is a non-profit international association, open to all Somali lawyers worldwide. Their main goals are collecting all of the existing Somali laws and regulations (including *Xeer* and Sharia), to restore the judicial infrastructure and defend human rights and civil liberties, through close cooperation with the Somali legislative branch.⁵⁶⁷ This seems like a prosperous initiative, however their website is not up to date and we cannot be sure the association is still active on Somali soil.

4. A Judicial Set-Up for Somalia

4.1 Specific Somali Needs for Enhanced Legal Systems

The various Somali legal systems urgently need to be thoroughly ameliorated, in order to prevent the further escalation Somali conflict and demise. In this chapter, an attempt will be made to sum up some of the aspects of Somali life that are in need of a more comprehensive legislation or an elaborate judiciary system.

4.1.1 Supporting the Somali Economy

People tend to forget that the economy of Somalia has kept on flourishing in times of famine, conflict and insecurity, with as ultimate example the booming sector of telecommunications and money transfer. Agriculture however still is the most important economic sector, since livestock revenues represent 40 per cent of the country's GDP

⁵⁶¹ HAMMOND, L., "Somalia Rising: Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, 190

⁵⁶² SCHLEE, G., "Customary Law and the Joys of Statelessness", 266

⁵⁶³ LE SAGE, A., *Stateless Justice in Somalia*, 51

⁵⁶⁴ See: <http://drc.dk/home>, last consulted 14/08/2013

⁵⁶⁵ LE SAGE, A., *Stateless Justice in Somalia*, 52

⁵⁶⁶ LE SAGE, A., *Stateless Justice in Somalia*, 52 (Interview with DRC project manager in Hargeisa)

⁵⁶⁷ See: <http://www.somalilaw.org/index.html>, last consulted 14/08/2013

and produce over 50 per cent of Somalia's export revenues.⁵⁶⁸ The informal money transfer sector (*xaliwaad*) allows Somalis from the diaspora or refugees to send financial support to families or clans still living in Somalia, by simply using a telephone instead of the formal bank system.⁵⁶⁹ However, Somali businessmen are often held back when unrolling their business activities, because of the lack of enforcement opportunities and legal protection for their business operations. Hendrix has pointed out that international law carries little options for the enforcement of private contracts in the absence of a central government.⁵⁷⁰ This indicates once more the urgent need for a functioning administration in Somalia as well as the need for international legislation that can be applied when a country's state apparatus is no longer in effect.

4.1.2 Prosecution of Somali Pirates

Although piracy off the Somali shore has significantly decreased, Somalia and the international community are still confronted with Somali criminals that try to hijack vessels at high seas outside any state's jurisdiction. The United Nations Convention on the Law of the Sea (UNCLOS) defines that universal jurisdiction applies in the case of piracy, as defined in art. 101⁵⁷¹, giving every state the jurisdiction to seize and prosecute pirates following domestic rules.⁵⁷² However, few states are willing to prosecute Somali pirates, although UNCLOS prescribes that all states have a responsibility in repressing piracy *to the fullest extent*.⁵⁷³

Consequently, the need for a fair but decisive prosecution procedure for these criminals and a place for imprisonment in order to dissuade pirates from further crimes, poses yet another problem to the Somali administration. Due to a lack of Somali imprisonment capacity, pirates are often released after their capture (known as "the catch and release attitude" of some nations), which obviously does not proclaim the right incentives.⁵⁷⁴ The Counter Piracy Programme (CPP), a project by the United Nations Office on Drugs and Crime (UNODC) and partly funded by the EU, has managed to find some primary solutions for the issue of pirate prosecution. Collaborating with the Somali government, they have established three correctional facilities throughout the Somali country, situated in Hargeisa (Somaliland), Bossaso (Puntland) and Garowe (Somalia).⁵⁷⁵ Although this certainly indicates a positive trend, Somalia still does not have the appropriate means to tackle the piracy problem in a comprehensive manner. The Somali prisons are still lacking the necessary capacity to imprison all the Somali pirates. Strengthening rule of law in Somalia, will consequently need to comprise the establishment of a legal framework for prosecuting pirates, consistent with the international provisions on piracy as defined in UNCLOS. The UN has called upon its

⁵⁶⁸ <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>, last consulted 13/08/2013

⁵⁶⁹ LEWIS, I., *Understanding Somalia and Somaliland*, London, Hurst & Company, 2008, 99

⁵⁷⁰ HENDRIX, J.E., "Law Without State: The Collapsed State Challenge to Traditional International Enforcement", *Wisconsin International Law Journal*, 2006, 24:2, 589

⁵⁷¹ UNITED NATIONS, *United Nations Convention on the Law of the Sea*, 1982, December 10, art. 101

⁵⁷² UNITED NATIONS, *United Nations Convention on the Law of the Sea*, 1982, December 10, art. 105

⁵⁷³ UNITED NATIONS, *United Nations Convention on the Law of the Sea*, 1982, December 10, art. 100

⁵⁷⁴ STERIO, M., *Piracy off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, the Seychelles and Mauritius*, Cleveland State University, 2012, 9 (available at: http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1631&context=fac_articles)

⁵⁷⁵ UNODC, *Counter Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects*, March 2013, (available at http://www.unodc.org/documents/easternafrika//piracy/UNODC_Brochure_Issue_11_wv.pdf)

members several times to provide national facilities to imprison Somali pirates, but most of the states are reluctant to imprison Somali criminals in their domestic facilities, as these criminals often seek asylum in the concerned country after serving their prison sentence. Kenya, Mauritius and the Seychelles are currently imprisoning Somali pirates in their national facilities.⁵⁷⁶ However, especially in the case of Kenya, some concerns have risen about the standards of treatment in their national prisons, regarding possible violations of human rights and the possibility that money received by the national authorities to enable imprisonment has gone elsewhere, implying corruption.⁵⁷⁷ The ultimate goal of imprisonment is to dissuade pirates from further pirate activities, an objective that unfortunately misses its impact if detention facilities provide better living conditions than those the average pirate is used to, causing yet another quandary. Kenya declared to suspend further pirate prosecution and imprisonment in 2010, but later on agreed to further address cases, under the condition that international support for the construction of judicial infrastructure would be increased.⁵⁷⁸

Separate from the imprisonment problems, the Somali government has also failed to tackle the piracy problem at its core, since they exercise almost no control over the coastal towns, where pirates normally operate from, and national laws on piracy cannot be effectively enforced there. Piracy has grown into an autonomous Somali business, supported by warlords and militia factions, which the Somali government up until now has not been able to expel.⁵⁷⁹

4.1.3 Tempering Extremist Sharia Interpretation

A harmonised view of justice would also diminish the opportunity for militant Islamists to interpret Sharia law to fit their own interests and to use it for the purpose of increasing their personal power.⁵⁸⁰

4.1.4 Reassuring Human Rights

In 2013, Somalia yet again received the worst possible score in the category on violations of human rights and rule of law, as issued in the Failed State Index by Fund For Peace.⁵⁸¹ These various violations however cannot be tackled without the existence of functioning Somali administrations. The rise of failed states has indicated all the more the deficiencies of international law concerning the protection of human rights, since they are construed around the presumption of an existing functioning state that can implement and enforce these rights.⁵⁸² As a result of this hiatus, the protection of human rights, in these failed states, is non-existent. Another example of a functioning state

⁵⁷⁶ See: STERIO, M., *Piracy off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, the Seychelles and Mauritius*, Cleveland State University, 2012, 22p. (available at: http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1631&context=fac_articles)

⁵⁷⁷ STERIO, M., *Piracy off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, the Seychelles and Mauritius*, Cleveland State University, 2012, 11 (available at: http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1631&context=fac_articles)

⁵⁷⁸ PHAM, J.P., "Putting Somali Piracy in Context", *Journal of Contemporary African Studies*, 2010, 28:3, 332

⁵⁷⁹ STERIO, M., *Piracy off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, the Seychelles and Mauritius*, Cleveland State University, 2012, 3 (available at: http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1631&context=fac_articles)

⁵⁸⁰ LE SAGE, A., *Stateless Justice in Somalia*, 8

⁵⁸¹ <http://ffp.statesindex.org/rankings-2013-sortable>, last consulted 05/08/2013

⁵⁸² THURER, D., "The "Failed State" and International Law", *International Review of the Red Cross*, December 1999, 81:836, 736

apparatus being a premise when enforcing human rights, comprises the fact that civil and political human rights above all aim to protect individuals against the abuse of power carried out by state administrations, and that the economic, social and cultural human rights need to be implemented in the state's legislation before they can be enforced.⁵⁸³ As for today, it is unsure if the new government of the Federal Republic of Somalia can be considered liable for human rights violations, as it still has not been able to claim various significant parts of the Somali territory and other organised groups are still performing 'governmental activities'.

The author will not attempt to sum up all human right violations in Somalia, as the list unfortunately seems to be endless. However, to indicate the urgent need for a functioning government that can effectively deal with this pile of human rights violations, an exposition of some of the most common violations committed in Somalia will be made.⁵⁸⁴

One of the most severe human rights violations is definitely the arbitrary or targeted killing of Somali civilians, humanitarian workers and journalists, carried out by either the Somali Federal government and its allied troops (AMISOM), the Somaliland and Puntland forces, the terrorist organisation Al-Shabaab, the pirates or the local warlords and their militias.⁵⁸⁵ The Rights of the Child also are often violated, since all the parties involved in the Somali conflict are guilty of having recruited children into their forces.⁵⁸⁶ Somali women are often raped by militias and are still largely subjected to the practice of female genital mutilation,⁵⁸⁷ although this Somali tradition has been formally prohibited in the new Somali constitution.⁵⁸⁸ The former government of Somalia, the TFG, could not prevent arbitrary arrests and detentions throughout the country, often followed by unfair trial procedures.⁵⁸⁹

Although highly needed by the Somali people, the ability to directly deliver humanitarian aid has been restricted, especially in Al Shabaab controlled areas. The radical movement has recently even forbidden the presence of the international organisation Islamic Relief on its territory, which was one of the last international humanitarian agencies still working on the field in Somali conflicted areas.⁵⁹⁰

Also, several personal freedoms have been increasingly restricted, again especially in Al-Shabaab controlled areas, including the freedom of speech, the freedom of assembly and the freedom of religion.⁵⁹¹

Questions arise on the accountability of the Somali state for not respecting and implementing human rights in the Somali territory. Each state must fulfill the negative

⁵⁸³ THURER, D., "The "Failed State" and International Law", *International Review of the Red Cross*, December 1999, 81:836, 738

⁵⁸⁴ For an utterly complete overview of these human rights violations, see: US DEPARTMENT OF STATE, *Report on Human Rights Practices for 2011 in the Country of Somalia*, 2012, May 24, 39 p. (paper version, but also available in a digital and more recent version at:

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>), last consulted 10/08/2013

⁵⁸⁵ <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>, last consulted 10/08/2013

⁵⁸⁶ <http://www.hrw.org/world-report/2013/country-chapters/somalia>, last consulted 14/08/2010

⁵⁸⁷ For more information on war crimes against women and the practice of female genital mutilation see: GARDNER, J. and EL BUSHRA, J. (ed), *Somalia: The Untold Story: The War through the Eyes of Somali Women*, London, Pluto Press, 2004, 69-96

⁵⁸⁸ THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, art. 101

⁵⁸⁹ <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>, last consulted 10/08/2013

⁵⁹⁰ <http://www.hrw.org/world-report/2013/country-chapters/somalia>, last consulted 14/08/2013

⁵⁹¹ <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>, last consulted 10/08/2013

and positive obligations before international law to refrain itself from practices that do not comply with the principles of international law and to actively protect its people against these practices by preventing or criminalising them.⁵⁹² It is obvious that the Somali state has not fulfilled both these obligations and therefore violates the various human rights treaties it is a party to, although these treaties rarely foresee a sanction in case of non compliance. However, the new Somali government has made some primary efforts in reassuring the compliance to human rights. The new constitution of Somalia dictates the establishment of a Human Rights Commission, independent of state control, that will not only promote and monitor human rights implementation, but will also investigate possible violations.⁵⁹³ On May 30 2013, the Somali ministry of Justice proposed their draft law for the establishment of this commission to the Somali parliament.⁵⁹⁴ Human Rights Watch however believes that this draft does not meet the standards defined in the United Nations Paris Principles on the establishment and the functioning of national human rights institutions.⁵⁹⁵ It is however, once again, not clear if Somalia could be held accountable for failing to comply with its positive obligations in regard to international law, since it is contested if the country can still be considered a failed state according to international law. Indeed, if a state does not have the necessary power and means to prevent human rights violations, it is believed not to be liable for breaches of international law.⁵⁹⁶

Statistics of the year 2013 will have to point out if the Somali Federal Government has been able to reduce the amount of human rights violations and to penalise the violators in a sufficient legal manner. However, these violations will have to be handled with patience since short term significant amelioration is not foreseen, especially given the ongoing turmoil in Somalia.

4.1.5 Curbing Somali Criminality

There is no doubt that the number of crimes in Somalia should decrease dramatically, not only to protect Somali nationals but also to succeed in promoting Somalia as a safe, lawful country that can anew attract foreign economic investors. Separate from the lack of effective enforcement methods, as pointed out in paragraph 4.1.1, another dissuading factor that has been withholding businesses from operating in Somalia, is its hostile environment, characterised by theft, (naval) kidnapping and arbitrary murder. In 2003, it seemed that the most weighty crimes were carried out by Somali political and top economic figures, who engaged in all sorts of corruption and other 'white collar crimes', whereas the typical street crimes comprising murder and armed robbery seemed to be less omnipresent.⁵⁹⁷ As for today, Al Shabaab and individual warlords are still providing the highest criminality rates. Puntland has made some significant efforts

⁵⁹² HAECK, Y., *Procederen voor het Europees Hof voor de Rechten van de Mens*, Antwerpen, Intersentia, 2009, 42-45.

⁵⁹³ THE SOMALI FEDERAL REPUBLIC, *Provisional constitution*, art. 41 and 111b

⁵⁹⁴ <http://www.hrw.org/news/2013/06/12/somalia-strengthen-human-rights-law>, last consulted 14/08/2003

⁵⁹⁵ <http://www.hrw.org/news/2013/06/12/somalia-strengthen-human-rights-law>, last consulted 14/08/2003

⁵⁹⁶ THURER, D., "The Failed State and International Law", *International Review of the Red Cross*, December 1999, 81:836, 748

⁵⁹⁷ MENKHAUS, K, "State Collapse in Somalia: Second Thoughts", *Review of African Political Economy*, 2003, 30:97, 412

in expelling radical Islam in its region and should be consulted when attempting to expel Al Shabaab in South and Central Somalia.⁵⁹⁸

Somalia has functioned as an ideal environment for radical movements, since there is no central government to hinder their actions, the Somali borders are unpatrolled and the country provides a free market for trading arms.⁵⁹⁹ However, the absolute criminality rates do not appear to be as high as one would expect and international observers have often wondered why criminality in Somalia has not skyrocketed, since the country provides the ideal conditions for it. Therefore, Menkhaus believes that Somalia serves as the ultimate example that crime rates are much higher where the formal administrations are corrupt than where there are none.⁶⁰⁰

As pointed out before, corruption at the top political level needs to be diminished to a minimum, in order to create a stable political administration.

4.1.6 Regulation of Land and Property Disputes

The Somali legal systems have up until now not established a harmonised regulation on property. Chapter 3 of the Constitution of the Federal Republic of Somalia does foresee the establishment of a national land policy, that will amongst other things ensure the correct resolution of property disputes.⁶⁰¹ Up till today, such a national policy has not been established, although that kind of regulation has been urgently needed for a decade. Nowadays, regulations on property disputes seem to vary, according to region, which has obviously led to various interclan conflicts. Conflicts over property of land and possessions have increasingly arisen because of the civil war and the following internal displacements. New clans have settled on abandoned land, while the former occupiers fled the region or even the country to protect themselves from ongoing conflicts. However, refugee camps may not be able to or willing to accommodate these displaced people much longer. The many Somali refugees will not move back to their hometowns as long as a secure environment cannot be guaranteed though. Therefore, distinct national rules about property urgently need to be established, in order to solve conflicts about possession in a civilised and lawful manner and in order to avert physical confrontation between clans.

4.1.7 Defining the Status of Somaliland

Although this is more of a long term matter, the issue should be dealt with in a decisive manner. Lewis states that the future relation between Somaliland and the state of Somalia should be urgently discussed, preferably in combination with the border dispute between Puntland and Somaliland.⁶⁰²

⁵⁹⁸ PHAM, J.P., "Putting Somali Piracy in Context", *Journal of Contemporary African Studies*, 2010, 28:3, 336

⁵⁹⁹ IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, 284

⁶⁰⁰ MENKHAUS, K., "State Collapse in Somalia: Second Thoughts", *Review of African Political Economy*, 2003, 30:97, 413

⁶⁰¹ THE SOMALI FEDERAL REPUBLIC, *Provisional constitution*, Chapter 3

⁶⁰² LEWIS, I., *Understanding Somalia and Somaliland*, London, Hurst & Company, 2008, xi

4.2 Key Questions on Establishing a Judicial Set-Up

Various questions come to mind when trying to find the ideal conditions for a Somali judicial set-up. Most of these dilemma's strongly interfere with one another, but an attempt for subdividing these questions has been made, in order to bring some clarification in this complicated matter. Since the ultimate outcome on a judicial set-up for Somalia will be strongly defined by several political issues, these questions are also integrated in the following classification.

4.2.1 Anarchic Somalia: In Need of a State?

Somalia has been the ultimate example for anarchists and libertarians to support their theory that people are often better off without formal state institutions. Somalia provides an ideal opportunity for them to prove that economies do seem to flourish when they rely on self-regulation, without involvement of governmental institutions.⁶⁰³ Some of their statements have been backed by statistics from the UN and the World Bank, that prove that the Somali economy has significantly increased since it has lacked any form of central government.⁶⁰⁴ Peter Little has done some research on how Somalia has changed since the collapse of its effective government and has concluded that the Somalis have generally been better off since their government collapsed, particularly their economy, which has developed a booming informal financing sector and more recently a telecommunications sector that provides some of the lowest mobile prices in the world.⁶⁰⁵

However, the Somali economy has also suffered from a lack of governmental support, since businesses have seen their endeavours restricted by ongoing conflicts and insecurity and often have to pay taxes to local warlords or militia leaders.⁶⁰⁶ Furthermore, research has pointed out that Somalis prefer to be state nationals, because of their fear that a stateless status would make it difficult for them to function in a world that consists of states and in which legal protection is inherently connected with citizenship.⁶⁰⁷

4.2.2 Supporting National or Regional State Building Efforts?

Most of the foreign involvement in Somali state building, especially from the UN and the US, has focused on supporting the existing established national administrations. Since the international law system presumes the existence of a working state, it seems logical to primarily approach the problem of failed states with efforts to reconstruct the state and its infrastructure. However, the effectiveness of this approach has been questioned several times. Whether support for the Somali central government has actually been

⁶⁰³ For further information on this topic, see: LEESON, P.T., "Better Off Stateless, Somalia Before and After Government Collapse", *Journal of Comparative Economics*, 2007, 35:4, p. 689-710; MUBARAK, J.A., "The "Hidden Hand" behind the Resilience of the Stateless Economy of Somalia", *World Development*, 1997, 25:12, p. 2027-2041; POWELL, B., FORD, R. and NOWRASTEH, A., "Somalia after State Collapse: Chaos or Improvement?", *Journal of Economic Behaviour and Organisation*, 2008, 67, p. 657-670

⁶⁰⁴ HARPER, M., *Getting Somalia Wrong?*, 112

⁶⁰⁵ See: LITTLE, P.D., *Somalia: Economy Without a State*, in *African Issues*, Oxford, Indiana University Press, 2003, 206 p.

⁶⁰⁶ HARPER, M., *Getting Somalia Wrong?*, 114

⁶⁰⁷ SCHLEE, G., "Customary Law and the Joys of Statelessness", 269

proven needful and should be continued, is a contested issue. Experiences with central government and the effectiveness of their local administrations have caused Somalis to be distrustful and unaffected by national ruling, as pointed out on several occasions throughout this dissertation.

Therefore several authors and observers have made efforts to prove that the Somali people never have and never will encounter any benefits from further support for the central government and that foreign investors are basically wasting their financial resources if they continue their current policies.

Lewis has pointed out that the Somali pastoral society is not familiar with any hierarchical patterns, since their decision making process is almost anarchic and does not provide permanent authority for any clan member.⁶⁰⁸ Rule of law in Somalia was indeed never historically associated with a national centralised judiciary and police force. Before colonialism, the country was considered one of the safest places on African soil, not because the enforcement of rule by any standing police force, but because of the 'social contract' and kinship code of conduct Somalis lived by.⁶⁰⁹

Menkhaus therefore concludes that international state building organisations and foreign governments that try to "resurrect" the central administrations of Somalia, are actually not rebuilding anything but are instead trying to establish functional administrations on a first occasion, which is obviously a much more challenging effort.⁶¹⁰

Hesse points out that other than the fact that the concept of a state is not rooted in Somali culture, it is also contaminated with negative associations, due to the abuse of power by the colonial administrations as well as by military dictator Barre.⁶¹¹

A critical malfunction in foreign support efforts, seems to be the stubborn persistence of Western governments and organisations to hold onto their culturally embedded ideas of state building that do not match the Somali reality. Little believes that the rise of regional administrations and initiatives as providers of economic, social, political and judicial stability have undermined Western ideas on state building and that they should be primarily examined as a basis for further Somali development instead of the Western rooted ideas on the concept of state.⁶¹²

Van Notten and Lewis have pointed out several times that all efforts to create a state democracy, in a manner that is embedded in the Western world, will ultimately fail, since it reflects a culture totally unlike that of the Africans.⁶¹³

⁶⁰⁸ LEWIS, I.M., *A Modern History of the Somali (Revised, Updated and Expanded)*, Athens, Ohio University Press, 2002 [1998], 10

⁶⁰⁹ MENKHAUS, K, "State Collapse in Somalia: Second Thoughts", *Review of African Political Economy*, 2003, 30:97, 412

⁶¹⁰ MENKHAUS, K, "State Collapse in Somalia: Second Thoughts", *Review of African Political Economy*, 2003, 30:97, 412

⁶¹¹ HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, 71

⁶¹² For further insights on this topic see: LITTLE, P.D., *Somalia: Economy without a State*, Oxford, Indiana University Press, 2003, 206 p.

⁶¹³ See VAN NOTTEN, M., *The Law of the Somalis* and LEWIS, I.M. in all of her published books on Somalia.

4.2.3 Top-Down or Bottom-Up Approach?

An essential question when trying to establish a judicial set-up for Somalia is whether a top-down or bottom-up approach should be employed, both methods having their own strengths and weaknesses. Authors have different beliefs on this political stumbling block. However, determining which approach should be used does have major consequences for the outcome of the Somali judicial system.

The state building efforts that established the TNG, TFG and ultimately the Federal Government of Somalia are clear examples of using a top-down approach. Many authors however defend the bottom-up approach, which supports the establishment of decentralised political authorities, like the Somaliland and Puntland administrations. Pham points out that it would be incomprehensible if the international community did not start working together with the regional administrations, given the accomplishments they have already made.⁶¹⁴ Lewis believes it is only natural that the Somaliland authorities would be consulted to give insight on their past experiences in "state building".⁶¹⁵ However, given the complex history and power divisions of both regions, we cannot simply adopt the Somaliland system and apply it to the Somali state to start out the complicated and adversarial process of state building. Though, we should bear in mind that, unlike Somalia, where existing forms of government are being ignored or eliminated, Somaliland has built its politics around them.⁶¹⁶ Still, Somaliland cannot be seen as the ultimate illustration that bottom-up policies are more fruitful, since the region itself has also been exposed to several top-down policies, carried out by the authoritarian president Egal, who even encouraged civil war to secure the Somaliland state.⁶¹⁷

Indeed, both approaches can be applied simultaneously, as Somalia's newly elected president Mohamud has already indicated his intention to employ a bottom-up approach, whereby the local administrations would be organised first and involved in the selection of regional actors.⁶¹⁸ Le Sage also proposes a combination of both approaches, as he desires to strengthen capacity of the Somali formal judicial systems with educational programmes, training and infrastructural support, but also emphasises the importance of strengthening the Somali's legal confidence through legal aid programmes, translation of all legal codes and an improved awareness of legal rights.⁶¹⁹ Yet, the bottom up approach is a very broad political technique, sensitive to diverse interpretations. Some authors believe the building block approach is the best possible technique to reconstruct Somalia. Matt Bryden is probably the best known defender of the building block approach for Somalia, claiming that Somalia should be divided into various "building blocks", which should each be supported in their separate efforts at building a political and judicial set-up.⁶²⁰ Bryden distinguishes Somaliland and Puntland as two building blocks that have already proven their effectiveness, while for South-Central Somalia, several classifications could be made, depending on the constituent components for regional cohesion. One of the earliest, although not explicit defenders of

⁶¹⁴ PHAM, J.P., "Putting Somali piracy in context", *Journal of Contemporary African Studies*, 2010, 28:3, 336

⁶¹⁵ LEWIS, I., *Understanding Somalia and Somaliland*, London, Hurst & Company, 2008, xi

⁶¹⁶ HARPER, M., *Getting Somalia Wrong?*, 134

⁶¹⁷ BALTHASAR, D., "Somaliland's Best Kept Secret: Shrewd Politics and War Projects as Means of State-Making", *Journal of Eastern African Studies*, 2013, 7:2, 231

⁶¹⁸ UNSC, *Report of the SG*, 2

⁶¹⁹ LE SAGE, A., *Stateless Justice in Somalia*, 10

⁶²⁰ For more information on the building-block approach, see: BRYDEN, M., "New Hope for Somalia? The Building Block Approach", *Review of African Political Economy*, March 1999, 26:79, 137-144

the building block approach was Mohamed Sahnoun⁶²¹, who believed humanitarian aid during the UNOSOM operations could have been delivered in a much more efficacious manner if foreign aid workers had used the Somali major ports, resembling the former political centers of the country.⁶²²

Bruton argues that a bottom up approach should certainly be employed to solve the Somali lack of governance, but he does however strongly condemn the "building block" strategy, as it would appoint officials and establish professionalised institutions instead of traditional leaders and local innovations.⁶²³ Because of his beliefs that the building block approach is actually a bottom up approach with all the disadvantages of the top down approach, he strongly encourages international actors to support the community-based development and governance initiatives rather than a regional central administration.⁶²⁴ The bottom up approach can therefore either indicate the construction of various regional administrations or the even more decentralised support for local initiatives, based on the community level.

4.2.4 Details on the Involvement of Traditional Sources of Law

The *Xeer* system has created a paradox, as it has provided rule of law to the people and protected the state from further collapse but at the same time has instituted inequalities before law and is susceptible to corruption.⁶²⁵ However, bearing in mind the analysis on Somali *Xeer* and its legitimacy amongst the Somali people, it is undeniable that *Xeer* must be implemented in the Somali judicial set-up one way or another. On top of its widespread acceptance, *Xeer* is also perceived as the most accessible justice system, unlike the central formal institutions.⁶²⁶

This implies that *Xeer* must either be implemented in national or regional legislation or the *Xeer* judicial system itself should be legally enforced and supported. Although the latter would seem the most opportune manner towards a nationally unified legal system based on widely accepted traditional rules, several authors have expressed their concerns about the legal enforcement of *Xeer*. Schlee amongst others believes that the enforcement of Somali customary law could eventually undermine the whole purpose of the *Xeer* system and could therefore change its nature, which would ultimately once again result in a decreasing in public support.⁶²⁷ Given the special status of clan elders in *Xeer*, we therefore must be careful when considering the formal institutionalisation of the Somali customary law as a legal system, as this could easily compromise the role of the *oday*. Clan elders have not been granted standing authority in *Xeer* and

⁶²¹ M. Sahnoun was special representative of the UNSG in times of the UNOSOM operations in Somalia. For more information on his ideas on more efficient humanitarian relief, see: SAHNOUN, M., *Somalia: The missed opportunities*, Washington D.C., United States Institute of Peace, 1994, 89

⁶²² BRYDEN, M., "New Hope for Somalia? The Building Block Approach", *Review of African Political Economy*, March 1999, 26:79, 138

⁶²³ BRUTON, B.E., *In the Quicksands of Somali: Where Doing Less Helps More*, Foreign Affairs, November/December 2009, 91 (available at: <http://www.somalilandtimes.net/sl/2009/408/IntheQuicksandsOfSomalia.pdf>)

⁶²⁴ BRUTON, B.E., *In the Quicksands of Somali: Where Doing Less Helps More*, Foreign Affairs, November/December 2009, 91-92 (available at: <http://www.somalilandtimes.net/sl/2009/408/IntheQuicksandsOfSomalia.pdf>)

⁶²⁵ GUNDEL, J., *The Predicament of the 'Oday'*, 43

⁶²⁶ SOMALIA JOINT NEEDS ASSESSMENT, *Governance, Security and the Rule of Law: Cluster Report*, August 2006, 18 (available at: http://www.somali-jna.org/downloads/Somali%20JNA1_Gov-Sec-Rule%20of%20Law%20-%20I.pdf)

⁶²⁷ SCHLEE, G., "Customary Law and the Joys of Statelessness", 262

institutionalising them as a permanent judicial force in an effort to enforce *Xeer*, would most likely subvert their authority, as has happened in the past. A more convenient solution therefore would be to integrate *Xeer* in the central and regional legislation efforts as much as possible, without compromising the status of the clan elders.

Pham encourages the intensified involvement of traditional clan leaders, the business community and several civil society actors, since they have already proven to be able to bring some basic rule of law in Somali society.⁶²⁸ Furthermore, they hold the support of the Somali people, often they already are aware of existing stumbling blocks and sometimes they have already developed an agenda on how to approach these.⁶²⁹

Mohamed has proposed a hopeful, though quite difficult to implement, strategy wherein the Somali key regional administrations would consult (unpaid!) clan elders on their positions on Somali law, and in collaboration with paid local authorities, would draft some generally agreed upon legislation.⁶³⁰

However, another problem to clan involvement would be the rightful identification of the legitimate current clan leaders, since the power ratio's in clan structures have shifted due to growth of Somali population on the one hand and internal displacement because of ongoing conflicts on the other.⁶³¹

4.3 International Support for a Somali Judicial Set-Up

Questions have arisen on the effectiveness and the contribution of foreign efforts in supporting the Somali state in its reestablishment.

Harper believes that the endless discussions of the international community on how to support Somalia in its state building have up until now not brought forth any actual improvements to the Somali lives.⁶³² Consequently, she draws the conclusion that

Somali people should be the only actors in the reestablishment of their society, uninfluenced by foreign stakeholders and keeping in mind the Somaliland example.⁶³³

Lewis supports her opinion by stating that the most significant political progress was made in regions that have developed on an individual basis, without much international interference.⁶³⁴ Since it has brought no fruitful solutions for the Somali deadlock, Lewis also discourages international engagement, except in the area of arms control.⁶³⁵

Because several countries with commercial interests in the Horn of Africa, keep providing weapons to the insurgents and thus interfering in the Somali internal conflict, it becomes even more difficult for the Somali government and its allies to restore peace and security.

Nevertheless, foreign involvement in the Somali state building process is not likely to end or even decrease anytime soon, given the international aspect of the Somali conflict. Somali piracy has proven to hold detrimental global effects and foreign actors are urged to tackle its onshore causes as soon as possible. The growing threat of insurgent groups

⁶²⁸ PHAM, J.P., "Putting Somali Piracy in Context", *Journal of Contemporary African Studies*, 2010, 28:3, 336

⁶²⁹ PHAM, J.P., "Putting Somali Piracy in Context", *Journal of Contemporary African Studies*, 2010, 28:3, 336

⁶³⁰ MOHAMED, J., "Kinship and Contract in Somali Politics", *Journal of the International African Institute*, 2007, 77:2, 235

⁶³¹ GUNDEL, J., *The Predicament of the 'Oday'*, v

⁶³² HARPER, M., *Getting Somalia Wrong?*, 8

⁶³³ HARPER, M., *Getting Somalia Wrong?*, 13

⁶³⁴ LEWIS, I., *Understanding Somalia and Somaliland*, London, Hurst & Company, 2008, ix

⁶³⁵ LEWIS, I., *Understanding Somalia and Somaliland*, London, Hurst & Company, 2008, ix

that could provide a safe haven and breeding ground for terrorists, provides another reason for foreign involvement, especially for the US. Consequently, when setting up an ideal judicial system for Somalia, we must always bear in mind the political and economic interests of foreign stakeholders concerning Somali state building, as they will ultimately be the creators of the country's political future. Given the significant ongoing foreign involvement, it certainly is a necessity to only consider those judicial set-ups that are established within a realistic framework of current foreign political and economic interests.

The ultimate decision on whether focus will be put on the Somali regional and local judicial systems or on the nationally imposed ones, will depend on international politics toward Somalia. The UN and US share a tradition of primarily supporting central state building efforts, a rather unfortunate decision, given the established legitimacy and accomplishments of Somali regional administrations. However, they finally seem to have realised the need for promoting regional governance initiatives. In 2010, the US announced a "dual-track policy" regarding Somalia, which would imply continued support to the central government, in addition to increased support for the relative stable regions, Somaliland and Puntland in particular.⁶³⁶

As stated above, the numerous international support programmes in Somalia should also be harmonised in order to provide aid delivery for the Somali people on a larger scale.

4.4 Two Possible Judicial Set-Ups

When logically analysing the various possibilities for a judicial set-up for Somalia, the author believes there are four possible set ups, but two of them should ultimately be scratched out, because of their unrealistic character. First, the set-up of a central legal system that does not respect the legal traditions of *Xeer* and Sharia, should be eliminated, as it would never be considered legitimate by the Somali people and would therefore lack significant enforcement capacities. Secondly, the option to only enforce Somali customary law and Sharia through its local administrations, in the absence of an established central government, should also be eschewed, as this is not at all a realistic set-up. Although this might be a useful possibility at its core, the political reality of foreign involvement would never get the support such an approach needs and it would therefore be unrealistic to label it as a possible solution for the Somali judicial deadlock. This leaves us with two possible approaches on the Somali judicial future, although both categories often intertwine when practical elaborations are being defined.

4.4.1 One Harmonised National Legal System Respecting *Xeer* en Sharia Law

When following this course, the formal administrations in Mogadishu remain the main institutions in law enforcement and legislation, but they would implement *Xeer* en Sharia elements in their lawmaking and judiciary procedures. We have already pointed out that *Xeer* certainly must be integrated in formal legal systems, since the Somali people accept its legitimacy and will always keep using *Xeer* rules to resolve clan conflicts. However, the harmonisation of several law systems into one harmonised set-

⁶³⁶ HARPER, M., *Getting Somalia Wrong?*, 179

up does not necessarily imply that all of the Somali regions should be regulated by one enforced legal system at the cost of another.⁶³⁷

Gundel believes that *Xeer* should be involved in all future state building efforts and should be harmonised with current national legislation.⁶³⁸ The controversial concept of clan insurance could be a stumbling-block for human rights advocates for integrating *Xeer* in the formal judicial systems. However, as long as security cannot be guaranteed throughout the Somali territory, people will continue to be dependent of their clans and employ the principle of clan insurance in order to protect themselves.⁶³⁹ Gundel warns that the discussion between defenders of traditional values and defenders of universal human rights should not get in the way of the formation of a harmonised effective legal system for Somalia.⁶⁴⁰

Le Sage proposes the formation of a National Legal Harmonisation Committee to harmonise both the Somali legal codes and the traditional sources of law, *Xeer* and Sharia, in conformity with international human rights.⁶⁴¹ This committee should be established as the outcome of a consensus reached by various regional participatory forums.

The Borama conference that helped form the Somaliland state, could provide a useful example for the infrastructure of the Somali judicial set-up. As described above, the conference not only gathered 150 delegates, representing the various Somaliland clans, but also allowed women and Somali nationals from the diaspora to advocate their interests.⁶⁴² The outcome of the conference was a code of conduct that respected *Xeer* traditions and Islamic Sharia principles, described by Bradbury as the Somaliland national *Xeer* or "social contract".⁶⁴³

By integrating *Xeer* directly into the national legal system, we could escape the problems and conflicts that would most certainly arise when enforcing *Xeer* as a full grown judicial system. Le Sage also points out that a majority of the Somali people would rather see the Federal Government undertake a comprehensive harmonisation effort of all judicial systems, than to solely enforce *Xeer* right away.⁶⁴⁴

4.4.2 Two Parallel Legal Systems with Mutual and Equal Support

Despite its non Western principles, *Xeer* does promote a peaceful society, where consensus and the eschewing of conflict are the central issues. Therefore, it must be considered a full grown legal system, that could function in parallel to national legal initiatives.

Lewis states that, after examining which regions are willing to start extensive peace negotiations with the national government, the existing bodies that are generally accepted by the local Somalis should be supported in dealing with certain problems that will arise and their decisions should be enforced.⁶⁴⁵

⁶³⁷ LE SAGE, A., *Stateless Justice in Somalia*, 54

⁶³⁸ GUNDEL, J., *The predicament of the 'Oday'*, ii

⁶³⁹ GUNDEL, J., *The predicament of the 'Oday'*, iii

⁶⁴⁰ GUNDEL, J., *The predicament of the 'Oday'*, iii

⁶⁴¹ LE SAGE, A., *Stateless Justice in Somalia*, 9

⁶⁴² See paragraph 3.1.2; *The Somaliland Constitution*

⁶⁴³ BRADBURY, M., *Becoming Somaliland*, 98

⁶⁴⁴ LE SAGE, A., *Stateless Justice in Somalia*, p. 11

⁶⁴⁵ LEWIS, I., *Understanding Somalia and Somaliland*, London, Hurst & Company, 2008, xi

Zuin believes that, like the Gacaca courts in Rwanda, the Somali *Xeer* courts could be the ideal mechanisms for solving local disputes on property, minor crimes and inheritance and family matters.⁶⁴⁶ The government should be involved though, to ensure a correct and fair way of ruling by local judges. However, its role must be limited to minimal supervision and it certainly cannot intervene in the use of *Xeer*, as this would compromise *Xeer*'s legitimacy with the Somali people. Zuin also states that, although *Xeer* is based on oral tradition, it would have to be formalised in a restricted manner by documenting the trial's verdicts and procedures. Another task for the government would be to render universal accessibility to *Xeer*, so that minority clans would also be guaranteed equal protection by *Xeer*.

Zuin also believes that an ad hoc tribunal should be erected, in order to deal with mass atrocities like warcrimes and crimes against humanity that have been committed during the Somali conflict.⁶⁴⁷ It would deal with the human rights abuses in Somalia, such as arbitrary targeting of civilians, rape of women, recruitment of child soldiers and many more. This ad hoc tribunal would comprise both national and international staff and should preferably be established on Somali soil, but if the security situation would not allow that, in a neighbouring country. The goal of this ad hoc tribunal would be to finally hold accountable those who severely violated international human rights laws and to discourage others from committing any more violations because of the punishment that would follow.

⁶⁴⁶ ZUIN, M., "A Model of Transitional Justice for Somalia", *Praxis: The Fletcher Journal of Human Security*, 2008, 23:2, 95

⁶⁴⁷ ZUIN, M., "A Model of Transitional Justice for Somalia", *Praxis: The Fletcher Journal of Human Security*, 2008, 23:2, 95

5. Conclusion

The ultimate goal of this dissertation was to indicate the Somali legal systems' urgent need for harmonisation, in order to provide a comprehensive, transparent and most importantly, a generally accepted rule of law, that renders the Somali people equal in the eyes of the law. This pressing need for harmonisation is proven by the many domains of life in which Somalis are hindered in their actions by lawlessness. Furthermore, a functioning judiciary would be a first step in decreasing the several Somali conflicts, not only because of the need to formally punish those that have committed significant violations of (human rights) laws, but also as a mechanism to prevent conflicts from escalating any further. Furthermore, several conflicts even found their origin in the arbitrary application of rule of law in Somalia.

The Somali crisis has been labelled a matter of international concern, not only because of the effect that it has had on the global market, but also because of the major engagement of foreign actors in the Somali state building process. Given the multitude of projects and initiatives established and the amount of financial resources spent, all in order to improve the Somali legal situation, it is all the more important that foreign actors are working towards clear, realistic and concordant objectives, bearing in mind the various reasons of their previous failures. Another challenge for the international community, indicated by the Somali deadlock, comprises the padding of the hiatus in international law with respect to protecting civilians that are living in a country without a functioning state apparatus.

The author will not attempt to give an unequivocal answer to the question what Somalia's legal future will or should look like and how the various intertwined legal systems should be harmonised into one functioning, generally accepted judiciary, because there simply is no such answer. With this dissertation, an attempt has been made to give some insights in the complicated, interwoven network of judicial systems that seem to be (dys)functioning throughout the country. The legal accomplishments of the various judicial systems have been discussed, together with their many crucial shortcomings.

A new constitution and the set-up of a Somali national government were finally established last year, after several failed attempts, but a major stumbling-block will ultimately be the effective enforcement of these rules, considering the Somali opinions on national rules and government. Therefore it is important that the informal justice systems that are embedded in the Somali culture, continue to be respected and integrated in the judicial efforts by the central and regional administrations. Even more important will be the inclusion of the Somali people in this process, in an open dialogue, in a manner according to the Somali traditions. A bottom up approach will be required, not instead of, but rather in combination with the more commonly applied top down approach.

However, this process will be a long term project, that will perhaps not render the apace progress the international community seems to be hoping for.

6. Nederlandstalige Samenvatting

De Somalische impasse bezorgt de internationale gemeenschap al meer dan twee decennia lang zware kopzorgen. Het land nam dit jaar, naar aloude gewoonte, de eerste plaats in op de Failed States Index ranglijst, wat aantoonde dat Somalië, ondanks zijn veelbelovende recente politieke ontwikkelingen, nog een lange weg te gaan heeft in zijn pogingen tot het herstellen van de veiligheid en de rechtsbescherming voor zijn burgers. Het Somalische conflict heeft een internationale dimensie, niet alleen omwille van de piraterij die heel wat effect lijkt te hebben op de globale economie, maar vooral vanwege de grote betrokkenheid van internationale actoren in het proces van Somalische staatsopbouw. Samen met de VS mag de VN zeker beschouwd worden als één van de belangrijkste internationale partners betrokken in de Somalische staatsheropbouw, al lijkt de VS vooral bezorgd te zijn om de aantrekkingskracht van de Somalische wetteloosheid op terroristische organisaties, zoals Al Shabaab, een radicale Islamistische beweging ontstaan in Somalië.

De opkomst van *failed states*, zoals Somalië, heeft de internationale gemeenschap bewust gemaakt van de aanwezige hiaten in het internationale recht met betrekking tot de rechtsbescherming van onderdanen van staten, die geen werkend staatsapparaat meer hebben. Internationale rechtsregels lijken de aanwezigheid van een werkende staatsadministratie te veronderstellen, wat resulteert in een gebrek aan effectieve bescherming voor onderdanen van een staat zonder dergelijke werkende overheid. Gezien het concept *failed state* tot op de dag van vandaag geen algemeen aanvaarde definitie kent, is het onzeker, gezien de recente politieke ontwikkelingen in het land, of Somalië nog bij het selecte groepje staten hoort dat kan gekwalificeerd worden als failed state, in zijn wettelijke betekenis. De bepaling van de wettelijke status van het land brengt echter wel belangrijke gevolgen met zich mee aangaande de Somalische staatsaansprakelijkheid.

Het opzet van deze masterproef bestond erin een algemeen overzicht te geven van de verschillende rechtssystemen die in Somalië gebruikt worden, rekening houdend met hun sterktes en zwaktes, om uiteindelijk tot een conclusie te komen die een aanzet kan geven voor een geharmoniseerd juridisch systeem dat aanvaard wordt door de volledige Somalische bevolking en hen gelijke rechten bezorgt voor de wet. Dit bleek echter geen sinecure te zijn, niet alleen wegens het tekort aan raadpleegbare primaire en secundaire wettelijke bronnen, maar eveneens door de verscheidenheid aan juridische systemen die er in Somalië bestaan.

Het Somalische gewoonterecht *Xeer* lijkt het rechtssysteem te zijn dat de meeste legitimiteit geniet onder de Somalische bevolking, maar wordt gekenmerkt door, naar westerse normen, oubollige en onmenselijke rechtspraktijken, die vaak niet kunnen in overeenstemming gebracht worden met internationale mensenrechtenstandaarden. De formele rechtssystemen daarentegen, beloven in hun constituties wél een efficiënte rechtsbescherming voor de Somalische onderdanen, met respect voor de algemeen aanvaarde juridische basisnormen, maar blijven meestal dode letter, gezien het gebrek aan effectieve juridische handhaving door de formele overheden. Naast deze twee rechtssystemen, is er ook nog het Sharia recht, dat geïncorporeerd is in de Somalische moslimcultuur, maar vaak aangewend wordt door radicale bewegingen om de lokale bevolking te terroriseren.

Een harmonisatie van deze drie voornaamste rechtssystemen lijkt één van de belangrijkste voorwaarden om het Somalische conflict niet verder te laten escaleren, niet alleen omdat overtreders van Somalische en internationale rechtsregels moeten gestraft worden voor hun daden, maar omdat de willekeurige toepassing van de verschillende rechtssystemen zorgt voor een ongelijke rechtsbescherming voor Somalische onderdanen, wat eens te meer voor conflicten zorgt.

Een eenduidig, afgelijnd voorstel voor een geharmoniseerd juridisch bestel in Somalië leek een ietwat utopische doelstelling voor deze masterproef, gezien het onmogelijk was veldonderzoek te verrichten en gezien de schaarste aan wetenschappelijke bronnen, die elk van de drie belangrijkste Somalische juridische systemen analyseren en evalueren. Enkele voorwaarden om een werkend, aanvaard en eenduidig juridisch stelsel te creëren zijn nochtans duidelijk geworden tijdens dit onderzoek. Vooreerst moeten de regionale administraties van Puntland en Somaliland betrokken worden in de uitvoering van deze juridische harmonisatie, gezien hun relatief succesvolle pogingen om vrede en stabiliteit terug te brengen op hun grondgebied. Verder moeten ook de belangrijkste *Xeer* tradities en Sharia principes gerespecteerd en geïntegreerd worden, zodat de Somalische bevolking de geharmoniseerde wetten als legitiem beschouwd.

De weg naar een geharmoniseerd juridisch systeem voor Somalië belooft echter nog lang te zijn en vol complicaties, die de internationale gemeenschap zal moeten aanpakken via een eenduidig beleid.

Annex

Map (1) of Somalia that distinguishes the autonomous regions Somaliland and Puntland, who are not mentioned on official maps of the Somali country or the United Nations.⁶⁴⁸



⁶⁴⁸ <http://www.lonelyplanet.com/maps/africa/somalia/>

Map (2) of Somalia that distinguishes its various regions and highlights its internal diversity.⁶⁴⁹



⁶⁴⁹ <http://www.un.org/depts/Cartographic/map/profile/somalia.pdf>

Bibliography

PRIMARY LEGAL SOURCES

AFRICAN UNION, *African Union Constitutive Act*, 2000, July 11, Lome, art. 4 (b)
(available at: http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm#Article4)

INTERNATIONAL COURT OF JUSTICE, *The Frontier Dispute Case (Burkina Faso v. Republic of Mali)*, *ICJ Reports 1986*, p. 554-561
(available at: <http://www.icj-cij.org/docket/files/69/6447.pdf>)

The Montevideo Convention on the Rights and Duties of States, Montevideo, 1933, December 26 (available at: http://avalon.law.yale.edu/20th_century/intam03.asp)

THE REPUBLIC OF SOMALILAND, *The Constitution of the Republic of Somaliland*, April 2000
(http://somalilandlaw.com/Somaliland_Constitution_Text_only_Eng_IJSSL.pdf)

THE SOMALI FEDERAL REPUBLIC, *Provisional Constitution*, Mogadishu, 2012, August 1
(<http://unpos.unmissions.org/LinkClick.aspx?fileticket=CqsW6PVY-C4%3d&tabid=9708&language=en-US>)

UN GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, 1948, December 10, 217 A (III) (available at: <http://www.un.org/en/documents/udhr/>)

UNITED NATIONS, *United Nations Convention on the Law of the Sea*, December 10, 1982

UN SECURITY COUNCIL, *Resolution 733*, UN Doc., 1992, January 23, S/RES/733
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/733\(1992\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/733(1992)))

UN SECURITY COUNCIL, *Resolution 751*, UN Doc., 1992, April 24, S/RES/751
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/751\(1992\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/751(1992)))

UN SECURITY COUNCIL, *Resolution 794*, UN Doc., 1992, December 3, S/RES/794
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/794\(1992\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/794(1992)))

UN SECURITY COUNCIL, *Resolution 814*, UN Doc., 1993, March 26, S/RES/814
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/814\(1993\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/814(1993)))

UN SECURITY COUNCIL, *Resolution 865*, UN Doc., 1993, September 22, S/RES/865
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/865\(1993\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/865(1993)))

UN SECURITY COUNCIL, *Resolution 897*, UN Doc., 1994, February 4, S/RES/897
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/897\(1994\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/897(1994)))

UN SECURITY COUNCIL, *Resolution 954*, UN Doc., 1994, November 4, S/RES/954
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/954\(1994\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/954(1994)))

UN SECURITY COUNCIL, *Resolution 1356*, UN Doc., 2001, June 19, S/RES/1356
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1356\(2001\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1356(2001))))

UN SECURITY COUNCIL, *Resolution 1407*, UN Doc., 2002, May 3, S/RES/1407
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1407\(2002\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1407(2002))))

UN SECURITY COUNCIL, *Resolution 1425*, UN Doc., 2002, July 22, S/RES/1425
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1425\(2002\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1425(2002))))

UN SECURITY COUNCIL, *Resolution 1519*, UN Doc., 2003, December 16, S/RES/1519
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1519\(2003\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1519(2003))))

UN SECURITY COUNCIL, *Resolution 1725*, UN Doc., 2006, December 6, S/RES/1725
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1725\(2006\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1725(2006))))

UN SECURITY COUNCIL, *Resolution 1744*, UN Doc., 2007, February 20, S/RES/1744
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1744\(2007\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1744(2007))))

UN SECURITY COUNCIL, *Resolution 1772*, UN Doc., 2007, August 8, S/RES/1772
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1772\(2007\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1772(2007))))

UN SECURITY COUNCIL, *Resolution 1814*, UN Doc., 2008, May 15, S/RES/1814
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1814\(2008\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1814(2008))))

UN SECURITY COUNCIL, *Resolution 1816*, UN Doc., 2008, June 2, S/RES/1816
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1816\(2008\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1816(2008))))

UN SECURITY COUNCIL, *Resolution 1844*, UN Doc., 2008, November 20, S/RES/1844
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1844\(2008\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1844(2008))))

UN SECURITY COUNCIL, *Resolution 1851*, UN Doc., 2008, December 16, S/RES/1851
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1851\(2008\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1851(2008))))

UN SECURITY COUNCIL, *Resolution 1863*, UN Doc., 2009, January 16, S/RES/1863
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1863\(2009\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1863(2009))))

UN SECURITY COUNCIL, *Resolution 1972*, UN Doc., 2011, March 17, S/RES/1972
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1972\(2011\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1972(2011))))

UN SECURITY COUNCIL, *Resolution 1976*, UN Doc., 2011, April 11, S/RES/1976
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1976\(2011\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1976(2011))))

UN SECURITY COUNCIL, *Resolution 2002*, UN Doc., 2011, July 29, S/RES/2002
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2002\(2011\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2002(2011))))

UN SECURITY COUNCIL, *Resolution 2036*, UN Doc., 2012, February 22, S/RES/2036,
available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2036\(2012\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2036(2012))))

UN SECURITY COUNCIL, *Resolution 2067*, UN Doc., 2012, September 18, S/RES/2067
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2067\(2012\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2067(2012))))

UN SECURITY COUNCIL, *Resolution 2093*, UN Doc., 2013, March 6, S/RES/2093
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2093\(2013\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2093(2013))))

UN SECURITY COUNCIL, *Resolution 2102*, UN Doc., 2013, May 2, S/RES/2102
(available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2102\(2013\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2102(2013))))

BOOKS

BRADBURY, M., *Becoming Somaliland*, in *African Issues*, London, Progressio, 2008, 271 p.

BRONS, M.H., *Society, Security, Sovereignty and the State in Somalia: From Statelessness to Statelessness?*, Rotterdam, International Books, 2001, 312 p.

DE TEMMERMAN, E., *De Hoorn van Waanzin*, Leuven, Davidsfonds, 1992, 224 p.

GARDNER, J. and EL BUSHRA, J. (ed), *Somalia: The Untold Story: The War through the Eyes of Somali Women*, London, Pluto Press, 2004, 257 p.

HAECK, Y., *Procederen voor het Europees Hof voor de Rechten van de Mens*, Antwerpen, Intersentia, 2009, 468 p.

HANSEN, S.J., *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group, 2005-2012*, London, Hurst & Co., 2013, 195 p.

HARPER, M., *Getting Somalia Wrong? Faith, War and Hope in a Shattered State*, London, Zed Books, 2012, 217 p.

KNAPEN, P., *Somalië: Restore Hope: Een Land tussen Hoop en Vrees*, Antwerpen, Standaard Uitgeverij, 1993, 48 p.

LEWIS, I.M., *A Modern History of the Somali: Revised, Updated and Expanded*, Oxford, James Currey Paper, 2002 [1998], 347 p.

LEWIS, I.M., *A Pastoral Democracy: A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa*, Oxford, Oxford University Press, 1961, 320 p.

LEWIS, I.M., *Understanding Somalia and Somaliland*, London, Hurst & Company, 2008, 139 p.

LITTLE, P.D., *Somalia: Economy Without a State*, in *African Issues*, Oxford, Indiana University Press, 2003, 206 p.

MUKHTAR, M.H., "Islam in Somali history: Fact and Fiction", in Ahmed, A.J. (ed), *The Invention of Somalia*, New Jersey, Red Sea Press, 1995, 1-29

RENDERS, M., *Consider Somaliland: State Building with Traditional Leaders and Institutions*, Leiden, Koninklijke Brill, 2012, 290 p.

SAHNOUN, M., *Somalia: The Missed Opportunities*, Washington D.C., United States Institute of Peace, 1994, 85 p.

SAMATAR, A.I., *The Somali Challenge: From Catastrophe to Renewal?*, Boulder-Londen, Lynne Rienner Publishers, Inc., 1994, 296 p.

VAN NOTTEN, M., *The Law of the Somalis: A Stable Foundation for Economic Development in the Horn of Africa*, Trenton, The Red Sea Press, Inc., 2005, 255 p.

ARTICLES

BALTHASAR, D., "Somaliland's Best Kept Secret: Shrewd Politics and War Projects as Means of State-Making", *Journal of Eastern African Studies*, 2013, 7:2, p. 218-238

BATTERA, F. and CAMPO, A., "The Evolution and Integration of Different Legal Systems in the Horn of Africa: The Case of Somaliland", *Global Jurist Topics*, 2001, 1:1, 17 p. (available at <http://www.mballi.info/doc113.htm>)

BRUTON, B., "In the Quicksands of Somalia: Where Doing Less Helps More", *Foreign Affairs*, November/December 2009, p. 79-94 (available at: <http://www.somalilandtimes.net/sl/2009/408/IntheQuicksandsOfSomalia.pdf>)

BRYDEN, M., "New Hope for Somalia? The Building Block Approach", *Review of African Political Economy*, March 1999, 26:79, p. 137-144

COJANU, V. and POPESCU, A.I., "Analysis of Failed States: Some Problems of Definition and Measurement", *The Romanian Economic Journal*, November 2007, 10: 25bis, p. 113-132

DOORNBOS, M., "Somalia: Alternative Scenarios for Political Reconstruction", *African Affairs*, 2002, 101, p. 93-107

EGGERS, A.K., "When is a State a State? The Case for Recognition of Somaliland", *Boston College International and Comparative Law Review*, 2007, December 1, 30:211, p. 211-222

HAMMOND, L., "Somalia Rising; Things are Starting to Change for the World's Longest Failed State", *Journal of Eastern African Studies*, 2013, 7:1, p. 183-193

HELMAN, G.B. and RATNER, S.R., "Saving Failed States", *Foreign Policy*, Winter 1992-1993, 89, p.3-20

HENDRIX, J.E., "Law Without State: The Collapsed State Challenge to Traditional International Enforcement", *Wisconsin International Law Journal*, 2006, 24:2, p. 587-626

- HESSE, B.J., "Lessons in Successful Somali Governance", *Journal of Contemporary African Studies*, 2010, 28:1, p.71-83
- IBRAHIM, M., "Somalia and Global Terrorism: A Growing Connection?", *Journal of Contemporary African Studies*, 2010, 28:3, p. 283-295
- KOSKENMAKI, R., "Legal Implications Resulting from State Failure in Light of the Case of Somalia", *Nordic Journal of International Law*, 2004, 73, p. 1-36
- LEESON, P.T., "Better off Stateless, Somalia Before and After Government Collapse", *Journal of Comparative Economics*, 2007, 35:4, p. 689-710
- MENKHAUS, K., "State Collapse in Somalia: Second Thoughts", *Review of African Political Economy*, 2003, 30:97, p. 405-422
- MENKHAUS, K., "The Crisis in Somalia: Tragedy in Five Acts", *African Affairs*, 2007, 106:24, p. 357-390
- MOHAMED, J., "Kinship and Contract in Somali Politics", *Journal of the International African Institute*, 2007, 77:2, p. 226-249
- MUBARAK, J.A., "The "Hidden Hand" behind the Resilience of the Stateless Economy of Somalia", *World Development*, 1997, 25:12, p. 2027-2041
- OSINBAJO, Y., "Legality in a Collapsed State: The Somali Experience", *International and Comparative Law Quarterly*, 1996, 45:4, p. 910-923
- PHAM, J.P., "Putting Somali Piracy in Context", *Journal of Contemporary African Studies*, 2010, 28:3, p. 325-341
- POORE, B., "Somaliland: Shackled to a Failed State", *Stanford Journal Of International Law*, 2009, 45, p. 117-150
- POWELL, B., FORD, R. and NOWRASTEH, A., "Somalia after State Collapse: Chaos or Improvement?", *Journal of Economic Behaviour and Organisation*, 2008, 67, p. 657-670
- SAMUELS, S., "Constitution-Building during the War on Terror: The Challenge of Somalia", *New York University Journal of International Law and Politics*, 2008, 40:2, p. 597-614
- SCHLEE, G., "Customary Law and the Joys of Statelessness: Idealised Traditions versus Somali Realities", *Journal of Eastern African Studies*, 2013, 7:2, p. 258-271
- SILVA, M., "Somalia: State Failure, Piracy and the Challenge to International Law", *Virginia Journal of International Law*, Spring 2010, 50:3, p. 553-578
- STEVENSON, J., "Jihad and Piracy in Somalia", *Survival: Global Politics and Strategy*, Oxford University Press, 2010, 52:1, p. 27-38

THURER, D., "The "Failed State" and International Law", *International Review of the Red Cross*, December 1999, 81:836, p. 731-761

VARK, R., "State Responsibility for Private Armed Groups in the Context of Terrorism", *Juridica International*, 2006, 11:1, p. 184-193

ZUIN, M., "A Model of Transitional Justice for Somalia", *Praxis: The Fletcher Journal of Human Security*, 2008, 23:2, p. 89-108

OTHER PUBLICATIONS

ABDURAHMAN, A.O.S., *Order Out of Chaos: Somali Customary Law in Puntland and Somaliland*, Accord, 2010, 21, p. 58 -59 (available at: http://www.c-r.org/sites/c-r.org/files/Accord%2021_17Order%20out%20of%20chaos_Somali%20customary%20law_2010_ENG.pdf)

ACADEMY FOR PEACE AND DEVELOPMENT, *The Judicial System in Somaliland*, Hargeisa, April 2002, 13 p. (available at: <http://www.mbali.info/doc178.htm>)

AYNTE, A., *Al Shabaab and Post-Transition Somalia*, African Arguments, 2012, September 3 (<http://africanarguments.org/2012/09/03/al-shabaab-and-post-transition-somalia-by-abdi-aynte/>)

BARNES, C. and HASSAN, H., *The Rise and Fall of Mogadishu's Islamic Courts*, Chatham House and the Horn of Africa Group, April 2007, 8 p. (available at: <http://www.chathamhouse.org/sites/default/files/public/Research/Africa/bpsomalia0407.pdf>)

BRUTON, B.E., *Somalia: A new approach*, Council on Foreign Relations: center for preventive actions, March 2010, Council Special report No 52, 45 p. (available for download at: <http://www.cfr.org/somalia/somalia/p21421>)

GUNDEL, J., *The Predicament of the 'Oday': The Role of Traditional Structures in Security, Rights, Law and Development in Somalia*, Danish Refugee Council & Oxfam, November 2006, 62 p. (available at: http://www.logcluster.org/ops/som/infrastructure-communication-various/Gundel_The%20role%20of%20traditional%20structures.pdf)

HEALY, S. and SHEIKH, H., *Somalia's Missing Million: The Somali Diaspora and its Role in Development*, UNDP, March 2009, 44 p. (available at: <http://www.so.undp.org/index.php/Download-document/70-Forging-Partnerships-with-the-Somali-Diaspora.html>)

HERSI, M.F., *Research Guide to the Somaliland Legal System*, Globalex, February 2009, 7 p. (available at: <http://www.nyulawglobal.org/globalex/somaliland.htm>)

LE SAGE, A., *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives*, Centre for Humanitarian Dialogue, July 2005, 59 p. (available at: http://www.ssrnetwork.net/uploaded_files/4397.pdf)

LOMBARD, L., *Elder Counsel: How Somalia's Aged Tribal Justice System Keeps the Peace in a Country Known for Chaos*, Legal Affairs, October 2010, 3 p.
(available at: <http://www.legalaffairs.org/printerfriendly.msp?id=891>)

MACCALLUM, S.H., *The Rule of Law Without the State*, Mises Daily, September 12, 2007,
(available at: <http://mises.org/daily/2701>)

MENKHAUS, K., *The Somali Spring: Is the Poster Child of Failed States Finally Getting its Act Together?*, Foreign Policy, 2012, September 24 (available at:
http://www.foreignpolicy.com/articles/2012/09/24/the_somali_spring)

MOLLER, B., *Somalia after the Ethiopian withdrawal*, Danish Institute for International Studies, January 2009, 4 p. (available at:
http://www.diis.dk/graphics/Publications/Briefs2009/bmo_somalia_2.pdf)

PILLARS OF PEACE SOMALI PROGRAMME, *Puntland Note: Mapping the Foundations of Peace; Challenges to Security and Rule of Law, Democratisation Process and Devolution of Power to Local Authorities*, November 2010, 120 p. (available at:
http://www.interpeace.org/publications/doc_download/67-puntland-note-mapping-the-foundations-of-peace-english)
(including: JAMA HASSAN FARAH, *Focus Group Discussion with Minorities*, Garowe, 21 January 2010)

PLOCH, L.; BLANCHARD, C.M.; O'ROURKE, R., *Piracy off the Horn of Africa*, Congressional Research Service, 2011, R40528, 43 p.
(available at: <http://www.fas.org/sgp/crs/row/R40528.pdf>)

PUNTLAND DEVELOPMENT RESEARCH CENTRE , *Annual report 2010*, January-December 2010, 4 p. (available at: [http://pdrsomalia.org/wp-content/files/reports/PDRC%20Annual%20Report%202010%20\(D2\).pdf](http://pdrsomalia.org/wp-content/files/reports/PDRC%20Annual%20Report%202010%20(D2).pdf))

PUNTLAND DEVELOPMENT RESEARCH CENTER, *Understanding Democracy in Puntland: Impact Assessment Report*, Pillars of Peace Programme: Phase 1, June 2012, 13 p.
(available at: <http://pdrsomalia.org/wp-content/uploads/2012/10/Democratization-Campaign-Impact-Assessment-Puntland.pdf>)

SCHLEE, G., *Regularity in Chaos: the Politics of Difference in the Recent History of Somalia*, Max Planck Institute for Anthropology, Halle/Saale, 2001, 34 p.
(available at: http://www.eth.mpg.de/cms/en/publications/working_papers/pdf/mpi-eth-working-paper-0018.pdf)

SHINN, D.H., *Somaliland: The Little Country That Could*, CSIS: Africa Notes, November 2002, nr.9, 7 p. (available at: http://csis.org/files/media/csis/pubs/anotes_0211.pdf)

SOMALIA JOINT NEEDS ASSESSMENT, *Governance, Security and the Rule of Law: Cluster Report*, August 2006, 102 p.(available at: http://www.somali-jna.org/downloads/Somali%20JNA1_Gov-Sec-Rule%20of%20Law%20-%20I.pdf)

STERIO, M., *Piracy off the coast of Somalia: The argument for pirate prosecutions in the national courts of Kenya, the Seychelles and Mauritius*, Cleveland State University, 2012, 22 p.(available at: http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1631&context=fac_articles)

THE INTERNATIONAL CRISIS GROUP, *Somalia: From Troubled Transition to a Tarnished Transition?*, 2012, August 20 (available at: <http://www.crisisgroup.org/en/publication-type/media-releases/2012/africa/somalia-from-troubled-transition-to-a-tarnished-transition.aspx>)

THE INTERNATIONAL CRISIS GROUP, *Somaliland: Time for African Union Leadership*, Africa Report n. 110, 2006, May 23 (available at: <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somalia/Somaliland%20Time%20for%20African%20Union%20Leadership.pdf>)

TURITTO, J., *Interview with Ambassador Brook Hailu Beshah*, International Affairs Review, 2008, November 8 (available at: <http://www.iar-gwu.org/node/49>)

UN HABITAT, *Somaliland, Puntland: The Land Legal Framework: Situation Analysis*, UN Human Settlement Programme, November 2006, 68 p. (available at: http://www.unhabitat.org/downloads/docs/4417_21585_somaliland.pdf)

UNODC, Counter Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects, March 2013, 20 p. (http://www.unodc.org/documents/easternafrika//piracy/UNODC_Brochure_Issue_11_vv.pdf)

UN SECURITY COUNCIL, *Report of the Secretary-General on Somalia*, UN Doc., 2013, January 31, S/2013/69, 21 p. (available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2013/69)

US DEPARTMENT OF STATE, *Background Note: Somalia*, Bureau of African Affairs, 2012, December 27 (available at: <http://www.state.gov/r/pa/ei/bgn/2863.htm>)

US DEPARTMENT OF STATE, *Report on Human Rights Practices for 2011 in the Country of Somalia*", 2012, May 24, 39 p. (paper version, but also available in a digital and more recent version at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>)

US DEPARTEMENT OF STATE, *Somalia: Eliminating the Terrorist Threat (Fact Sheet)*, African Affairs, 2007, January 25 (available at: <http://2001-2009.state.gov/p/af/rls/fs/2007/79383.htm>)

WORLD BANK, *The Pirates of Somalia: Ending the Threat, Rebuilding a Nation*, Washington DC, 2013, January 1, Report nr. 76713, 216 p. (available at: <http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf>)

WEBSITES

<http://amisom-au.org/mission-profile/amisom-police/>

<http://data.unhcr.org/horn-of-africa/regional.php>
(UNHCR, *Somalia Fact Sheet*, May 16, 2013)

<http://drc.dk/home>

<http://ffp.statesindex.org/indicators>

<http://ffp.statesindex.org/rankings-2013-sortable>

<http://news.bbc.co.uk/2/hi/8491329.stm>

<http://unpos.unmissions.org/Default.aspx?ctl=Details&tabid=9705&mid=12667&ItemID=19547> (UNPOS, *Year End Letter From SRSG Mahiga*, 31 December 2012)

<http://unpos.unmissions.org/Default.aspx?tabid=9708&language=en-US> (UNPOS, *Chronology of Events in the Somali Peace Process*)

http://unpos.unmissions.org/LinkClick.aspx?fileticket=jY_dosGykQY%3d&tabid=9737&language=en-US (UNPOS, *Timeline of the Somali constitutional process: 2004-2012*)

<http://unpos.unmissions.org/Portals/UNPOS/Repository%20UNPOS/110906%20-%20Initialled%20Roadmap.pdf> (*Somalia End of Transition Roadmap*)

http://www.africa-union.org/root/au/auc/departments/psc/amisom/AMISOM_Background.htm

<http://www.faoswalim.org/>

<http://www.hrw.org/news/2013/06/12/somalia-strengthen-human-rights-law>

<http://www.lonelyplanet.com/maps/africa/somalia/>

http://www.somalilandlaw.com/constitutional_developments.html

<http://www.somalilaw.org/index.html>

<http://www.so.undp.org/index.php/1Law-Enforcement.html>

<http://www.unhcr.org/51a862296.html> (UNHCR, *Press Release*, 2013, May 31)

<http://www.un.org/depts/Cartographic/map/profile/somalia.pdf>

<http://www.un.org/News/Press/docs/2013/sga1401.doc.htm>

<http://www.unpo.org/members/7916>

<http://www.unsomalialia.net/History-of-UN-in-Somalia.htm>

<http://www.wfp.org/countries/somalia/operations>

<http://www.wfp.org/countries/somalia/overview>

<https://www.cia.gov/library/publications/the-world-factbook/fields/2066.html>

<https://www.cia.gov/library/publications/the-world-factbook/fields/2103.html>

<https://www.cia.gov/library/publications/the-world-factbook/geos/so.html#People>