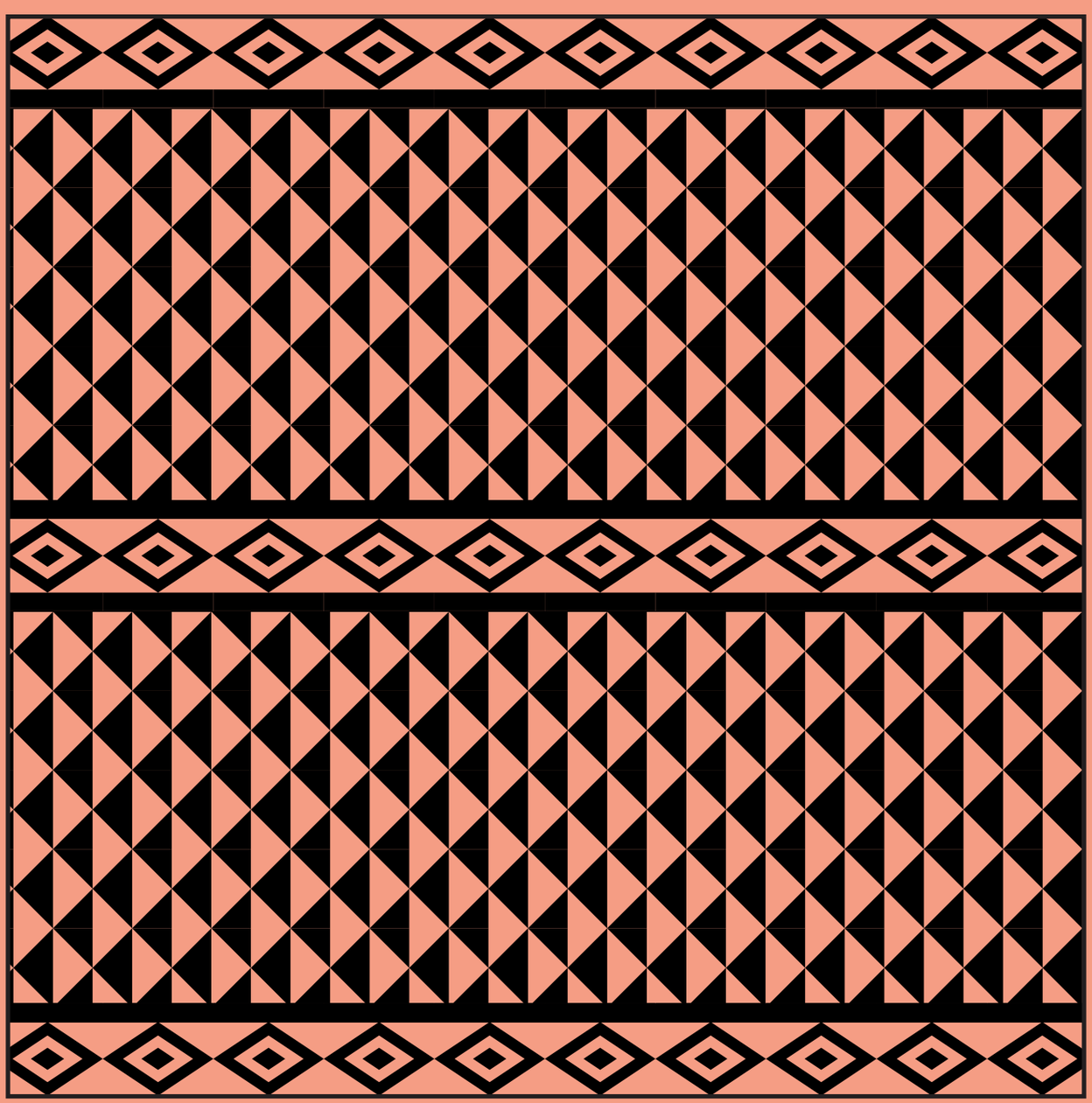
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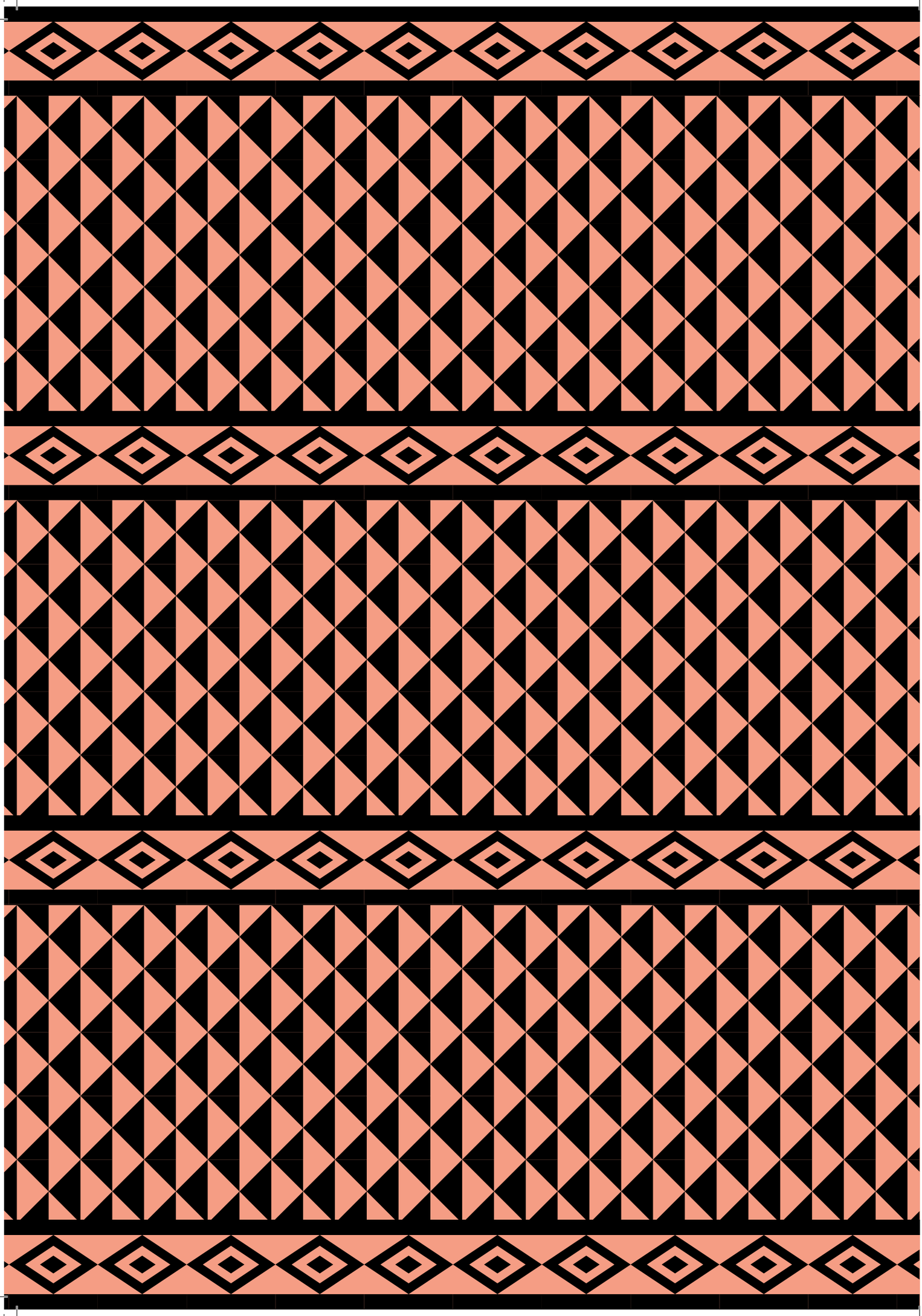
TRANSITIONAL JUSTICE IN SOMALIA



TRANSITIONAL JUSTICE IN SOMALIA - NOVEMBER 2021

IMPLEMENTED BY ADAM SMITH INTERNATIONAL

DELIVERING PEACE & STABILITY IN SOMALIA



‘THE BEST BED THAT A MAN CAN SLEEP ON IS PEACE’

SOMALI PROVERB

All patterns and colours used in this publication are inspired by Somali textiles

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1 EXECUTIVE SUMMARY

Despite political progress and the establishment of state institutions, Somalia continues to be beset by protracted armed conflict. Violent contestation for power has taken place for at least 35 years since the demise of the Siad Barre government in the late 1980s, though many argue that Somalia has suffered a legacy of violence going back as far as the colonial era. Yet, despite multiple efforts to forge national reconciliation, often through internationally backed conferences, this pursuit remains elusive.

In response to this challenge, following public consultations, a National Reconciliation Framework (NRF) was established in 2019, setting out five pillars of work to advance this objective. Pillar II, on dealing with the past, thus far lacks a specific strategy and mechanism for delivery. Furthermore, while the 2012 Provisional Constitution (Article 111i) provides for the establishment of a Truth and Reconciliation Commission, this is yet to be established. It is within this gap that initial research to understand the potential scope and parameters of transitional justice is undertaken.

A combination of desk-based and field research reflected on the concept and objectives of transitional justice; what has been done to date in Somalia; the backdrop of violence that it will need to address; the attitudes and needs of Somalis towards addressing past violence; and what the scope, parameters, contradictions and limitations may be, as well as the policy setting in which it must operate. The research finally draws on some experiences of other countries that have undertaken transitional justice initiatives and proposes some initial steps forward that international agencies, the Federal Government of Somalia, and concerned Somali actors could take to move the issue forward.

1.1 LESSONS FROM TRANSITIONAL JUSTICE LITERATURE

Transitional justice is understood as a tool within the wider reconciliation endeavour, seeking to address the legacy of violence by acknowledging the array of violence perpetrated, bring to light the history of what occurred, and securing the accountability of perpetrators while simultaneously seeking to restore and repair broken social relations. Nevertheless, advancing justice and accountability for past violence—let alone establishing the truth of what occurred—is a complicated and contentious endeavour, and even the best-designed initiatives have suffered complications and challenges. A review of the origins and development of theoretical frameworks for transitional justice (TJ) and their application in different contexts across the last 80 years, without specific reference to Somalia, suggests several considerations to approach TJ programming in Somalia:

- Any TJ model will need to be context sensitive. It cannot simply follow a preconceived, externally developed formula, nor deploy a purely technical approach uninformed by political and social realities.
- TJ measures should not be overburdened with expectations. They should not try to cover reconciliation and holding perpetrators accountable as well as state building and nation building within the context of a National Reconciliation Framework. A TJ programme of work should have a focussed objective, while additional aspects of state-building or wider aspects of reconciliation may need to be performed in parallel or sequentially.
- To be effective, TJ must involve a large section of the population, focusing on ordinary people and the realities of their daily lives. It should be designed and implemented from the 'bottom' up. Donor and international agencies should avoid being a visible and driving force as it may work at cross-purposes, undermining popular trust and legitimacy in the pursuit.
- In situations of ongoing crisis, where the state is weak and in competition with non-state actors, TJ cannot exclusively depend on existing state structures. Rather, state actors can participate among other actors in the TJ process within the context of a national TJ framework.
- To deal with the violent past in a politically fragmented context like Somalia, a national framework needs to be developed, beginning by tackling issues at the local and regional levels.
- TJ is a long-term and complex process. Strict timelines, benchmarks, and excessive bureaucratisation will likely prevent the process from building support and achieving results.
- Without local legitimacy, no stable support for TJ can be established. Somali political elites do not necessarily represent local communities across the country. Yet, these communities' commitment is critical for a meaningful TJ process.


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1.2 SOMALI REFLECTIONS ON THE NEED, SCOPE, AND CHALLENGES OF DEALING WITH THE PAST

The research entailed fieldwork conducted in Mogadishu, Kismayo, Baidoa, Galkayo, and Garowe. The primary data provides insights into the parameters and scope for TJ programming in Somalia and highlights the contradictions and challenges that any process will have to engage in:

- Most respondents stated that dealing with the violent past is essential. They were keen to see that past crimes and injustices against individuals—not just against groups—be dealt with to end the victims' grudges against the perpetrators, which keep feeding mistrust in the country.
- Respondents tended to focus in on the violence perpetrated during the 1990s. While some respondents referred to atrocities committed by Al-Shabab and foreign troops in recent years, the violence committed by warlords and clan militias was more often treated as the issue that needed redressing.
- Many admitted that it is challenging, if not impossible, to deal with all past crimes and injustices. Some suggested dealing only with the main perpetrators, principally former warlords, but they cautioned that some of these are holding political office today.
- Women stressed that gender-based violence/sexual violence (GBV) has a long-term negative impact on the victims and that, even after 30 years, they should have an opportunity at least to speak out and be heard. However, all agreed that this is challenging due to the culturally engrained stigmatisation of victims among Somalis and the challenge of identifying perpetrators.
- Most respondents emphasised that property crimes should be dealt with, no matter when and how they happened, and that seeing someone holding stolen property often perpetuates grievances. Immovable property, i.e., houses and land, should be returned. This was, as many admitted, still complicated because of the lack of reliable title deeds and because of the determination of illegal owners to defend 'their' property that they were occupying, often continually for decades.
- For the respondents, the most relevant and preferred source of law for dealing with the violent past is *Shari'a*. In particular, many felt that conflicts over property were best resolved through Islamic law. In more general terms, individual accountability could most clearly be established under *Shari'a*. Somali customary law (*Xeer*) was seen as suitable for inter-group reconciliation. While several men in the research mentioned that they received compensation for some crimes under *Xeer*, female respondents almost unanimously expressed reservations about Somali customary law. They stressed that it primarily benefits men and that it can be unfair, since it privileges stronger over weaker groups and only provides 'settlements'—not justice.
- The respondents clearly expressed a wish for a clear, effective, and fair overarching legal structure. Yet, equally clearly, they mentioned that the current state system existing in Somalia was far from being able to deliver on this.
- Many saw international law as a suitable instrument to deal with the main perpetrators. Several respondents mentioned that the International Criminal Court, or a special tribunal for war crimes in Somalia, should adjudicate the warlords including potentially some powerful actors in the government today who had committed crimes or ordered atrocities in the past. While some felt that an international mechanism could transcend domestic clannism, which could be an important challenge to a fair process, other respondents also cautioned that an external process could create more insecurity in an already volatile political situation in Somalia.
- Some respondents mentioned foreign troops as perpetrators of crimes both past and present. Some also praised AMISOM's role in fighting Al-Shabab in 2007 and 2008, but others mentioned atrocities and abuses against Somali civilians committed by foreign forces—some with extensive detail. Many felt that there should be some mechanism to address the atrocities and abuses by foreign troops and perpetrators, however the type of mechanism and its feasibility would need greater interrogation.
- Reflections on the structural marginalisation of women and minorities and its connection to past violence were limited. Despite the question being raised, many respondents lacked a clear understanding of what violence marginalised groups had specifically faced, let alone what kind of justice, accountability, or reparations for women or minority groups might be needed or entail. In practice,



justice concerning minority group members would have to include dealing with past violations at both an individual and at a collective, structural level. This would require a legal framework that provided for truth-telling and adjudication of perpetrators, and entailed provisions for affirmative action, which *Shari'a* law and courts alone would not be able to provide. Similarly, the deeply engrained patriarchal structures of Somali society would have to be tackled when dealing with the violence experienced by women and girls over the past decades in the context of civil war in Somalia.

- Several contradictions emerged from the interviews. On the one hand, respondents found it important to deal with the violent past and hold individual perpetrators accountable. On the other hand, a majority advocated 'forgiving and forgetting' as an appropriate way of dealing with many past crimes. Furthermore, forgiving was not seen as unconditional, but rather contingent upon redress, after which forgiveness could occur. It is not clear in the data whether the former only refers to individuals and the latter to communities, or groups. *Shari'a* and, to a lesser degree, *Xeer* were mentioned as the most appropriate legal bases for dealing with the violent past; but respondents also emphasised that a fair and robust judiciary administered by an effective state was necessary to deal with past crimes. Although Article 2 of the Provisional Constitution establishes the primacy of *Shari'a* over any other source of law, in practice, Somalia is one of the few contexts where different legal orders co-exist, often without a clear hierarchy.

1.3 KEY CHALLENGES TO TJ IN SOMALIA

Aggregating all the data collected and analysed for this research, we have identified six key challenges that have profound implications for TJ programming in Somalia:

- **Absence of overarching and legitimate legal and political structures, and lack of legitimacy of state institutions.** The political landscape in Somalia is fragmented, and there is no dominant legitimate authority. The limited reach of the government presents a challenge to any approach that is highly dependent on overarching state power. The contested nature of politics in Somalia, through the Al-Shabab insurgency; clan militias' active contestation of control in parts of south and central Somalia; Jubbaland and Puntland FMS fractures with the FGS; and Somaliland's unilateral secession in the north-west all suggest that, at present, a state-centred approach to TJ alone will not lead to a comprehensive dealing with the violent past in Somalia. It also means that TJ today, or any time soon, cannot be driven solely by state institutions; therefore it will be challenging for a national TJ framework to take root in Somalia in the present circumstances. However, the NRF could still provide a framework within which a few initial steps could be taken, as we advise below. Certainly, if in the near future an administration comes to power that manages to produce more popular legitimacy, the NRF—or even the provisions in the Provisional Constitution (Article 111I) regarding the establishment of a Truth and Reconciliation Commission—could be activated to provide an overarching framework for various TJ measures in Somalia.

- **Non-hierarchical plural legal situation and the strong influence of *Shari'a.*** Not one of the existing legal systems in the country prevails over the others. Elsewhere, typically, statutory law dominates, and religious or customary law fills particular niches or can be used by certain actors or in specific situations. In Somalia, *Shari'a*, statutory law and *Xeer* exist side by side. In some areas, they can be accessed simultaneously. In others, statutory law is excluded (for example, in Al-Shabab–controlled terrain and the rural peripheries). This implies that any approach to TJ would have to accommodate elements of all three relevant legal systems. While it is not unusual to combine statutory and customary legal approaches within national TJ frameworks (e.g., in Rwanda and Liberia), to date, the incorporation of *Shari'a* as a third element has never been attempted. Given that the Somali Provisional Constitution established the primacy of *Shari'a* over other sources of law, including statutory, advancing a legal framework for TJ in Somalia will require navigating this unexplored territory.

- **Clannism.** While allegiance towards one's patrilineal kin has a long tradition among Somalis, clans underwent a substantial transformation in their importance during the late 1980s and the early 1990s. Subsequently, clannism—which considers narrow interests among patrilineal relatives in all

spheres of daily life—now inhibits open and balanced discussions about past violent incidents. Key events struggle to be discussed publicly without provoking the patrilineal relatives of those accused of crimes and atrocities to rush to a general defence of their fellow clan members. This constitutes a considerable challenge for typical TJ procedures such as truth-telling, criminal persecution, and vetting. In other contexts, group identities also superseded all others (e.g., in Rwanda and South Africa), but in these contexts there was a clear political settlement providing more enabling conditions.

- **Structural violence against women and minorities.** Structural violence is a form of violence wherein a social structure or social institution may harm people by preventing them from meeting their basic needs. This is the case in Somalia concerning women and members of minority groups—particularly when dealing with their past violent experiences. Gender-based violence comes along with the stigmatisation of the victims in Somalia. Violence and injustices against minorities are often not considered in the same way as violence and injustices among "equals" (i.e., men belonging to similarly strong majority groups). These long-established inequalities in Somali society will likely also impinge on any TJ initiative in Somalia. Generations of entrenched norms around power and position in society cannot be undone through short term measures. A TJ process in Somalia that does not address structural violence and injustice will therefore fail to address key dimensions.

- **The ambiguous role played by the international community.** External actors have been involved in Somalia at various points over the past 35 years. While much of this has contributed towards humanitarian relief and peacekeeping, there have also been times when foreign actors have been a direct party to the conflict. During the 1980s, the military regime received strong military and other support from foreign states. In the early 1990s, international peacekeepers were known to have perpetrated human rights violations (HRW, 1995); at times foreign support has strengthened warlords; And more contemporarily, foreign troops through AMISOM have harmed civilians through actions in pursuit of their mandate, or through sexual violence (Wilson, 2014). Already Canada has undertaken a prosecution against troops who were sent to keep the peace in 1993 but who instead tortured and killed a Somali youth (Amnesty, 1995). Similarly, under the Human Rights Due Diligence Policy, AMISOM now documents and makes reparations for civilian casualties that have emerged from its own actions (UNSOM, 2019). Going forward, any TJ process will need to acknowledge the full legacy of past violence in Somalia—regardless of whom the perpetrator may be. If, or where, this relates to foreign states and troops, a TJ process will need to consider whether, where, and through which instruments it may be beneficial to pursue accountability.

- **Competing Trauma Narratives.** There is a multitude of partly opposed collective trauma narratives which different clans or lineages hold onto. In these narratives, frequently, the 'murderer' of one group is the 'hero' of the other. This provides little space for shared and nuanced accounts of what happened and shared responsibility. It also upholds the clear-cut and politicised boundaries between 'victims' and 'perpetrators', which again inhibits more complex discussions about ambiguous realities regarding who did what. This situation is not exceptional to Somalia—it is common to many conflicts and other processes of transitional justice. However, it is important that the challenge of documenting the past and establishing the facts in such context is not underestimated.

1.4 THE CASE OF SOMALILAND

Across Somalia there have been different policy approaches in response to dealing with the violent past, in particular that of Somaliland/ north-western Somalia. Over the past three decades, the people of Somaliland have gathered valuable experiences with a process that could be described as TJ, without a formal process, but entailing important aspects of region-wide reconciliation and dealing with the violent past, albeit limited to intra-Somaliland issues. We have identified some relevant lessons to learn from:

- The process of dealing with past violence and injustice grew from the bottom up. It was based on locally legitimate, 'face-to-face' proceedings between relevant collectives (lineage or clans). A general amnesty complemented this for crimes committed by persons from the region during the first civil war in the 1980s. While amnesty is a contested measure in the context of TJ, it may be that without such tools there may be little traction in securing the engagement of elites who may have been involved in past violence.
- The process was phased over a long term. It would be unrealistic to expect that the complex histories of violence in Somalia could be dealt with in 'one go' and in a relatively short time (one, two or three years). It may be useful to consider a phased approach that allows for different components to be addressed and built upon, recognising that it could take years for the full array of issues to be addressed.
- Somaliland has seen different measures at different times, and it did not undertake all the possible steps for political reasons. TJ in Somalia must consider the political economy of justice and the legitimacy of any TJ mechanism: who wants what type of TJ and when, to what end? What kind of TJ do the concerned people envisage and why? Politics and power are thus involved when considering 'whose priorities take priority' in dealing with the past.

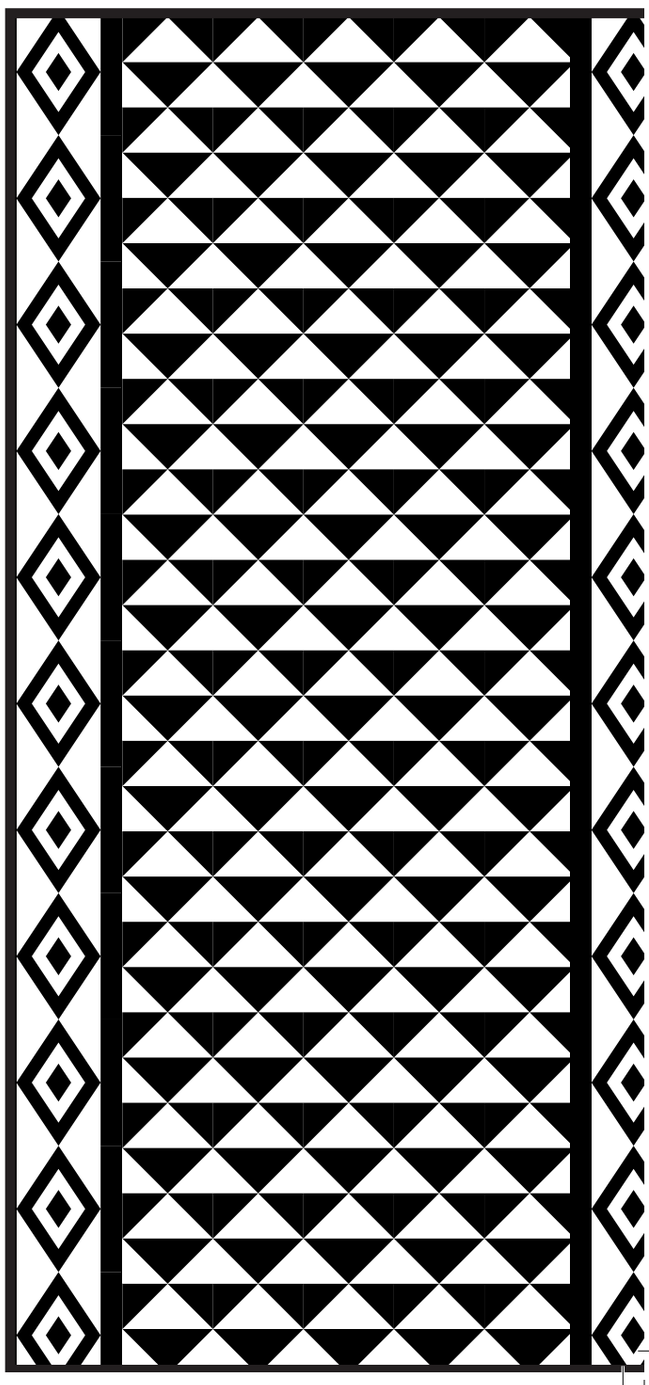
1.5 LESSONS FROM OTHER COUNTRIES

In addition, the research explored TJ processes in other countries which may present relevant features to the case of Somalia and help to identify a range of different tools and approaches that can balance truth, justice, and peace in the pursuit of post-conflict reconciliation:

- **South Africa and truth-telling.** Truth-telling could be one approach to deal with the masses of 'ordinary' perpetrators in Somalia. Over the past four decades, many individuals committed many crimes during different periods of the Somali conflict making the pursuit of justice through normal channels unlikely. This situation is not dissimilar from the crimes of the Apartheid regime in South Africa from the 1960s to the early 1990s. To allow individual and low-rank/ no-rank perpetrators to admit to their crimes—for example, as members of the Somali National Army in the 1980s, as members of warlord militias, as members of smaller gangs, or as members of one of the extremist groups (Hizbul Islam, AS, and earlier Al Ittihad)—would do two things: firstly, it would shed light on episodes of violence that are otherwise difficult to grasp and verify. Secondly, it would give the victims of these violent acts (rape, killings, and lootings) a chance to give testimony.
- **Rwanda, Sierra Leone, and the integration of customary practices and institutions.** Rwandan state courts could not deal with the massive number of suspects who were often held for years without due process. The Rwandan government resorted to a traditional dispute settlement strategy known as 'Gacaca', which Rwandans originally used to deal with family and inheritance disputes. In 2000, approximately 11,000 such community courts were established. They were presided over by community leaders and endowed with coercive powers, hearing cases of murder, manslaughter, assault, and property offences committed during the genocide. However, after some initial success, many Rwandans lost interest in the lengthy and unprofessional proceedings, complicated by threats to witnesses in many localities where Hutus were dominant. In Sierra Leone, public testimonies in front of the community were used to reintegrate community members who had committed crimes against their people. For these members, however, reintegration became a more important objective than uncovering past crimes, which resulted in perpetrators' public testimonies focusing not on admitting past deeds, but on presenting themselves as acceptable community members.

- **Peru—collecting a complex collective memory and legal reform.** The Truth and Reconciliation Commission (TRC) in Peru was special in the regard that it involved a number of distinguished, ambitious, and open-minded commissioners—some of whom had a long personal track record of human rights activism. The TRC commissioned considerable basic research in all regions of the country to first, document the violence that had happened; and second, gather voices of those affected about their priorities regarding dealing with the past violence. Thus, the TRC managed to create a certain popular momentum and was sensitive to diverse and, naturally, occasionally contradictory perspectives and demands. It also went a considerable way to give voice to the structurally marginalised—i.e., indigenous groups from the highlands and the Amazon. Yet, in the aftermath of the TRC, and as a result of the change of government in Peru, many measures proposed by the commission began to be slowly implemented. As of 2021, legal reforms to deal with the violent past are still unfolding. In Somalia, there is a need for creating space or spaces for exploring and documenting complex narratives of the conflict. Developing a single and integrated narrative (as is attempted in Rwanda under President Kagame) may not fit Somalis' needs. Any representation of the past violence—for example, in museums, books or podcasts—must account for the diversity of experiences and the blurred boundary between victims and perpetrators in Somalia, similar to the example of the Lugar de Memoria[1] (LUM) in Lima. The LUM is a national museum documenting the 1980–2000 armed conflict in Peru. It sets out to tell a more complex history of the political violence, giving a voice to many individuals who have experienced the violence in different ways. Peru has also seen a number of legal reforms in the aftermath of the TRC (2001–2003) that provide victims of violence and their relatives with compensation in the form of free and preferential access to higher education and healthcare. The state also put additional resources into searching for and identifying those who were disappeared during the civil war, and for those buried anonymously to be reburied officially.

- **The former Yugoslavia and accountability for the main perpetrators under international law**. A special tribunal was established in 1993 to deal with the violence in former Yugoslavia. It operated until 2017, based on international law, and dealt with around 150 cases of which it adjudicated roughly two thirds, issuing numerous sentences between acquittal and life. It offers a possible model to combine truth-telling in exchange for impunity, with an international tribunal adjudicating a group of main perpetrators from the different periods, groups, and clans discussed in the research. For such a process to succeed, it must avoid any impression of clan bias. The standards of establishing the truth must be transparent to all observers, and the Somali public must be able to follow the proceedings.



1.6 RECOMMENDATIONS

Against this backdrop, any TJ process in Somalia should start in a low-profile way but ensure that it is designed in an inclusive and transparent manner. It could also initially be localised in the sense that in different localities and different regions of the country, different priorities regarding dealing with the violent past could be recognised. Drawing from the experiences outlined above, the preliminary steps international partners could take to advance TJ in Somalia could include:

1 LOCALISING TJ IN SOMALIA:

1.1 Given that the various regions of the country have different histories of violence, consideration should be given to a locally and/or regionally differentiated approach to TJ in Somalia, recognising also that different states are at different stages regarding security and political stability. While Somaliland/north-western Somalia largely is stable, many parts of southern Somalia still face active conflict and protracted insecurity. Violence in northern Somalia escalated mainly in the 1980s and early 1990s, while in south and central Somalia, violence erupted mainly around 1990 and is partly still ongoing. The main actors of violence in the north (including Puntland) were government forces and a small number of relatively well-organised clan militias. In Puntland, additionally, Al Ittihad Al Islamiya—and later Al-Shabab—played a certain role, but not to the degree the latter continue to shape dynamics of violence in southern Somalia. Southern Somalia has seen the most complex layers of violence, from clan militias to militant Islamists to foreign intervention and Somali government forces. Against this backdrop, it would be worth thinking of a localised, bottom-up TJ process in Somalia that takes these differences into account.

1.2 A starting point for such a TJ process would be localised documentation of past violations and crimes. Researchers familiar with the local context could be trained to collect legally and socially relevant evidence—of course, according to previously agreed standards of proof. Local documentation centres may need to be created, and witness protection measures may need to be considered.

2 ESTABLISHING A FORUM OF EXPERTS:

2.1 Create an inclusive but still concise discussion forum with a quota for relevant groups, consciously including women and minorities. Women could either be involved as members of a certain patrilineal descent group or as 'fifth clan'—i.e., as an independent social group. However, both options can be challenging since even as a particular social group, Somali women can get involved in clan politics of their own patrilineal descent groups.

2.2 Initially this could be an expert forum that does not comprise too many individuals. It should include credible representatives of victims' groups and highly capable experts, civil society, and religious leaders.

2.3 From Somaliland, not only the Isaaq should be invited, since Somaliland is genealogically more diverse and members of non-Isaaq groups have had their own experiences of past violence from the late 1980s onward.

2.4 In the sense of localising TJ, the 'central committee' for TJ in Somalia should facilitate the establishment of regional sub-committees that coordinate the abovementioned work of evidence collection and documentation of local and regional histories of violence based on witness statements and other forms of evidence.

2.5 This concise committee of Somali experts ideally would not have any decision-taking powers, initially convening as a discussion forum without making their deliberations public. Publicity of the initial debates could lead to rising tensions in Somalia; only once certain issues have been identified as most relevant should the committee consider making them public. At an appropriate time, it should tour through Somalia to explain its ideas and concerns in several major towns of Somalia and engage local communities. Rural communities should be made aware of these events and be supported in attending.

2.6 If the committee decides that international law should play a role in dealing with past violence in Somalia, an international legal framework would have to be devised in a way that is aligned to important *Shari'a* principles. Politically and practically, any approach to TJ in Somalia must take *Shari'a* into consideration.



3 THE ROLE OF THE STATE AND EXTERNAL DONORS:

3.1 The National Reconciliation Framework provides the space for the aforementioned forum of experts, and the Provisional Constitution provides orientation, in stating the need for the establishment of a Truth and Reconciliation Commission in the future, and the primacy of *Shari'a* law over statutory and customary law.

3.2 However, the process should make efforts not to become politicised. Both the FGS and its donors should avoid influencing the agenda of the central expert forum and the regional forums. Financial support could be given to documenting past violations and crimes, facilitating research, establishing documentation centres, protecting them, and guaranteeing the security of witnesses.

3.3 Both the FGS and the donors should avoid steering the process, but rather ensure that it is Somali-led. This should involve a mixture of actors credibly representing the diverse sections and milieus of Somali society coming together and openly discussing the matters at hand, allowing for a successful TJ process to unfold that is Somali-owned and thus can develop legitimacy in the eyes of the people concerned. The FGS and its donors will, to a degree, have to step back and watch.



2 INTRODUCTION

2.1 BACKGROUND

Somalia has been in protracted armed conflict since the mid-1980s. Foreign observers presented it as the paradigmatic 'failed state', but shortly after the fall of Siad Barre, local and regional political orders emerged, providing flexible forms of governance in many areas of Somalia. These forms of governance usually featured traditional and religious forms of authority, in parallel with some regional state structure. Temporarily, even warlords provided for some sort of political order (Bakonyi, 2006; Menkhaus, 2006/2007; Hagmann and Hoehne, 2009). Contrary to external (often western) perspectives, state collapse in Somalia did not lead to anarchy. The fragmentation of the political system offered some basic security to those integrated into the localised political orders (e.g., along clan lines). Yet, the threat of violence remained considerable, and there was limited will or capacity to deal with past human rights violations (Warah, 2014; Besteman, 2017)—either internally or externally (with very few exceptions; see Razack, 2004). Until the present day (Nov. 2021), the political landscape of Somalia has been characterised by rifts between militant Islamists of Al-Shabab and the Somali government; between Federal Member States and the central government, including between Somaliland—the secessionist republic in the north-west of Somalia—and the rest of Somalia; as well as by innumerable localised communal conflicts. There is still no overarching, effective, and legitimate political authority in the country.

Against this backdrop of ongoing violent conflict and political fragmentation, it is challenging to discuss national reconciliation let-alone explore the scope and parameters of TJ. Nonetheless, at local and regional levels, between patrilineal descent groups, a host of reconciliation processes under Somali customary law (*Xeer*) have already taken place over the past decades. Moreover, several national peace conferences have been held for Somalia, for example in 2000 in Arta (Djibouti) and 2002–2004 in Eldoret and Mbagathi (Kenya), with the aim of establishing functioning governments. But the transitional governments created outside of Somalia were weak and internally contested. Particularly under the Transitional Federal Government (TFG) established in Kenya—a new round of fighting escalated in Somalia. In the midst of violent devastation, following the rise and fall of the Union of Islamic Courts (UIC) and the Ethiopian intervention, a first National Reconciliation Conference was held in Mogadishu in 2007. The attempt lacked momentum, however, due to Al-Shabab's (AS) emergence around the same time as a powerful militant and political actor that would go on to rule much of south-central Somalia, particularly between 2008 and 2011. From mid-2011 onwards, with the help of AMISOM, AS was driven out of the major urban centres of southern Somalia, including Mogadishu.

Over recent years, Somali government institutions have been gradually restored and state building conferences have been held in Mogadishu. In this context, consultations for a National Reconciliation Framework (NRF) began in 2017 through the Ministry of Interior, Federal Affairs, and Reconciliation (MOIFAR), which culminated in the production of a National Reconciliation Framework in 2019. The framework was endorsed by the Somali cabinet, lending it credibility and political legitimacy. The primary objective of the NRF was to create an overarching framework that could guide work on reconciliation in Somalia. The NRF's five pillars are:

i. Re-imagining a national *heshiis bulsho* (trans: social contract) by developing a shared vision of an interdependent, fair, and secure society

ii. Acknowledging and dealing with the past

iii. Restoring and transforming community relationships

iv. Building trust in government institutions and structures

v. Supporting economic and social recovery activities

Although a National Reconciliation Plan (NRP) was developed as an instrument to guide implementation and efforts have been underway to establish FMS level plans, practical application to date has been limited. Furthermore, despite the establishment of the framework, a specific and tangible mechanism to advance the second component—acknowledging and dealing with the past—has yet to be developed.

Concurrently, within the 2012 Provisional Constitution, Article 111i provided for the establishment of a national Truth and Reconciliation Commission. The commission is supposed "…to foster national healing, reconciliation, and unity and to ensure that matters relating to impunity, revenge, and other triggers of violence are addressed through a legal and state directed process".[2] Yet, as of 2021, this commission has yet to be constituted—let alone deployed. It is in this gap that research into the scope and parameters of transitional justice and the potential to deal with Somalia's legacy of violent conflict is undertaken.

To date, academic reflection on the issue of TJ in Somalia has been limited. In an early article, Zuin (2008) proposed a hybrid approach to TJ in Somalia. She discusses Somali customary law, *Xeer*, and an ad hoc international tribunal as potential options for dealing with the violent past; yet, beyond this proposal, Zuin does not go into the details and complexities of the situation in Somalia, nor analyse the ways in which *Xeer* and international law would complement or oppose each other. Abdulkadir and Ackley (2014) conducted a study on Somalis in the United Arab Emirates, investigating their perspectives on TJ in Somalia; yet, their results did not go beyond saying that Somalis in the Arabic diaspora have a strong preference for restorative justice based on Islamic values and provisions, facilitating forgiveness, and compensation. While this research in some regards supports important findings of this study regarding the importance of Islam for TJ in Somalia, the focus of Abdulkadir's and Ackley's study is extremely narrow, and on-the-ground research was not conducted.

More beneficial is Abdurahman M. Abdullahi's (2014) research conducted on Somali conceptions of TJ inside Somalia. He indicated that "There is no agreed-upon terminology for transitional justice in the Somali language" (Abdullahi 2014: 17). He rightly added: "This observation indicates that the modern concept of transitional justice is not well articulated in the Somali mass media, or even in Somali academic circles" (ibid.). He devised *cadaaladda xilliga kalaguurka* (literally: 'the truth in the time of transition') as the most appropriate (but not widely used) Somali term for 'transitional justice' (ibid.: 18). Abdullahi interviewed 30 persons in Mogadishu. He emphasised that the traumatic memories were still haunting many of his respondents; that the absence of overarching legal structures was one reason why conflicts continued (e.g., over property); and that women in particular suffered from the stigmatisation associated with rape, and therefore could not get justice for the gender-based violence (GBV) that they had experienced (ibid. 23-30). Regarding individual accountability, Abdullahi stressed that:

"On the necessity of personal accountability for violence and/or in- justice, half of the interviewees (15 out of 30) responded positively. This is another indication of the growing public attention to "modern justice" norms, likely resulting from exposure to Islamic jurisprudence, urban culture, and even the awareness programs of numerous civil society organizations and peace movement groups. On the other hand, 6 of the 30 respondents declared that they do not believe in personal accountability and continue to favour collective responsibility of the clan members for the crimes committed." (ibid.: 31).

Certainly, this statement is not based on a representative sample, given that only 30 persons in one location were interviewed. Still, Abdullahi's findings corroborate what we also found in our research with some 73 people across five locations in south-central Somalia: namely, that many Somalis have a quite ambiguous view on individual accountability. This report shows that such ambiguity is related to the existence of different legal systems (*Shari'a*, Somali customary law/*Xeer*, and statutory law) without any hierarchical order—given the long absence of any effective state structures and the complex layers of violence constituted by more than 35 years of violent conflict in parts of Somalia.

Conscious of the challenges of advancing a TJ and reconciliation agenda in this context, SSF commissioned this research to operate exactly in this area. The research is a first step in assessing the demands for truth-telling, accountability, and reparations, and the parameters that these may need to be cognisant of; as well as the limitations, challenges, and opportunities of the Somali political, social, institutional, judicial, and security context.

2.2 OBJECTIVES

The project was tasked to research the types of post-conflict truth and justice processes that could be feasible in Somalia, given the social, political, and institutional realities. Its objectives were to:

6. Examine locally grounded indigenous and religious truth-telling mechanisms practised in parts of Somalia, both past and present.

7. Explore different approaches applied when dealing with past violence—drawing from other relevant contexts—and identify those that have balanced truth, justice, and peace in the pursuit of post-conflict reconciliation.

8. Identify what kind of documentation of past violence and the scope of justice that may be desired and feasible in Somalia, considering the perspectives of victims, political leaders, elites, and perpetrators.

9. Consider explicitly the challenges and dimensions of documenting sexual and gender-based violence and how TJ may be applied to these cases given confidentiality and trauma concerns.

10. Reflect on the scope of TJ initiatives to support the establishment or strengthening of political settlements and reconciliation and identify existing opportunities.

11. Identify the types of issues and risks—as well as relevant time frames—that a TJ process which documents the past will likely need to engage with, and propose mitigation measures.

12. Identify opportunities for truth-telling, documentation of the past, and TJ approaches that could be feasible in Somalia given its political, economic, social, justice, and security sector realities.

13. Work closely with the Somali Peacebuilding Coordination Unit, INGOs, civil society, relevant Somali government, and international stakeholders.


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2.3 METHODOLOGY

The study started in July 2021 with a review of the literature and ethnographic insights compiled by the author during field research in northern Somalia between 2002–2018. We reviewed 136 articles and books in peer-reviewed publications and grey literature—we provide the bibliography in Annex 1.

This was followed in August and early September 2021 by empirical research; in total, we interviewed 73 persons, of which 17 were women from different social backgrounds, including politicians, religious authorities, traditional authorities, civil society activists, former militia personnel, and IDPs.

Location	General Population	Legal Experts	Political Elites	Total
Mogadishu (4–16 Aug)	12–15	4–5	4–5	20–25
Kismayo (16–24 Aug)	5–6	3	2–3	10–12
Baidoa (16–24 Aug)	5–6	3	2–3	10–12
Galkayo (16–24 Aug)	5–6	3	2–3	10–12
Garowe (7–15 Aug)	5–6	3	2–3	10–12
Total	39	17	17	73

Table 1: Interviewees by location and category

Regarding their 'clan belonging', most respondents belonged to so-called majority groups; five were from minority groups (Gabooye and Somali Bantu, for example). The research also managed to speak to five former members of Al-Shabab (AS). To include the latter was a deliberate choice, since the research team as a whole found it important to be as inclusive as possible, particularly since Al-Shabab constitutes a relevant force in Somali politics and society. All interview partners were anonymised.

The interviews were conducted with the help of a semi-structured questionnaire entailing around 30 questions about personal experiences related to violence and injustices; perspectives on justice; and accountability and hopes for the future in relation to dealing with Somalia's violent past and what TJ processes might be applicable. The questions were discussed in English and Somali among the team members and eventually a Somali version of the questionnaire was used. The interviews were conducted by Somali field researchers in Somalia. The location of the interviews was chosen by the respondents. The interviews took between 30 minutes and 1.5 hours, depending on the availability of the interlocutor. Some of the interviews were recorded. If recording was not possible, extensive notes were taken. Subsequently, a detailed protocol of each interview was written; these were then analysed using Atlas.ti to code them for information relevant to this study.



2.4 STRUCTURE OF THE REPORT

Section 3 gives a brief background to TJ and its objectives. It provides a brief overview of the development of TJ and important definitions. Subsequently, the section introduces current theoretical debates on TJ. This serves as a conceptual and theoretical basis for reflection on TJ in Somalia.

Section 4 outlines the dynamics of violent politics in Somalia. It highlights relevant episodes of violence and human rights violations in the 1970s and 1980s, culminating in the civil war and military interventions in the 1990s and 2000s. Subsequently, the section reflects on the plural legal context of Somalia, involving customary, Islamic, statutory, and international law. It concludes with a brief look at nascent TJ initiatives in Somaliland and briefly touches on the efforts to establish a National Reconciliation Framework and a "friends of reconciliation" donor group.

Section 5 presents the findings of the empirical data. It highlights the will of respondents to deal with the violent past and hold individual perpetrators accountable. It deals in detail with questions of repentance and forgiveness, and whether people would prefer to remember or forget the violence they endured. Moreover, this section goes into detail with regards to: which legal sources people would prefer; what kind of crimes should be dealt with—if any; how gender differences play out when dealing with the violent past; and also how structural inequalities concerning women and members of minority groups impinge on dealing with the violent past under different legal systems. The second part of the section highlights contradictions between various positions voiced, and seeks to make sense of the findings with regard to the future planning of TJ in Somalia.

Section 6 highlights what has happened regarding TJ in Somaliland thus far. The experience in this region over the past 30 years provides important lessons for TJ in the rest of Somalia. Section 7 outlines the key challenges for TJ in Somalia. Section 8 proposes a few lessons that can be learned from TJ processes in other countries: mainly South Africa, Rwanda, Peru, Sierra Leone, and former Yugoslavia. Section 9 concludes the report with recommendations, followed by the bibliography and annexes.


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3 TRANSITIONAL JUSTICE: ORIGINS, CHARACTERISTICS, AND KEY ISSUES

This chapter introduces the concept of transitional justice (TJ). It discusses its origins, the main facets, the critiques developed in academic and practitioner circles, and their implications for programming on TJ in Somalia.



3.1 ORIGINS OF TJ

The concept of TJ is usually traced back to the Nuremberg trials after the end of the second world war, during which the crimes of the leaders of the Nazi regime in Germany were tried (Teitel 2000: 27). The foundational idea was to make it clear, internationally, that certain crimes were so horrendous that national sovereignty and national laws could not protect the perpetrators. The second foundational idea was that in order to move from illiberal rule to democracy, those responsible for the worst of the past crimes must be held accountable.

This, however, produced a fundamental dilemma—one that began in Nuremberg and persists today. At the heart of the dilemma lies the question: To what extent is this shift from illiberal rule, or from war, to peace and—ideally—democracy "guided by conventional notions of the rule of law and individual responsibility associated with established democracies" (ibid.), and how many exceptions (regarding punishing or exculpating perpetrators) have to be made? Teitel points to the exceptional character of transformation legal arrangements, as opposed to conventional legality in democracies at times of peace:

What is the relevant legal order? Military or civilian? International or national? And, no matter what the relevant legal order, to what extent ought understandings of criminal responsibility be projected backward? Is the entire justice project hopelessly ex post? Who should be held to account, and, for what offense? (Teitel 2000: 28)

Initially, TJ was conceptualised in legal terms in the European tradition of legal thought. This tradition was continued in Latin America in the 1980s, where mainly national legislation, but also special amnesty laws, were used to assist transitions from authoritarian rule to democracy (Skaar et al., 2016).

Aukerman (2002: 47-51) summarises three core assumptions underlying the conventional approach to TJ as: a) "forgetting is unacceptable", b) "prosecutions…must conform with accepted standards of due process", and c) "prosecutions are necessarily selective". Much of the established TJ literature agrees that without addressing past injustices and holding perpetrators accountable, sustainable peace, democracy, and development cannot be reached (Benomar, 1993; Borneman, 1997: 110; McGrattan, 2009: 165-166; Buckley-Zistel, Mieth, and Viebach, 2010).

3.2 CHARACTERISTICS OF TJ

In her influential genealogy of TJ, Teitel (2003) distinguishes three phases. The first phase includes international law applied against Germany and German officials after World Wars I and II; in particular the Nuremberg trials (1945–46), which laid the basis for establishing individual responsibility for war crimes, genocide, and crimes against humanity—and marked the beginning of modern human rights law.[3] The second phase is associated with the political changes brought about by the end of the Cold War (Siegel, 1998). Democratisation after authoritarian rule in Latin America and Africa, and after the disintegration of the Soviet Union in Eastern Europe and Central Asia, was accompanied by demands for dealing with past injustices (Teitel, 2003: 75–89). TJ moved beyond retributive justice and incorporated increasingly complex mechanisms between amnesty, truth-telling, and trials/punishment, as well as increasingly integrated restorative elements of justice. In the process, TJ became essentially linked to state and nation (re) building. Most famous in this context was South Africa's Truth and Reconciliation Commission (1995–98). Teitel characterises the third phase as "steady-state TJ" (ibid.: 89). It began with the new humanitarian interventionism since the 1990s (Pandolfi, 2008) and led to the normalisation of TJ as part of the post-conflict reconstruction package. It involves a partial return to the Nuremberg principles, as the creation of the International Criminal Court (ICC) in 2002 established individual responsibility for war crimes, genocide, and crimes against humanity (Teitel, 2003: 90). The tribunals for Rwanda, former Yugoslavia, and the special court for Sierra Leone go in the same direction.

One important aspect of TJ since the early 1990s—and particularly in the third phase as defined by Teitel—is that it is closely connected to reconciliation. TJ as part of external interventions in conflict settings, or as part of complex processes of peace and state building, needs to include reconciliatory elements. Aiken (2014: 40) stressed that: "Antagonistic perceptions of collective identity necessarily play a role in the commission and perpetuation of mass violence and gross human rights violations in divided societies."

Therefore, there is a need to alter "the antagonistic nature of these identities and the hostile system of relationships and belief systems associated with them to achieve lasting societal reconciliation and sustainable peace" (ibid.).

It follows that reconciliation is a fundamentally transformative process; one that, according to Bar-Tal and Bennink (2004: 12), ultimately requires "changing the motivations, goals, beliefs, attitudes, and emotions of the great majority of society members regarding the conflict, the nature of the relationship between the parties, and the parties themselves". Against this backdrop, Aiken (2014: 41) argues that: "Those TJ interventions that will be most successful in advancing reconciliation will be those that are able to work to promote interrelated processes of instrumental, socioemotional, and distributive forms of 'social learning' among former antagonists—all of which have been identified in the conflict transformation literature as being necessary, if not sufficient, conditions for reconciliation in deeply divided societies." Accordingly, TJ as part of wider societal reconciliation processes is connected to wider transformation processes in a society.

Focusing again more closely on TJ, it is clear that—as Teitel (2000) emphasised—it requires extraordinary legal measures, including forms of law that were otherwise not acceptable in orderly legal proceedings and even ways for dealing with past wrongs that may be outside of the current legal order. In particular, this outlined that the Nuremberg trials partly contradicted the established (Roman) legal concept '*nullum crimen sine lege praevia*, *nulla poena sine lege*' (no crime without previous law, no punishment without law), given the creation of new elements of crime like the 'crime against peace' (mainly focusing on the planning and conducting of a war of aggression) specifically for the tribunal. Non-legal dealings with past wrongs in the context of TJ can refer—for example—to rituals or symbols of reconciliation or reintegration at national or local level.

In general, with regard to TJ one can distinguish retributive and restorative elements. Retributive justice refers to the repair of justice through unilateral imposition of punishment; whereas restorative justice means the repair of justice through reaffirming a shared value consensus in a bilateral process.

In Nuremberg, and later on in Latin America, the retributive understanding of TJ dominated. But from the 1990s onwards, the approaches to TJ became increasingly diversified; while retributive elements continued to play a role—e.g., regarding the tribunals for the former Yugoslavia and for Rwanda (Teitel 2000: 38–48)—restorative elements gained prominence—e.g., in the Truth and Reconciliation Commission in South Africa, and the attempts to come to terms with the genocide in Rwanda based on a modified version of customary proceedings within the so-called 'Gacaca courts' (Hankel, 2011). Additionally, attempts to come to terms with decades of violence in northern Uganda in the early 2000s included 'traditional' elements of forgiving perpetrators and reintegrating them into local society (Finnström, 2008; Jeffrey, 2011).

Currently, both a narrow and a broader definition of TJ exist (Buckley-Zistel, Mieth, and Viebach, 2010: 104–105). The narrow definition sees TJ as a "conception of justice associated with periods of political change, characterised by legal responses to confront wrongdoings of repressive predecessor regimes'" (Teitel 2003: 69). The broader definition was proposed by former UN Secretary-General Kofi Annan, who defined TJ as:

Compris[ing] the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof. (UN 2004: 4)

This definition includes various retributive (e.g., courts, tribunals, vengeance) and restorative (e.g., truth-telling, rituals, amnesty) mechanisms to deal with past injustices and gross human rights violations.

A key element of TJ is, as outlined above, to facilitate the transition from war to peace and from illiberal or authoritarian rule to democracy. Thus, concepts of democracy and peace, the rule of law, and liberal values were attached to TJ in recent years (basically, from the 1990s onward). Oomen (2005) mentioned that for external actors who sometimes initiate and fund these processes, the promotion of democracy and the rule of law remains an important objective in transitional processes.

Another current trend concerns TJ in ongoing conflict. Engstrom (2013: 42) recognised a "discernible shift from the pursuit of accountability strategies after the cessation of armed hostilities on the one hand, and on the aftermath of political transitions on the other, to attempts to achieve accountability for atrocities even before a political settlement of armed conflict has been reached". Such interventions in ongoing conflict can, of course, have different results. On the one hand, juridical interventions can have a deterring effect; some believe that they could contribute to ending violence, since political decision-makers realise that they will be held accountable. On the other hand, the threat of trial can prevent parties to an ongoing conflict from laying down arms; this can prolong war and related human rights violations. Engstrom (ibid.: 48) stressed that he did not find firm evidence for one or the other position. Still, both positions need to be kept in mind. They are especially relevant regarding considerations of TJ in contemporary war theatres like Libya, Syria, Afghanistan, and Somalia.

Concomitantly, contemporary TJ is somewhat of a 'hotchpotch' including diverse ingredients that are not always harmonising with each other, like international human rights law, legal proceedings at national level, and local and indigenous approaches to injustices. It is used in post-conflict situations, in which a 'victor's peace' is prevalent (such as in Nuremberg in Germany, but also in Rwanda after the genocide); but it is also part of regime change (as in many Latin American cases in the 1980s) and of reconciliation and nation-building processes that are unfolding, such as in South Africa in the mid-1990s. More recently, TJ has been contemplated as a measure in ongoing conflicts to contribute to the ending of violence and basic reconciliation—although data on the success (or non-success) of such endeavours is scarce. Hence, we should understand TJ as a malleable concept that has evolved over the past decades in relation to changing global and local political dynamics (ibid.: 94; Elster, 2004; Kisiangani, 1998: 10–12; Niethammer, 2007).

3.3 KEY ISSUES

The current literature pays attention to the limits of TJ, as conceptualised so far.[4] One such focus is on local perceptions of justice; weak state institutions; the role of legal orders beyond the state; layers of violence and injustice by a multitude of different actors over long periods of conflict that are hard to address; and what all of this means for TJ projects on the ground. Another focus is on TJ as part of a 'liberal peace' agenda, privileging the rule of law and the liberalisation of markets and politics.

On localising TJ: Shaw and Waldorf (2010) advocate a bottom-up perspective to the study of TJ. Such an approach considers the ways in which TJ mechanisms are challenged, resisted, instrumentalised, and reconfigured in local engagements (ibid. 4). Shaw and Waldorf (2010) also emphasise that the ubiquitous call for respecting national standards and even indigenous approaches to TJ is misleading (for example, International Human Rights Law Institute, 2007). Kofi Annan (UN 2004: 12) argued that: "Due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards and local tradition." However, recent research into the factors that enhance sustainable local reconciliation found that without some enforcement mechanisms, local reconciliation through customary systems is not always sustainable (Smith, 2021). Indigenous ways of dealing with past injustices and violations of people's rights frequently do not conform to international human rights standards or to the laws and interests of the nation state in which they operate (Theidon, 2006; Shaw and Waldorf, 2010: 5). Moreover, the enforceability of legal decisions (be they based on 'traditional' or 'statutory' or any other form of law) is often problematic.[5] To understand the empirical working of TJ in its local setting, one must first disentangle the local. The local is not detached from national or global and neither is it from the realm of 'tradition' and 'culture' (Escobar, 2001). Shaw and Waldorf (2010) propose a "place-based approach" to TJ that integrates micro- and macro-political dynamics and local and transnational relationships which all play out in a particular locale or place. This of course also means that settlements should be found at a local level before any national solution to a conflict can be found.

Simultaneously, it necessitates the need to deal with the limitations of local approaches to justice: in some cases, such as Somalia (but also Rwanda), e.g., customary law will quickly reach its limits in the face of the magnitude of certain past violations. Similarly, a weakly institutionalised statutory system cannot deal at once with thousands of crimes. Such limitations should be calculated into a place-based approach.

A place-based approach to TJ recognises that customary and indigenous norms frequently have the advantage over statutory law, and that local communities see them as more legitimate. Yet, indigenous mechanisms are far from being wholly benign—for example, customary law frequently excludes women and youth and has been co-opted or even corrupted by colonial and post-colonial governments (West and Kloeck-Jenson, 1999; Fanthrope 2005; Hagmann, 2007; Hoehne, 2007). A place-based approach emphasises that silence—rather than truth-telling—is sometimes a strategy to secure social and physical survival employed not only by perpetrators, but also by victims. Individual accountability may at times be less important than the establishment of social morality. Ex-combatants in Sierra Leone, for example, used public testimonies not to admit past deeds but to present themselves as acceptable members of the community at present (Shaw, 2010). A place-based approach also considers that not only victims but also perpetrators of violence can suffer from the trauma of violence (Peters and Richards, 2007). In situations of mass violence, victims and perpetrators may trade places from locale to locale and over time (Korf et al., 2010; Shaw and Waldorf, 2010: 20; Weinstein et al., 2010). In Somalia, for instance, some militias first evicted certain clans from certain areas. The latter then formed their own militias and cracked down on other, weaker groups, evicting or enslaving them. Such dynamic and local histories of violence need to be considered in a localised approach to TJ.

Finally, embedding TJ in specific places draws our attention to the fact that questions of security and insecurity, of coexistence and separation, impinge on people's preferences for either retributive or restorative justice.

Those who have to live together after violence in one place as "intimate enemies" (Theidon, 2006) may prefer restorative mechanisms including amnesty, while others who reside in seclusion or who enjoy security in the diaspora may demand retributive mechanisms to hold perpetrators accountable.

De Greif (2020: 255) recently picked up on this criticism and stressed that TJ frequently misses out on the particularities of the local context and is becoming too formulaic and technocratic. As part of what critics call a 'toolkit-approach' to TJ, it seems that in some cases, proponents of TJ assume that the same measures work equally well everywhere, and also that it is no longer a question of which measures (truth commissions, reparation programs, prosecutorial mechanisms) should be applied, but only how they should be best applied (ibid.).

On TJ and liberal peace: The paradigm of liberal peace has been criticised as following a neoliberal agenda pushed mainly by global northern powers which also dominate the World Bank (WB) and the International Monetary Fund (IMF). It has not proven empirically that countries are able to move from a situation of crisis and fragility to stable democracy and economic development through top-down interventions (Engstrom, 2013: 53; Gready and Robins, 2019: 33). Such interventions often benefit local or national elites (Engstrom, 2013: 52). Elections and procedural democracy, constitutionalism, and the rule of law are often far away from the realities of most of the population in places like Afghanistan, South Sudan, or Somalia. Neoliberal interventions in fragile and crisis-ridden economies tend not to benefit the masses. Especially in places like Afghanistan and Somalia, these 'liberal' interventions often take place simultaneously to illiberal counterterrorism or counter-insurgency measures privileging security over ordinary people's civil, social, and economic rights. Therefore, 'the liberal peace' has been widely criticised in fragile transitional contexts for prioritising the creation of institutions over a contextualised engagement with the welfare of the population, creating "empty" institutions paralysed by a lack of capacity—rather than responding to the everyday needs of the new state's citizens (Gready and Robins, 2019: 33). 'Liberal' TJ runs the risk of establishing 'donor-driven' arrangements. It favours top-down interventions in contexts of crisis and fragility (Buckley-Zistel et al., 2014: 5).

The results could include weak national institutions becoming overburdened, and implemented TJ measures that are out of touch with the conceptions and interests of the majority of 'ordinary people'.

These considerations lead to the crucial question underpinning the legitimacy of any TJ mechanism: 'What kind of TJ do the concerned people envisage?' This question must be further differentiated by considering existing social and historical cleavages that make the question 'Who wants what type of TJ and when?' a fundamentally political one.

Politics, power, and domination are thus involved when considering "whose priorities take priority" in dealing with the violent past (Weinstein et al., 2010). Who the 'concerned people' are can best be established by localising TJ and by starting to collect evidence and giving voice to people at a local level—which should precede any decisions at the national level. In the Somali case, but also in many other contexts, such a local-level approach must essentially be based on qualitative research. There is no reliable statistical data available in Somalia since the early 1980s (the latest demographic survey was conducted in 1982/83 but was never published) and a new census is hindered by the political fragmentation and prevailing insecurity in south-central Somalia.

Gready and Robins (2019) recently took up the challenge to propose a fresh approach—which they term "transformative justice". They define it as: "Transformative change that emphasises local agency and resources, the prioritisation of process rather than preconceived outcomes, and the challenging of unequal and intersecting power relationships and structures of exclusion at both local and global levels" (ibid.: 32). As part of this transformative approach—which can complement and reform classical TJ thinking—Gready and Robins emphasise context-specific understandings of peace, justice, and reconciliation. In this regard, their ideas are fully complementary with Shaw's and Waldorf's ideas about localising TJ. Gready and Robins highlight that processes, rather than events, are better suited to help people emerge from crisis, referring mainly to the event of truth-telling in front of a commission, which often leaves a victim re-traumatised without remedy. Processes, of course, would have to include—for example—the development of a new curricula in school, providing a more complex or balanced historical perspective or integrating languages of previously marginalised people (in multi-ethnic societies).

Gready and Robins also advocate tackling root causes of conflicts that are often located beyond local settings which can be combined with the localised approach to TJ outlined above. For Shaw and Waldorf, the local is not a clear-cut geographic entity but rather a space where interactions happen that are as much shaped by locally specific dynamics as by national, global, or transnational dynamics. The local in this sense is where all dynamics (local, national, global etc.) converge and become relevant in a locally specific way. Moreover, and quite specifically, Gready and Robins propose looking beyond victimhood at those actors who use their privileges to break ranks and become what the authors call 'rescuers'. For instance, in a context of authoritarian rule, there are always some individuals who would—by clan, ethnicity, or class-belonging—be part of the dominant, powerful group, but who actually decide to openly or secretly reach out to the oppressed and marginalised—even at the risk of having to face reprisals themselves. For Gready and Robins, those resisting an oppressive system that actually would have benefitted them and those using their privileges in a certain regime to rescue others should be featured in transformative justice processes. Focusing on those who resisted and rescued others would help post-conflict transformations to not be mainly backward-looking—but future-oriented. The question to ask then would not be 'what divided us' (in the past, during the time of violence and oppression) but 'what unites us' (regarding a joint future) (ibid.: 44-51).

3.4 FIRST LESSONS FOR THE SOMALI CASE

Transitional justice is understood as a tool within the wider reconciliation endeavour, trying to address the legacy of violence by seeking to establish what has occurred and securing the accountability of perpetrators, while simultaneously seeking to restore and repair broken social relations and give victims an opportunity to heal, reach closure, or in some cases receive compensation. The underlying basic idea is that dealing with the violent past in this way will enable a peaceful and societally harmonious future. Nevertheless, advancing justice and accountability for past violence—let alone establishing the truth of what occurred and providing for meaningful compensation and societal change (away from repressive and/or exclusionary structures to a more inclusive and 'open' society—is a complicated and contentious endeavour, and even the best-designed initiatives have suffered complications and challenges. A review of the origins and development of theoretical frameworks for TJ and their application in different contexts across the last 80 years, suggests several considerations to approach TJ programming in Somalia:

- Any TJ model for Somalia will need to be context-sensitive. It cannot simply follow a preconceived, externally developed formula, nor deploy a purely technical approach uninformed by political and social realities. Given the long and quite diverse conflict histories in various parts of Somalia, a TJ process should start by taking into account these local and regional specificities of violence.
- TJ measures should not be overburdened with expectations. They should not try to cover everything in one phase—e.g., reconciliation and holding perpetrators accountable and state building and nation building. The primary and already quite ambitious focus of TJ in Somalia could be firstly, to agree that the past histories of violence should be investigated, e.g., in various localities, and secondly, to establish a concrete framework of documentation and storing data (witness statements and other forms of data). However, this process should be not be directly connected to state or nation building. Of course, one precondition for basic TJ steps to begin is that there must be a minimum of stability in those localities where evidence is collected; so basic reconciliation and peacebuilding, at least at a local level, would have to precede the beginnings of TJ—albeit as long as the local population is given centre stage in the process (of course, external actors can also document atrocities while violence is ongoing; but the reach of external documentation is naturally limited, and the local nuances of violent events can only be provided by those closely involved).

- To be effective, TJ must involve a large section of the population, focusing on ordinary people and the realities of their daily lives. It should be designed and implemented from the bottom up. Donor and international agencies should avoid being a visible and driving force as it may work at cross-purposes, undermining popular trust and legitimacy in the pursuit. It is also clear that external involvement, including financial involvement, runs the risk of undermining local accountability. Phillips (2020) has recently argued that in Somaliland, basic peacebuilding in the 1990s was successful because of the absence of large-scale (and financially intense) external involvement. A similar argument could be made about TJ in Somalia: if external actors come in with considerable sums, they risk distracting local efforts and fostering corruption.
- In situations of ongoing crisis, where the state is weak and in competition with non-state actors, as in contemporary Somalia—TJ cannot exclusively depend on existing state structures. Rather, state actors can participate among other actors in the TJ process, within the context of a national TJ framework. In Somalia, a TJ mechanism could be based on hybrid political arrangements. A central forum of experts consisting of those within and outside of state structures, including traditional and religious authorities, local and transnational academics, and representatives of marginalised groups (especially minorities and women), could be put in charge of steering a TJ process that is as much as possible independent of direct interference by state actors (and their external allies). The arrangement could be akin to the hybrid political order that, regarding state institutions, was implemented in Somaliland in the 1990s: it could involve certain relevant ministries (justice, interior, religious affairs) as partners and the proposed forum of experts as a temporary but largely autonomous 'forum'. This forum could oversee the peaceful and effective conduct of localised TJ measures (e.g., local consultations and the collection and documentation of evidence). Once this part of the process has been completed, a national-level consultation involving ministries could take place that could then—in cooperation with selected external partners—discuss and ideally establish some high-level TJ measures (mindful of the wishes expressed by local people in the local-level consultations).
- TJ in Somalia will certainly be a long-term and complex process. Strict timelines, benchmarks, and excessive bureaucratisation will likely prevent the process from building support and achieving results. Any attempts to circumvent this, e.g., by handing over the process to a few 'elites' in Mogadishu and other urban centres, will almost certainly undermine the effectivity and legitimacy of TJ in Somalia. Without local legitimacy, sustained support for TJ is unlikely to be established; and while Somali political elites do not necessarily represent the local communities across the country, their commitment will be critical.

4 RELEVANT BACKGROUND TO THE SITUATION IN SOMALIA

A long history of violence and weak or absent state institutions encouraged the emergence of a non-hierarchical situation of legal pluralism in Somalia. Both aspects of the Somali situation are outlined in this chapter.

4.1 LAYERS OF VIOLENCE AND GROSS HUMAN RIGHTS VIOLATIONS IN SOMALIA

We can distinguish four broad phases of mass violence and gross human rights violations in Somalia:

1. Under the government of President Mohamed Siad Barre (1969–91), which also involved guerrilla operations against the regime and its supporters.
2. Under the 'warlords' (since 1991).
3. Under the Islamists (since circa 2003).
4. Under external military intervention by UNITAF/UNOSOM (1992–1995), Ethiopian troops (2006–2008), and the African Union Mission in Somalia (AMISOM) (2007–present).

Each of these phases has its characteristics of violence and human rights violations and involves partly different, partly similar perpetrators and victims[6].

4.1.1 THE BEGINNING OF VIOLENT POLITICS IN SOMALIA (1969–1991)

Mohamed Siad Barre's government (1969–91) targeted both individuals and entire clans it considered a threat to its power, particularly after Somalia's defeat in the Ogaden war in 1978. The infamous National Security Service (NSS) was granted wide-ranging coercive powers, including arrests without warrant. Torture and extrajudicial killings became endemic (Amnesty International, 1988). Guerrillas fighting the Barre government since 1979 also committed crimes and human rights violations, although they were smaller in scale and mostly remained undocumented (Gersony, 1989).

The indiscriminate use of force against civilians in north-western Somalia in 1988 killed thousands and displaced hundreds of thousands (Africa Watch, 1990). The perpetrators were state officials and members of the armed forces from various clans. The leading figures, however, were frequently members of dominant clan families, although Mohamed Siad Barre also systematically empowered individuals from socially weak (minority) groups, which guaranteed him their loyalty. Such individuals—including General Mohamed Ali Samatar, who was Minister of Defence and later also Prime Minister of Somalia, while belonging to the Tumaal, a minority group—enforced brutal orders. The primary victims of government repression were members of the Majeerteen clan (1979–81) and the Isaaq clan family (1981–1991) (Africa Watch, 1990; Bakonyi, 2010).

After the defeat of Somalia in the Ogaden war (1977–78), President Siad Barre (1969–1991) began to face armed opposition. Military officers, mainly from the Majeerteen, established the Somali Salvation Front (SSF) in 1979, which later reorganised and changed its name to Somali Salvation Democratic Front (SSDF). In 1981, military and civilian elites from the Isaaq clan family established the Somali National Movement (SNM). Both guerrilla movements started their campaigns against the government in Mogadishu from the territory of Ethiopia. The government reacted by deploying its military and security forces against the close patrilineal relatives inside the country. From 1982 onwards, the SNM began its armed struggle against the Somali government. In reaction, Barre placed north-western Somalia under military administration.

Gersony, a close observer of the situation at the time, stressed:

The Somali Armed Forces conducted what appears to be a systematic pattern of attacks against unarmed, civilian Issak [sic] villages, watering points and grazing areas of northern Somalia, killing many of their residents and forcing the survivors to flee for safety to remote areas within Somalia or to other countries. (Gersony (n 2), 1989)

Lewis, who visited north-western Somalia in 1985, confirmed that the region "began to look and feel like a colony under a foreign military tyranny" (Lewis, 1990). The government's military campaigns culminated in 1988 in the arial bombardments of Hargeisa and Bur'o—the two major towns in the north-west. Thousands of civilians, mainly Isaaq, were killed, and hundreds of thousands had to flee their homes. Compagnon found that state violence "created a deep rift between Isaaq and other Somalis" (Compagnon, 1990). Bradbury argued that "[t]he targeted nature of the repression gave rise to accusations that the government had embarked on a genocidal campaign against Isaaq" (Bradbury, 2008). It is worth noting that the military dictatorship in Somalia was supported until 1989 by the USA and other western allies, also with military equipment (Johns, 1989).

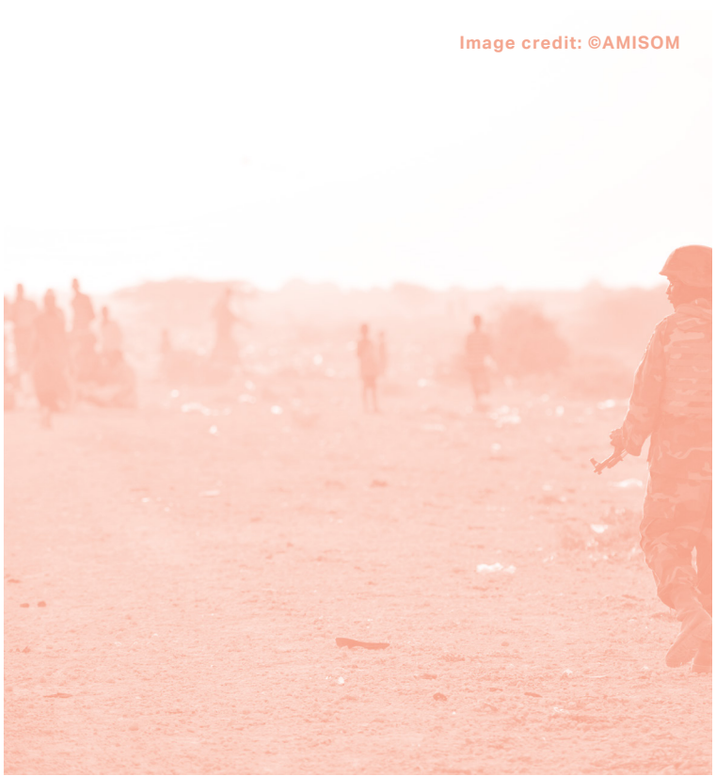


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4.1.2 WARLORDS AND PROTRACTED CIVIL WAR (1990–)

Warlords emerged after the fall of the government in early 1991. President Barre fled Mogadishu in January 1991, and the capital was overrun by clan militias belonging to the United Somali Congress (USC). Northern Somalia had already been partly overtaken by the Somali National Movement (SNM). Elsewhere in Somalia, new clan militias popped up, led by one or more warlords; within months, Somalia was divided into numerous warlord fiefdoms.

Under warlord rule, violence was endemic in many parts of southern and central Somalia. Initially, Hawiye militias pursued members of various Darood clans, who were held accountable as (alleged) supporters of the toppled president, but soon violence branched out (Nuruddin Farah, 2000). The number of clan militias multiplied—each fighting for the control of lucrative local resources (Schlee, 2002). The first peak of violence was reached when supporters of two Hawiye warlords, Ali Mahdi (Abgal) and Mohamed Farah Aideed (Habr Gidir), fought each other inside Mogadishu, with both leaders claiming the Somali presidency for themselves. Within months, some 10,000 people—many of them civilians—died in Somalia's capital, which was largely reduced to rubble. The more the violence spread, the harder it hit the weakest segments of the Somali population—women, children, and minority groups—who suffered looting, enslavement, sexual violence, and killing with impunity (Human Rights Watch, 1992; Cassanelli, 1995). Various Darood and Hawiye clan militias devastated southern Somalia's riverine areas, contributing to the famine and humanitarian crisis prevailing in 1992. This caused the death of approximately 300,000 Somalis, many of whom belonged to the Rahanweyn clan family or to the Bantu minority group, who were considered inferior by Darood and Hawiye militias (de Waal, 1997: Chapter 8). The oppression of 'low cast' Somali groups such as Midgaan, Tumaal, and Bantu, and of numerically weak groups such as the Asharaf, has a long history in Somali society. It escalated to unprecedented levels from 1991 onwards and is ongoing (Besteman, 1999; Menkhaus, 2003; Hill, 2010).

Before his fall, President Barre had deliberately promoted certain members of minority groups, such as Midgaan and Tumaal, into high political and military positions; "Beneath the surface, however, the exclusion from economic and political resources continued, and particularly Gosha/Jareer were treated as second class citizens" (Hoehne, 2015: 797). Until today (2021), minority group members continue to suffer disproportionally from insecurity and violence in Somalia. They continue to be "subjected to killings, torture, rape, kidnapping for ransom, and looting of land and property with impunity by faction militias and majority clan members, often with the acquiescence of federal and local authorities" (USDOS, 2020: 36).

In north-western Somalia, the dynamics of violence unfolded differently. Initially, the SNM took over large parts of north-western Somalia. In May 1991, this region of Somalia seceded unilaterally from the wider collapsing Somalia—declaring itself as the independent Republic of Somaliland. The heartland of Somaliland, between Hargeisa, Berbera, and Bur'o, was devastated by the war with the Somali dictatorship (see above). The SNM had taken over the government of Somaliland, but it could not effectively govern. The lack of resources and splits within the movement inhibited progress. In January and March 1992, fighting broke out in Bur'o and the port of Berbera when the SNM government set out to demobilise clan militias and take control of the towns. Something similar happened in 1994, when the new government of Somaliland under President Egal set out to control the airport of Hargeisa. Local clan militias resisted; heavy fighting engulfed Hargeisa and then also spread to Bur'o. For one year, from mid-1994 to mid-1995, both places were haunted by sporadic episodes of violence and civil war that alternated with periods of tense stalemate. Thousands were killed; tens of thousands of inhabitants fled the towns temporarily; and sexual violence escalated during these conflicts (Brons, 1994: 36–37; Hoehne, 2002: 89; Cabdiraxmaan, 2005: 62). Only from the late 1990s onward did Somaliland become increasingly peaceful, while in the eastern regions—inhabited mainly by Darood clans—occasional violence erupted between local militias and the Somaliland army.

North-eastern Somalia was volatile in the early 1990s. In 1991, Abdullahi Yusuf reorganised the SSDF as a Majeerteen militia and led it into the fight against Hawiye forces in Galkayo. The town is on the border between Hawiye and Darood territories in the north. When the Hawiye militias targeted the Darood in Mogadishu, the situation escalated in Galkayo. Only in 1993 was a fragile peace agreement concluded, and Galkayo remained a divided town until recently. When Abdullahi Yusuf was securing northern Galkayo for the Majeerteen, he defended not only his clan but proved himself a hero of the Darood clan family. In addition, Abdullahi Yusuf and the SSDF fought against Al Ittihad Al Islamiya (AIAI) in 1991 and 1992—the first Somali militant Islamist organisation. AIAI moved to the north-east after it was defeated in the south by Mohamed Farah Aideed. It took control of the port of Bossaso in 1992, from where the SSDF under Abdullahi Yusuf ousted it by the end of that year. Many members of Al Ittihad in the north-east were Dhulbahante, Warsangeli, or Majeerteen.[7] AIAI was finally defeated in 1993, and its members dispersed or left for south-western Somalia, where AIAI continued its activities, particularly in Gedo region. Puntland was founded in 1998; Abdullahi Yusuf became its first president. When his term was over in 2001, he refused to step aside. A contender, Jama Ali Jama, was established by some oppositional forces in Puntland as a new president; but Abdullahi Yusuf gathered his forces and forced Jama Ali Jama out of the region in 2002. Peace was re-established through the mediation of traditional authorities in 2003. Subsequently, Puntland remained largely at peace; interrupted, however, by the attempts of Al-Shabab (AS) to have influence in the region from 2007 onward.

4.1.3 MILITANT ISLAMISM (2003–)

Militant Islamists gained influence again in the early 2000s. Islamic courts had existed in Mogadishu and elsewhere in southern Somalia since the mid-1990s. From 2002 onward, Somali militant Islamists became a target in the US war on terror, but only indirectly. The US funded Somali warlords to eliminate terror suspects hiding in southern Somalia or to deliver them to Ethiopia—Washington's ally in the Horn. In this context, Islamic courts in Mogadishu, which all had their own small militias, began to pool their forces. Al-Shabab, which had been founded as a small cell around 2003, was the militia of the Ifka Halane court headed by Sheikh Hassan Dahir Aweys (Marchal, 2004, 2009; ICG, 2005). Starting in 2005, members of the then still quite small AS cell systematically assassinated their political opponents (ICG, 2006). The Union of Islamic Courts (UIC) was formed in early 2006 to battle the externally financed warlords.

The UIC won the battle in June 2006 and quickly established control over Mogadishu and much of south-central Somalia. This is also when AS, which had become the official armed 'youth wing' of the UIC, sought to distinguish itself through especially radical operations and conduct in the areas under its control. In reaction, the Ethiopian army invaded southern Somalia with the West's backing, upon the invitation of Abdullahi Yusuf, who had been installed as president of Somalia. The Ethiopian forces flattened the positions of the UIC within a week. They, together with the Somali forces loyal to Abdullahi Yusuf, occupied Mogadishu, where human rights violations were committed. While the UIC had disbanded as a consequence of the Ethiopian intervention and most of its leaders had fled Somalia, AS remained on the ground and soon emerged as the strongest opponent of what many Somalis saw as an unbearable occupation of their capital by enemy troops. Since 2007, AS has increased its military capacities and challenged its competitors. Its main enemies are the internationally-supported Federal Government, its allies including AMISOM, and other armed groups or organisations that challenge its authority (LPI, 2014). Like other armed groups in Somalia, AS forcibly recruits young and under-aged men. In territory controlled by AS, civilians are subject to extreme interpretations of *Shari'a* law, including flogging, amputations, and stoning (Report of the Secretary General- 2009: paragraph 53; Human Rights Watch, 2010, for an update see EASO, 2021).

4.1.4 EXTERNAL MILITARY INTERVENTIONS

Between 1992 and 1995 and since 2006, southern Somalia has been the scene of foreign military intervention. The UN Security Council sanctioned the first intervention by UNITAF/UNOSOM under US and UN command. Its mandate was to secure humanitarian aid delivery to halt mass starvation in southern Somalia and re-establish peace and order. However, foreign troops soon faced resistance and engaged in fighting Somali militias, killing hundreds of unarmed civilians in the process. Intervention forces committed a small number of documented atrocities (Petterson, 2001; HRW, 1995). Ethiopia's military occupation of Mogadishu and parts of southern Somalia (2006–2008) ousted the UIC but soon were confronted by a complex insurgency of Islamist and clan militias in Mogadishu and its surroundings (Human Rights Watch, 2007; Menkhaus, 2007). In early 2007, Ugandan and Burundian troops deployed to Somalia to protect the TFG as part of AMISOM, mandated by the UN Security Council. In 2008, AMISOM troops began fighting on the side of Ethiopian and TFG troops. Between January 2007 and December 2008, more than 10,000 civilians were killed in Mogadishu, and approximately 1 million had to flee the capital as all parties to the conflict committed war crimes and massive human rights violations (Human Rights Watch, 2007; Gettleman, 2007a; Menkhaus, 2008; Hoehne, 2008; Amnesty International, 2008; Human Rights Watch, 2008a).

4.2 PLURAL LEGAL CONTEXT

For centuries, Somali customary law (*Xeer*) and *Shari'a* have been side by side in the Somali peninsula. With the introduction of colonial state structures in the early 20th century, statutory law began to play a role. It did not achieve a dominant position until well into the mid-20th century. Only with independence in 1960, the overall political framework including the legal system was dominated by the state. Particularly under the government of Mohamed Siad Barre (1969–1991), the state institutions also extended to the rural hinterland. Yet, despite the relative strength of the state in Somalia in the 1970s and early 1980s, *Xeer* and *Shari'a* always also played a role for dealing with legal issues—albeit a subordinate one (Battera, 2005: 282). This changed dramatically with the collapse of the state structures from 1991 onward. Over the last three decades, state institutions have been weak or even irrelevant for most Somalis. Most conflicts, at least throughout the 1990s and early 2000s were settled by referring to *Xeer* or *Shari'a*. Statutory law has only gained some relevance in the past 15 years, initially in Somaliland and Puntland, where the old Somali (and often actually colonial) legislation was used as a basis for building up a judiciary. More recently, with the establishment of the Somali National Government (SNG) in Mogadishu, state institutions including the judiciary became somewhat more stable again. Yet, today (November 2021), the majority of Somalis, including people in Mogadishu, do not fully trust 'the state' to take care of their issues. Therefore, the current situation of legal pluralism in Somalia is characterised by a non-hierarchical co-existence of statutory law, customary law (Somali: *Xeer*), and *Shari'a* (Le Sage, 2005; Battera, 2005: 293, 311).

The legitimacy of the legal order, legal process, and conceptions of justice vary in customary, Islamic, and statutory settings (Elliesie, 2012: 565). Strong incompatibilities concern the status of women before the law and the type of sentences issued. Under customary law and *Shari'a* law, women are treated as 'second-class citizens' in many regards. While under *Shari'a* women have their rights, these rights are usually inferior to those of men. However, women can defend themselves before a *Shari'a* court if they wish to do so and receive direct compensation. Islamic law also guarantees women their share of inheritance, which is inferior to that of men.

Under customary law, women are represented through their male elders and their concerns are heard indirectly. Compensations for wrongs are usually received by male relatives of wronged women. Women themselves rarely have influence on decisions and, if wronged, only receive a small amount of personal compensation. Traditional inheritance rules disenfranchise women. Under statutory law, men and women enjoy equality—in theory at least. This also concerns inheritance, which contradicts *Shari'a* provisions, which had caused protests in the past when Siad Barre's government introduced a new family law in 1975 (Abdullahi, 2010). Minority groups are marginalised under customary law, whereas in theory, individual members of these groups enjoy equal rights under *Shari'a* or statutory law.

Judicial processes are different in each legal order. In customary law, older men play a decisive role. They must know Somali traditions, preceding *Xeer* cases, social relations, local and clan history, and proverbs. Younger men and women usually do not have a say in the decision-making process of elders. Under *Shari'a* law, Islamic scholars take the decisions. Their principal expertise is knowledge about the Qur'an and the Sunnah, and the discussions and interpretations in Islamic jurisprudence. They are all men, but their age can differ substantially, and young learned sheikhs can hold equal or even higher status than older sheikhs. Under statutory law, men and women are equal. Still, as according to the Constitution, all laws in Somalia must be in accordance with *Shari'a*, the judiciary thus does not include women. Under statutory law, individuals of different ages have the same rights and duties, except for underage persons.

In some regions of Somalia, all three legal orders are available—particularly in larger towns. In other areas, mostly in the countryside, only *Xeer* and *Shari'a* are available. Access to justice is quite different in urban and rural settings. Countryside dwellers usually only have access to customary law. *Shari'a* and statutory law are available in urban settings. Members of minority groups are often not considered in front of statutory courts—the "judges" usually do not belong to minority groups, and covert 'racism' plays a role in this context. The urban poor cannot afford proceedings under statutory law, which involve paying considerable fees and bribes to open a case and influence it in one's favour.

IDPs also have little access to justice under customary law; they hardly have bargaining power in conflicts with resident groups, and statutory law is frequently inaccessible due to a lack of financial resources.

Decisions taken by traditional authorities or judgments arrived at by judges or sheikhs are not consistently implemented. Traditional authorities and sheikhs have no means at their disposal to enforce rulings, except when *Shari'a* courts are sanctioned by AS and rely on their enforcement capacity. Elders can only ask the young men of their group to apprehend suspects or culprits and try to pressurise a person's relative to pay compensation; but this is confined usually to social pressure—traditional authorities do not command any standing force following their orders. Sheikhs have no means to enforce their judgments, with the exception of the case of the *Shari'a* courts established in Mogadishu in the early 2000s, and the courts of AS. State courts can order the police to implement judgments. Still, in practice, this is frequently not done, and members of powerful groups try to avoid punishments or the payment of compensation by relying on the protection of their patrilineal descent group (e.g., clan or lineage). Even the police are reluctant to pursue suspects without the consent of the person's influential elders.



Image credit: ©AMISOM

5 TRANSITIONAL JUSTICE IN SOMALIA: RESULTS AND PRELIMINARY ASSESSMENT

5.1 RESEARCH RESULTS

This section is based predominantly on empirical research conducted in Mogadishu, Kismayo, Baidoa, Galkayo, and Garowe between August and September 2021. While there is validity to the findings presented here, it is important to recognise that this comprises an initial pilot study on the subject based on empirical research in Somalia. There is very little other literature or research on Somali attitudes towards transitional justice in the public domain. We therefore advise further research to corroborate the findings and work with a larger sample of respondents, which then also must be diversified further (e.g., to include more members of so-called 'minority' groups, more young people, and additional locations, particularly rural communities and inhabitants of Somaliland). **Below, the analytical summaries emerging from this pilot research process are presented.**

5.2 IS THERE A DEMAND FOR TJ IN SOMALIA?

Given the social, security, and political risks involved in advancing a TJ mechanism, any initiative must be underpinned by a clarity as to the extent of locally-driven demand. Across the field research, the overwhelming perspective was that past violence and injustice should be addressed. Moreover, participants felt that this has to be done openly, to stop the cycles of constant insecurity and instability in Somalia, which mainly relate to 'unsettled bills' of one group or one person against another. Victims hold grudges against those who violated their rights in the past and this burdens society as a whole. Some added that, according to Islam, every person is responsible for their deeds and "if people feared Allah" they would voluntarily admit their bad deeds and ask for forgiveness.

Several people referred to examples of dealing with the violent past elsewhere—in Rwanda, Liberia, and Sierra Leone for example—and mentioned that if it was successful in those countries, something similar should be tried in Somalia. Stable legal institutions that have the power to address past crimes and hold perpetrators accountable were considered a precondition for any process of addressing past violence and injustice. Some respondents, however, also mentioned that it was better to forgive and move on, without detailed investigations into past wrongs and potentially long trials.

The protracted conflict and volatility of the situation in south and central Somalia until today (2021) was considered to be the main reason why the legacy of past violence has broadly not been dealt with thus far.

A political analyst from southern Galkayo argued: "People of the Mudug region say, let's be "*xalay dhalay*" on this matter [literally "born last night", meaning without grudges and crime; the Somali version of "forgive and forget"] by not going back and talking about what happened. But I really think we cannot move forward if we do not deal with what happened in the past and agree on the way forward. Because there are no agreements on most of what happened, there have so far just been minor things which have been dealt with […]." A former Al-Shabab member argued: "It is of utmost importance to deal with past crimes in order increase trust and confidence within society, as well as society's trust in their system of governance. There are no effective healing mechanisms available for women and minorities who have suffered from past violence and crimes."

A small minority, however, argued that because many of the main perpetrators were now deceased, there was no longer a need to investigate deeply into Somalia's violent past.

CONFLICTED EMOTIONS TOWARDS REMEMBERING THE PAST

Despite the initial support for some kind of transitional justice, in parallel, there were also conflicted feelings towards bringing up the past. When asked whether there was value in remembering the past, with few exceptions, most respondents argued that at an individual level, it would be better to forget and move on. Three reasons were mentioned: firstly, remembering causes emotional pain and may even (re)traumatise people. Secondly, reopening past events without a realistic opportunity to do something about these injustices may not be meaningful to some and may re-instigate bitterness without any form of redress. Thirdly, according to Islamic provisions, it is good to forgive; therefore, forgiving and forgetting, in this way, is a means to do something both religiously correct and simultaneously something which enables a person to manage their own emotional trauma.

On a personal level, many respondents held positions similar to that of a youth activist from Mogadishu, who noted that: "Remembering should not be done in a way that makes it an obstacle to healing and moving on emotionally and mentally." This was seconded by an academic from Garowe: "I think we shouldn't mess with scars that have healed, digging in to search crimes right now may not end in good way. Those who came forward and ask for forgiveness, they should get it, and those who didn't—we should forget them. Remembering doesn't make sense if you can't do anything about it immediately."

The dilemma between remembering and forgetting was clearly stated by a female activist and educator from Garowe: "The past violence is not good for me to remember because sometimes I cry about them. I believe that all people are traumatised because they experienced it or heard about it. The personal memory of past violence is hurting me and could hinder my personal development and decision. It may also cause me to lose hope. I sometimes try to forget them, but I could not forget because that is where I am from. The reality can't be denied." Only a few respondents mentioned that they would always remember—particularly with reference to property crimes.

A former Al-Shabab Judge from Kismayo argued: "Depending on the case, if it is related to a communal inter-clan conflict, I believe it is better to forget so that we would not have renewed hatred between the different clans from the same communities. But if the perpetrator is a known individual, it is always good to remember and seek justice."

Adding into these conflicted—and at times contradictory—sentiments, a number of respondents found collective memory of the past violence to be necessary and something that could bring value to establishing peace in Somalia. Several mentioned Rwanda as an example and spoke about the memory culture there and how it might help keep peace in the country today. They saw collective memory as part of national history, and several respondents could imagine memorials and museums commemorating the atrocities of the past decades.

Overall, the views suggest that if the legacy of past violence is to be engaged with meaningfully and the trauma of what has come to pass brought back into the public conscience, there will need to be an attendant responsibility that this is done in a way that meets such needs and realises the anticipated benefits. To remember injustices and grievance without redress may therefore be worse than remembering at all. Given the complex emotional trauma that engaging with the past may entail on a personal—let alone social and potentially political—level, any initiative will need to be cultivated with care and precision with clear leadership and demand by Somalis. Without clear significance of re-engaging the past, it may only reinforce the original injustice.

5.3 WHAT ISSUES WILL A TRANSITIONAL JUSTICE MECHANISM NEED TO ADDRESS?

Any transitional justice mechanism will need to have clarity as to the scope of its remit. Aspects of this will entail clarity over what types of violence and harms are to be considered, as much as by whom and over what time frame. The most prevalent crimes mentioned in the research were looting and violation of property rights, sexual violence (particularly rape), and killings.

Regarding killings and other violent crimes, including rape, many argued that the number of incidents over the past decades was "uncountable". A female NGO worker from Mogadishu stressed that: "It will be nearly impossible to go after them [the past perpetrators] and hold them accountable for their crimes." Yet, some respondents expressed the hope that still, many witnesses were around, and that at least the main perpetrators could be held accountable.

For most respondents, the worst crimes occurred during the military dictatorship, from the late 1970s onward. Many respondents recounted specific episodes of violence, notably after the fall of the Barre regime: they described, for example, the violence related to state collapse, the 'four-month war' in Mogadishu (*aftarta biloodka*), and the devastation of Baidoa by clan militias, which led to mass starvation in 1992. They described 'clan cleansing' in Mogadishu and Kismayo and made several mentions of massacres and rapes perpetrated. From the mid-2000s onward, respondents mentioned the violence of foreign troops, especially the Ethiopian and Kenyan ones. They reported war crimes from all sides, including the forced recruitment of child soldiers. Specific Al-Shabab attacks, e.g., the bombing of the Sharmo hotel in 2011 and the Zoobe Junction attack in 2017, were mentioned as the most memorable atrocities in Somalia.

The specific time frame over which violence has been perpetrated in Somalia is extensive, and it will be necessary to delimit the time period over which a TJ mechanism would apply. Any effort to document the past or create a national record may allow for acknowledgement of the interconnectedness of historical violence that goes beyond any official delineated period.

5.4 SEXUAL AND GENDER-BASED VIOLENCE

All women answering whether historical sexual and gender-based violence (SGBV) should be addressed insisted that perpetrators of SGBV—mainly rape in the Somali case—should be persecuted and brought to justice. However, they recognised that it may be difficult because so much of the sexual violence perpetrated was committed in the early 1990s, during the rule of clan militias and warlords. Issues of how long ago it was, but also the ability to identify perpetrators and evidence these instances, felt insurmountable. Nevertheless, female respondents stressed that it was important to deal with past sexual violence and to give victims a voice. Interestingly, all five former Al-Shabab members in the interview sample agreed that sexual violence needs to be tackled, and that past perpetrators of rape and sexual torture should be brought to justice. Among the other men in the sample, a majority advocated for prosecution and adjudication of perpetrators of GBV, but mostly in rather general terms.

A considerable minority, however, argued that it was impossible to deal with GBV in the context of dealing with Somalia's violent past, because the cases were too long ago, perpetrators and victims had died, and proof was missing.

A women's rights activist from Garowe mentioned cases of sexual violence that happened long ago: "These cases should still be tracked and be taken to justice because victims are mentally sick with it. I am not so sure that perpetrators could be found out because they are either gone or dead. The victim is still feeling the pain emotionally. It is right to track them down; only then the victims will find the justice." The general problem about rape in Somalia was clearly stated by a community leader from Baidoa: "Rape cases are rampant mainly during wars and our ladies feel shy to publicly come out and say 'I have been sexually assaulted' because of the fear of stigmatisation. There is a need to do a lot of awareness raising on their rights of women and give seminars that will teach them how to report such incidents secretly without exposing their identity,



but for past rape cases they should be forgotten and ignored because they may cause more harm than good." Still, a female educator and activist from Garowe countered the argument referring to a rape case from over thirty years ago: "That woman needs justice, nobody could ever forget her pain. Somalis said "layeelaa ma ilaawo, yaalaase wuu ilaawaa" which means the criminal may forget but the victim never forgets."

The scale and prevalence of sexual violence deployed over historic conflict in Somalia, and which continues to be an issue today, indicate that this is an area that a transitional justice mechanism will need to pay close attention to. A victim-led approach can help to define what could be feasible from a social and cultural perspective and, drawing on the experiences and approaches of other transitional justice mechanisms deployed elsewhere, can seek to balance the pursuit of justice with the need for recognition, truth-telling, and reparations. Careful consideration will need to be made around even performing research in this field and a responsible approach developed to avoid re-traumatising victims.


Image credit: ©AMISOM

5.5 MATERIAL LOSSES

All respondents agreed that property should be returned to its lawful owners. One made a distinction between movable and immovable property. The latter, e.g., land and houses, should be returned. The former, e.g., animals or cars, should not be returned (because they have been used or lost or are otherwise useless after many years).
The majority hinted at the challenge of proving legal ownership through documents or witnesses. Some argued that many had documents proving their rights, but others found it complex to establish ownership with certainty.

Several respondents discussed the 1970s and 1980s, and mentioned the change in laws around land ownership, which resulted in dispossessing particularly the members of rural minority clans of their assets. A small number of interviewees stressed that in some places, like Kismayo, some land and property had been returned, particularly with the help of Al-Shabab. Interestingly, no one advocated to 'forgive and forget' violations of immovable property. Also, few people mentioned that traditional authorities should deal with the matter under customary law. To the contrary, statutory law and sometimes *Shari'a* were mentioned as the most adequate frameworks to settle property conflict, adding that currently state institutions were too weak to effectively tackle the issue.

The ongoing problems with clarifying property issues in southern Somalia are well illustrated in the statement by a female NGO worker from Baidoa, who mentioned: "Last week there was a land dispute between siblings. They went to Idale [in the Al-Shabab–controlled area], and they were all called. They got a ruling and everyone was satisfied."
But land disputes are a significant problem. One respondent gave the example of a house built during the Siad Barre era where the owners have their title deeds: "But there are other people living in the house who say they bought it. Those who sold it said they bought it from another person. It has passed through three different hands. Two of the three who sold have died. Only the middle owner is alive. There is no court that can rule over this house." This complexity was confirmed by a female educator and activist from Garowe who stressed: "There are some people who were killed for the sake of trying to secure justice. This hinders the others with similar claims because they were afraid for their lives and they said, 'Property is gotten but no one returns back—the plaintiff must be safe from the defender'."

Given the complexity of demonstrating ownership, let alone the current limited capacity of redress over competing claims to property and land, this issue will require greater interrogation, bringing together thinking and research around land dispute resolution in Somalia—which is a complex field in and of itself—with expert knowledge of TJ mechanisms that have had to address similar challenges in other countries. It may be that an array of tools from return of property to financial reimbursement may need to be available to resolve the issue according to the different types of land and property theft over the years. While a TJ mechanism may need to invest time to identify a way to resolve and enforce disputes over historical land claims, there may be value and a need to see how this may intersect with contemporary disputes over land, as there may be crossover between the two. Any newly established TJ mechanisms will not only need to be adequately empowered to adjudicate and enforce decisions, but also need to be sufficiently informed not to overlap with existing dispute-resolution mechanisms, or it may risk becoming another legal forum within which disputants shop for their most favourable outcome.

5.6 WHO WAS RESPONSIBLE FOR THE VIOLENCE AND WHO SHOULD BE HELD ACCOUNTABLE?

Any transitional justice mechanism will need to identify not only what issues should be addressed but who was responsible and who should be held accountable. When asked to identify those responsible for past violence, respondents were quick to identify well-known warlords from the 1990s as those responsible for past violence. Some also mentioned Mohamed Siad Barre and his military regime. Less specifically, armed groups were mentioned, among them primarily the United Somali Congress (USC). Interestingly, some also accused 'traditional leaders' to have cooperated with militias in the crimes and injustices that happened in Somalia. Some spoke of a general moral collapse of ordinary Somalis, which allowed mutual killing and rampant criminality. No respondent explicitly mentioned the Islamist extremists (Al-Shabab and others), and no one blamed foreign forces for the violence in Somalia. One possible interpretation is that the respondents understood the question as 'who was originally responsible' for what happened in Somalia?' It would follow then that indeed, the military regime and the warlord/clan militias operating in the late 1980s and early 1990s were the ones who produced the violence in Somalia, and that later actors—most prominently Al-Shabab—followed on from there with other actors, such as AMISOM and clan militias, being further parties to the violence.

Many argued that it was difficult to identify and account for all perpetrators, due to the sheer quantity of them. Some argued that many who had committed crimes in the late 1980s and early 1990s were already deceased. Some respondents stressed, however, that at a minimum, the main perpetrators should be held accountable. For example, a civil society activist from Baidoa argued, "We should start with the heads who ordered the destruction and charge them. This will boost the confidence of the people. People will get the courage to bring all perpetrators to book, but if we start with both at once [well-known and less-known perpetrators] it will end up in crisis. We should start with the big people and then go down. The order was given by the big people to attack certain towns, without necessarily killing with their hands."

5.7 INDIVIDUAL ACCOUNTABILITY – CHALLENGES IN ITS PURSUIT

Most respondents stressed that perpetrators should be held accountable individually, and that collective accountability under customary law is not sufficient. Some added that no one who has committed a crime in the past should be allowed to hold political office. This refers to 'vetting', which is a quite established component of TJ procedures elsewhere (e.g., in Latin America). Many felt that without individual accountability, there would be no stability in Somalia in the future: if perpetrators get what they deserve, the former victims can be at peace and future perpetrators will be deterred. Several respondents stressed however that only if all perpetrators—meaning those of all clans—could be held accountable, one should push for individual accountability, hinting at some of the challenges that may be encountered if transitional justice is perceived to entail biases.

Many argued that at an individual level, most former perpetrators would seek to prevent investigations into their crimes: some hold powerful political positions in government, but also in a few cases as traditional authorities. Several respondents cautioned that establishing individual accountability would only create new rifts and conflicts in Somali society. A civil society activist from Baidoa criticised, "All murderers have joined the military force to save their lives. If an ordinary citizen cannot be held accountable, what about those who occupy powerful positions, such as presidents, prime ministers, speakers who have committed crimes but cannot be held accountable? If we collect data and list those criminals and revisit, people will welcome it. People have a lot to say in relation to the abuses they suffered and the feeling of the people will change if those criminals are listed." Some stated challenges of ascertaining accountability when "Those who are

supposed to judge, sometimes, are perpetrators themselves; perpetrators they are 'hiding' in the military or in the government to evade justice."

However, a community leader from Mogadishu cautioned, "Political balance in our country is delicate and can easily be unsettled. We need to be cautious. It is good to hold perpetrators accountable but considering the fragile situation of the country we need to forgive and ignore, because by holding them accountable we might put the country into more trouble. We should rather advise them to seek forgiveness from the community they have wronged." A female MP from Baidoa pointed out that: "The political balance in our country is delicate and can easily be broken; we need to be cautious. It's good to hold former perpetrators accountable but one has to consider the fragile situation of the country." This was underlined by a male university lecturer from Mogadishu who argued that: "Trying to tackle past violence amid this fragile state of Somalia will negatively impact Somalia's political stability and the political process."

In contrast, an active former Al-Shabab member argued, "Establishing the facts of past crimes including accurate accounts, records, the identity of perpetrators and similar facts, is a key obstacle to addressing past crimes. Any mechanism that aims to address past violence and crimes should not differentiate perpetrators in terms of status and position. It is important that powerful figures that today hold influential positions are held accountable." Another solution was proposed by a youth activist from Mogadishu: "I would have the perpetrators admit their wrongdoings and publicly ask for forgiveness."

It is clear from the above that there is no consensus on whether individual accountability could or should be pursued. While the overriding view is that individual accountability is a good thing, and arguably essential for enabling Somalia to find a way out of protracted fragility and sustained inter-communal conflict, reticence primarily stems from fears that it will precipitate new rounds of political instability. It will therefore be necessary for a TJ mechanism to consider either what level of accountability can be secured without instigating new forms of political instability under the current circumstances, or to consider under what circumstances (and how to create these) can individual accountability be prosecuted without risking new forms of instability.

5.8 CLAN SOLIDARITY AND INDIVIDUAL ACCOUNTABILITY

Added to the obstacles to securing individual accountability is the issue of clan solidarity. Respondents unanimously held the position that clan solidarity continues to be highly salient in Somalia. Clan members will defend each other, and individuals will react strongly to attacks on even distanced patrilineal relatives.

Clan solidarity is a dynamic phenomenon and it changes over time, however, in the absence of overarching state structures and an overarching legal system, clan solidarity has become an important fall-back option that provides security for many individuals where, in a time of need, the clan provides social services and justice on their behalf.[8] Although arguably even during periods of stable statehood in Somalia (from the 1960s to early 1980s), state actors manipulated clan solidarity for their own interest. According to some respondents, clan solidarity can lose importance if state structures become stable enough and provide the services that clans provide—mainly guaranteeing security and settling conflicts. Following the provision of social services by the state, individuals would no longer be beholden to their clan for such protection and resources, thus undermining the clan-orientated social contract.

In the context of addressing historical violence, a businessman from Kismayo argued: "The crimes of warlords are never addressed in an individual manner but are looked at from the clan perspective. This was necessitated by the fact that the perpetrators were being protected by clans, who in turn did not have a choice but to do so. Even *Shari'a*, where used, was not necessarily applied in a way that provided individual accountability. There is a Somali proverb that states "*kabahaaga iyo qabiilkaaba waa lagu jiraa*" [trans.: 'You stay/remain within your shoes and within your clan']. Clan is in part a kind of insurance. You couldn't stand alone as an individual." As most conflicts are settled between representatives of

patrilineal descent groups through the application of *Xeer*, many argued that, in reality, there is little individual accountability in Somalia. The clan, as a collective, will defend the accusations against one of their own, and conversely, will defend or pursue justice for an individual on a collective basis. A female activist from Mogadishu further noted that transitional justice may face active opposition by clans, "Any tribe whose members committed crimes against others will be opposed to [investigating past violence]." This includes the Somali government, which is based on the so-called '4.5 formula'. As a professional from Garowe stated, "Having a government built on 4.5 (clan system) is 100% complicating "putting a bandage" on the wound. The judge is nominated based on clan." These concerns reflect the fears that impartiality may simply not be feasible and thus undermine whatever process may emerge.

Furthermore, most respondents outlined that 'clannism', or clan-favouritism, combined with the lack of stable government institutions, are the biggest obstacles to dealing with the violent past. Respondents repeatedly mentioned that those who committed crimes against former enemies were—and are—considered 'heroes' (Somali: *geesi*) by their people. This is prohibitive to transitional justice more broadly, not just individual accountability. A female NGO worker from Mogadishu explained: "I think the biggest obstacle to come to terms with the violent past is the lack of unified historical accounts. People dispute the nature of the crimes committed as well as the perpetrators who committed them. This is due to the clan differences between Somalis. A warlord who might have committed serious human rights violations in the past might be defended today by his clansmen because he is seen as a hero. Some are even rewarded with top positions in the government including senate seats." This is a key point. In every conflict situation, different and partly contradictory narratives exist, but without a way to speak to each other 'across' these narratives, even a basic conversation about what happened to whom and who did what is currently impossible.

Given the 'hero' narrative surrounding individuals who have been involved in historic violence, if a TJ process were to target such perpetrators, their patrilineal descent group would normally rally behind them and seek to defend them. This problem is exacerbated if the perpetrator-cum-clan-mate is an influential political actor who has resources at their disposal to distribute among relatives and supporters.

One potential avenue for circumventing the protective force of the clan unit is the use of *Shari'a*. A politician from Garowe stressed that, "There can be no crimes committed by clans, because in Islam there is no such thing. '*Walaa Taziruu Waaziratan Wizra Ukhraa*' (Surah An-Najm, 53:58, trans.: 'No bearer of burdens shall be made to bear another's burden')—this is an Islamic principle. It means your family or tribe will not be punished for what you or other members of the family have committed."

A notable Somali peace activist from Mogadishu argued, "Clan solidarity will always be there, but if you have clear [legal] procedures and systems in place then you can convince people why this process [to turn away from clan solidarity and trust the judiciary] is important and how the outcome will help Somalis." There are signs that in some regions of Somalia the state system is gaining ground, which can replace clan solidarity to a degree. A Puntland example was provided by one expert from Garowe: "In Puntland there was a time when if a soldier kills someone by mistake, his tribe would be required to pay blood money. Things have changed: now the state pays blood money if a soldier kills someone by mistake."

The issue of clan solidarity and differential understandings of what took place during decades of conflict will also present a challenge at forming a shared understanding of the conflict. That said, Somalia will not be unique and other countries who have experienced similarly long conflicts will have had to deal with collective identity politics that may have been politicised during the war, as well as the reality that neat divisions over who was a victim and who was a perpetrator may not be feasible. It will be contingent upon a transitional justice mechanism to therefore identify ways of capturing the divergent and multi-faceted history of conflict from different communities, but also identifying strategies to transcend clan and ensure that accountability is understood to be unbiased. Where *Shari'a* has social traction in Somalia and an ability to transcend clan, this may need to be an important underpinning for a transitional justice mechanism.

5.9 LIMITS TO STATE CAPACITY AND POLITICISATION OF A PROCESS

Another fundamental obstacle was mentioned by a male civil society activist from Galkayo: "The absence of government power including the law enforcement institutions such as judiciary and police are a main challenge." Many respondents stressed that dealing with the violent past must be part of a systematic and well-managed process. Some doubted it was possible in Somalia today to start such a process, given the lack of state capacity and the prevailing insecurity in parts of the country. A former Al-Shabab member argued that: "The lack of an impartial state justice system as well as the lack of broad-based reconciliation between the different clan communities that fought against each other are the major obstacles to addressing effectively past violence at the national and local levels."

Some respondents, seeing the reality that inter-clan and political conflict are still very much active, argued that peacebuilding should come first, based on a pragmatic approach to negotiation between groups under *Xeer*. Only after ending the fighting could past crimes be investigated in detail. To do so before the establishment of peace would not be permissive.

Respondents argued that the challenges of clannism and groups that would oppose any kind of transitional justice cannot be overcome without stable government structures, including a strong and impartial judiciary.

This all points to a need to consider how a TJ mechanism can be constituted and more specifically, how it can be imbued with adequate power to act without being compromised by obligations around clan solidarity. This could point to a need to reflect on the composition and location (in country or external) of a TJ mechanism as much as enforcement capacity is concerned; and whether an extraordinary judicial framework is needed that is specially constituted.

5.10 DEALING WITH EXTERNAL ACTORS THAT HAVE PERPETRATED VIOLENCE

Given the reality that foreign states and armed units from a diverse array of backgrounds and mandates have been involved in conflict in Somalia, any attempt to embark upon transitional justice must take note of this facet and consider what scope there may be for holding foreign entities and individuals that have committed violence in Somalia accountable. During the 1980s, the military regime received military and other support from foreign states. In the early 1990s, international peacekeepers were known to have perpetrated human rights violations against Somali civilians (HRW, 1995). While there have been some examples of accountability, most notably legal proceedings in Canada against Canadian peacekeeping troops that were implicated in the abuse and murder of a Somali youth in 1993 (Amnesty, 1995), in practice, very little has been done in this space to date.

Respondents were divided in their opinion towards AMISOM, who has been present in Somalia since 2007. A fair number stressed that the foreign forces have done a good job in stabilising Somalia and in fighting Al-Shabab.

Many, however, also saw the foreign military interventions in a negative light, with a number also mentioning war crimes and human rights violations perpetrated by AMISOM forces. Some demanded that foreign forces be held accountable for atrocities they committed against civilians in Somalia. For example, a civil society activist from Baidoa explained, "I witnessed an incident where an Ethiopian soldier was killed by Al-Shabab who had implanted an IED on the chair he was sitting. He used to sit on that chair every time they [the Ethiopian troops] come out to fetch water. This was observed by Al-Shabab members and after a while they implanted an IED. The chair exploded and the soldier died. His comrade nearby took his gun and started to kill everyone who was passing there, killing over 20 people in a single day. The incident happened in a place called 'Four Junction' (Somali: *afar irdood*) in Baidoa." An Al-Shabab defector from Mogadishu witnessed atrocities and reported in detail: "The Ethiopian troops committed [crimes] during their presence in South Central Somalia. During the Mogadishu battle in 2007, they carried out indiscriminate aerial and artillery bombardments.

I also witnessed the massacre of Sarta Gaduudan in Hamar Jadid, Wardhiigley District, where 69 civilians were summarily executed, some with bayonets. One of these victims was a girl I knew who had her eyes severed with a bayonet. Also, there was the massacre of the Al-Hidaaya mosque in Huriwaa District, where more than 30 civilians were summarily executed, and the indiscriminate bombardment throughout 2007 and 2008 of the Mogadishu neighbourhoods, including Bakara Market, and the numerous documented executions of abducted civilians as well. I personally witnessed all the above."

A young activist from Mogadishu argued however, "I applaud the role of these forces, as they have come in the right time and took a leading role in liberating most of the urban centres from terror groups. But clearly, they have overstayed their time, and they commit crimes against the civilian population, including traffic incidents, rape, indiscriminate bombardment, and killings." While AMISOM is one armed actor who has been known to perpetrate human rights violations against civilians, specifically sexual violence (Wilson, 2014), casualties have also come about through the use of drones and arial bombardments, and violence by foreign troops goes back as far as UNISOM I, as noted by the Canadian affair above.

Some respondents suggested that it would take a strong Somali government or international court to do anything about these issues; in practice, however, accountability of foreign actors may be more amenable through international sources of law than domestic Somali endeavours. That said, there have been occasional instances where foreign parties to conflict in Somalia have been prosecuted. In August 2016, an African Union peacekeeper was held accountable for selling weapons and munitions, and under the Human Rights Due Diligence Policy, AMISOM now documents and make reparations for civilian casualties (UNSOM, 2019). Furthermore, November 2021 saw two Ugandan soldiers sentenced to death by a Ugandan military tribunal sitting in Mogadishu for the death of civilians in August this year. However, such instances are rare, but still demonstrate some scope for accountability of foreign troops.

Any TJ mechanism will therefore need to determine whether the documentation of violence and harms perpetrated by foreign troops and forces is an aspect of Somalia's conflict history that should be included or not. Only once this is determined can further exploration be performed as to the legal instruments, feasibility, and geographical locations through which accountability could be determined.

WHAT KIND OF JUSTICE IS DESIRED OR FEASIBLE WHEN TRYING TO DEAL WITH THE PAST

A TJ mechanism will need to be locally determined and informed by Somali expectations and needs—as well as to be culturally salient. To this end, the research set out to understand what justice means to Somalis, what kind of justice is wanted for past violence, and what the current available dispute resolution and judicial mechanisms are and whether they may be amenable for the purpose and objectives of transitional justice.

5.11 WHAT DOES JUSTICE MEAN TO SOMALIS?

Respondents emphasised that justice is when people's rights are respected. Numerous respondents related the concept of justice to Islam and said that fearing Allah provides the basis of justice. A respondent from Garowe added, "There is no justice beside the justice of Islam." This outlines the space of 'justice' in Somalia between, on the one hand, individual rights (to property, life, and free speech, for example), and on the other hand, Islamic provisions that in some regards prefer forgiving over persecuting crimes. A senior statutory court official in southern Galkayo stated that: "Justice, in my own definition, is everyone to get their rights and nobody to be oppressed and we can find justice by establishing organisations that maintain justice." For some women, they felt that justice would entail equal rights with men, which is not entirely in accordance with Islamic provisions. Nevertheless, the emphasis on individual accountability and rights, as well as strong and unbiased state institutions that can enforce decisions, suggests that Islamic *Shari'a* may be the preferred institution that is perceived to convey the kind of justice that Somalis would like to see applied.

Interestingly, traditional ways of settling conflict through *Xeer* were not inherently considered to convey justice; a vast minority of respondents mentioned that *Xeer* conveyed justice, with few respondents suggesting the legal orientation provided by the traditional authorities provided justice. Most respondents agreed that *Xeer* normally does not provide for individual accountability: it concerns relations between groups. The facts about a crime can be established, but the consequences are usually that one group (or party within the group) pays compensation to the other. Only in exceptional cases do traditional authorities agree that the accused must face the consequences individually. According to one sheikh from Mogadishu, *Xeer* does not deliver justice: "It's all about compromise." Similarly, a female professional from Garowe argued that: "The traditional system doesn't offer justice to the victim. What they do is 'settlement'. The criminal wants to avoid jail time, and the victim has been represented by the clan. That's the biggest obstacle. Just a settlement is not justice, it can even be injustice."

Overwhelmingly, respondents stated that currently, and for decades now, there has been no real justice in Somalia.

5.12 WHAT HAS ALREADY BEEN DONE TO DEAL WITH THE PAST, IF ANYTHING, AND HAS ANYONE ALREADY RECEIVED COMPENSATIONS?

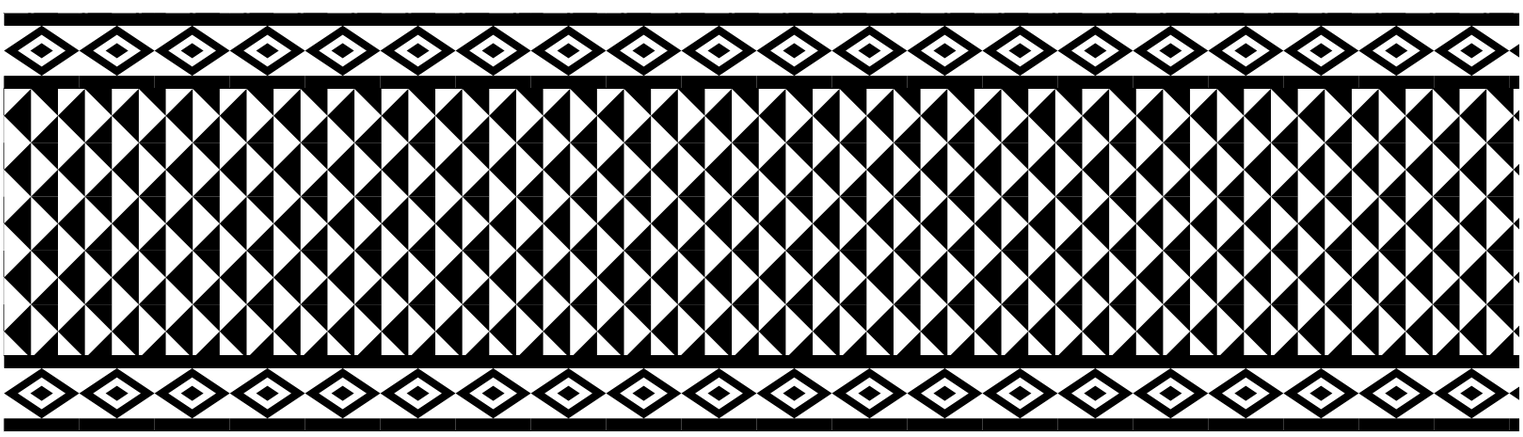
Most respondents felt that to date nothing has been done to deal with historical violence. Respondents mentioned neither *Shari'a* nor statutory law in relation to any attempts to deal with the past, suggesting that neither forum had yet attempted to do so. A few mentioned that, through customary law, some local disputes had been settled—most remarkably in the Mudug region in recent years. Among those that claimed to have suffered violence and injustice, the majority did not receive any compensation for the violations they experienced. Only a minority of respondents stated that they had received compensation under customary law, for instance when a close relative had been killed. None of the respondents mentioned that stolen property had been given back. *Xeer* was described to have been effectively applied in some instances of individual rights violations—nevertheless it was mostly men who benefited from it.

For some, *Xeer* has provided only ad hoc solutions at the local level and did not help to establish larger national agreements that could deal with past crimes comprehensively. Others argued that *Xeer* settlements just aim at stopping the escalation of violence without addressing what happened in a comprehensive way. In these agreements, not all past wrongs are adjudicated, but group representatives seek a consensus on how to stop killing each other. Respondents mentioned the peace process in Somaliland in the early 1990s as an exception to the normally 'limited reach' of *Xeer*,

where a series of interrelated meetings (Somali pl.: shirar) led to *Xeer* agreements that eventually paved the way to sustainable peace and state –building.[9]

A female peace activist was critical about reconciliation efforts in Somalia so far. She said: "[…] even when we talk about peace we are not genuine. Everyone is fake. We must stop that. People have not resolved their grievances. 'Clan so and so have met and settled their difference', they always say, but I never felt a true reconciliation in Somalia where the victims share their pain and the perpetrators are asked why they did it. That never happened. They just bring elders together and they talk about what happened to clan X and who did it. They don't talk about what happened to a specific person and I think that's why our peace and whatever we try to bring together doesn't last long."

The data also describes how some NGO projects contribute to dealing with past violence, for example the de-radicalisation and re-integration programs for former fighters.



5.13 UNDER WHAT LEGAL TRADITION SHOULD PAST VIOLENCE BE ADDRESSED?

Most respondents emphasised that *Shari'a* should be the source of law to deal with the violent past. *Shari'a* was considered divine—a "perfect" law. Some, however, admitted that it was not easy to understand it correctly and that its application in Somalia needs further discussion. Despite a plural legal context, it was clear that the three traditions are closely interlinked. A legal consultant from Galkayo stressed, "First, they [laws in Somalia] are all pretty much the same. It depends on who is applying it and who is convinced by it. But Somalis do not rule anything against the *Shari'a*. And the government is also an Islamic state (suggesting that *Shari'a* hold primacy). The important part is only who is judging the case."

Several respondents mentioned that *Xeer* should be used. Several respondents outlined how *Xeer* works and the ways it can bring peace. *Xeer* tends to focus on communal dispute resolution and peace, within the cultural framework of power differences and gender inequalities. Some considered it to be close to *Shari'a*, but others saw differences and emphasised that *Xeer* would not be fair. Regarding compensations for violations received under *Xeer*, women complained that compensations normally do not reach women: often male family heads receive compensations even when the victims are females, and this includes cases of rape. A female NGO worker added that traditional justice is biased and disenfranchises women: "For example, in cases of rape, traditional elders might decide to compensate the victim by marrying her to the perpetrator."

Several respondents mentioned that in principle, individual accountability can be established under state law. A sheikh from Mogadishu said, "Effective resolutions can be reached through the application of state laws but the people working in the justice institutions need to have integrity for this to be a viable option"; while a civil society activist from Kismayo added that, "Sexual violence and rape should be persecuted through the Somali state laws and justice system, but the system does not have the capacity for this possibility to fully materialise." Yet, it was necessary, they added, that the state legal system be powerful and stable. This was emphasised several times, demonstrating the shared view that the current reality in Somalia is different.

As a result of these concerns about the capacity for statutory law to be effectively applied, only a small minority put their trust in it as a viable tool for addressing the past. One respondent mentioned that all laws existing side by side were "weak". Although voiced only by one person, this is an important observation: in praxis, in everyday life, there is no dominant source of law in Somalia. The situation is one of legal pluralism in which, in contrast to most other contexts, all relevant legal systems are similarly weak (albeit, admittedly, the statutory system is by far weaker than *Xeer* and *Shari'a*).

For most though, it was *Shari'a* that gave the greatest confidence in justice being delivered. The majority of the respondents emphasised that it is possible to hold individual perpetrators accountable under *Shari'a*. A citation from the Qur'an was used to underpin this: "*Alla taziru waziratun wizra okhra*" (ىرخأ رزو ةرزاو رزت الأ, Surah An-Najm (53: 38) trans.: 'That no bearer of burden shall bear the burden of another'). A businessman from Kismayo added, "I believe perpetrators of past violence can be held accountable under *Shari'a*, *Xeer* is not based on fairness and perpetrators would not get a just punishment for their crimes, but under *Shari'a* the rulings with regards to crimes are fixed, are just, and as a Muslim community we trust it." One respondent outlined that under *Shari'a* every person from the age of 15 years is responsible for their wrongdoing and shall be held accountable.[10] Referring to the persistent problems with the effective working of the judiciary, a female IDP head from Mogadishu argued, "I would prefer that *Shari'a* law be the basis for holding people accountable because in the other laws there is corruption and bribery in the court. Someone would win if there were corruption involved. But in *Shari'a*, there is no corruption or bribery. The judge will judge fairly." Some respondents expanded on the issues facing *Xeer*. A researcher from Garowe stated, "It should be noted that those who trust the elders and their customary laws are the offenders and criminals. The victims have most trust in *Shari'a* law: that's the only way to get justice in their opinion…state courts are trusted but it hasn't reached the level of other two ways people use to get justice." Numerous respondents also stressed that under *Shari'a*, individual perpetrators would be held accountable and that,

if Somalis followed *Shari'a*, the "chaos" related to ongoing conflict and violence (and to past violence) could be resolved.

Adding to the belief that justice would most likely be delivered through *Shari'a*, many felt that the concept of reconciliation was understood exclusively as referring to Islamic provisions by the respondents. All statements referred to the expression from Surah An-Nisa [4: 128] "*Waa Sulhu khayr*" (trans.: 'Reconciliation is good'). Interestingly, reconciliation was not defined in a customary legal way. Yet, the preference for reconciliation under *Xeer* is, in principle, not different from the demand to reconcile under *Shari'a*. The only difference may be that under *Xeer*, groups are normally involved in reconciliation, whereas under *Shari'a*, the concept refers to individuals as well as groups. This suggests that *Shari'a* may be a flexible tool that can both deliver justice as well as be a vehicle for advancing reconciliation.

While the majority of respondents emphasised their support for *Shari'a*, a note of caution was raised with some respondents stressing that the religious authorities administering *Shari'a* belong to clans, and that this would have an influence on their legal decisions.

Many respondents mentioned that international law could play a role regarding holding the main perpetrators accountable, e.g., the well-known warlords or Al-Shabab leaders. This was expected to have a 'shock' effect on (still active) perpetrators in Somalia. Respondents also expressed the view that having an external, 'third' party in this regard would be beneficial. Yet, some mentioned that international law would have to work in close cooperation with the statutory legal system: only if the latter was stable would effective cooperation with international legal institutions be possible. Others argued that it would be beneficial to have external trials, e.g., in front of the International Criminal Court (ICC), to hold perpetrators accountable. But there was also some opposition to this idea, and a small number of respondents argued that international law had no role to play regarding alleged Somali perpetrators: they should be tried in Somalia and only the crimes of foreign forces, including AMISOM, should be subject to international legal proceedings. The majority agreed that certain aspects of past violence could be adjudicated under international law.

Yet, a business manager from Kismayo cautioned that the "lack of cooperation between local justice institutions and international justice institutions" would render ineffective such endeavours to deal with the violent past via international law. A trader from Kismayo felt that international law would only be relevant if it deals with "issues involving foreign troops. When relating to Somali actors, I do not see a role for international law. If a Somali actor is held accountable through international law, it might fuel the sentiment of victimisation of certain clans or communities."

Drawing on the attitudes towards and perceptions of different legal systems in Somalia and their potential capacity to address past violence, the primary leaning is towards *Shari'a*—with its stress on individual accountability and the propensity to be fairer and less corrupt in its application. In many countries, transitional justice mechanisms however tend to be a specially designed mechanism where the weightings around truth, accountability, retribution, and reparation are finely balanced according to the types of violence, perpetrator, and feasibility of prosecution and levels of punishment. As will be discussed in subsequent sections, TJ mechanisms have been known to integrate local customary forms of justice and dispute resolution with statutory procedural forms of justice. That said, so far, it is unknown to have three legal traditions combined within a TJ approach. The use of *Shari'a* in transitional justice is also unknown, however, given the reality that the Somali Constitution is undergirded by *Shari'a*—as per Article 2—the onus would be on a context-specific TJ legal mechanism to be informed by *Shari'a*. While this may be a new challenge, it may be sensible to bring *Shari'a* legal scholars together with customary and transitional justice experts to reflect on how this could be done, while pursuing the ambitions of justice mechanisms that can address past violence within the social, logistical, technical, and political constraints of the country.

5.14 HOW CAN THE FACTS ABOUT PAST VIOLENCE BE ESTABLISHED?

Any transitional justice mechanism will have to ascertain facts about the perpetration of violence—against whom and by whom, and under what circumstances—if any kind of accountability and justice are to be feasible. While the threshold for prosecution may vary according to the model of transitional justice being deployed and the balance between truth, justice, reparations, and accountability that has been determined, nevertheless, there will be a need to establish a modicum of truth and accepted facts around past violence.

Many respondents felt that for accountability, first facts and evidence need to be produced, and that due process was a precondition to hold perpetrators accountable. A former Al-Shabab member argued, "Establishing facts and accounts of past crimes is very difficult because such facts and evidence are tough to acquire. For instance, perpetrators might include powerful political elites who might have already died.

Some of the victims don't want to seek such facts due to fear of repercussion by their former perpetrators." Several respondents stated that fear of former perpetrators who still wield power in Somalia is a major challenge to the establishment of facts about past violence.

Given the historical nature of violence which meant that facts may be harder to discern and evidence more challenging to obtain, most respondents recommended that interviews of both victims and the accused would be beneficial. Some also mentioned that local elders should be interrogated, often implying their responsibility for past violence and injustice. Respondents noted that local organisations, such as NGOs or think tanks, would have documented certain conflicts in a few cases. But many also admitted that establishing the facts was difficult: many of the older potential witnesses have already died, and clan intimidation—or intimidation by influential individuals—could prevent the production of facts.

5.15 FORGIVENESS AND REPENTANCE

Many respondents highlighted that forgiveness has a strong value in Islam. Yet, it is not without conditions and it is not clear that one always has to forgive. On whether past perpetrators should be forgiven, the respondents were divided. Many mentioned that forgiveness would be the right thing, for different reasons: many referred to Islamic provisions, while others stressed that it was, under the current circumstances in Somalia, impossible or dangerous to hold perpetrators accountable (either due to the sheer mass of crimes or the fact that perpetrators belong to powerful groups and might defend themselves forcefully). Those advocating forgiveness did not do so unconditionally; they mentioned that, in accordance with Islam, before a perpetrator can be forgiven, they must admit their crimes and repent. Some also stressed that it was for the victim to decide if a perpetrator should be forgiven. An equally large group of respondents emphasised that perpetrators should not be forgiven and should be held accountable. The respondents outlined that many people have suffered and need to receive justice. Some also mentioned that those killed by others also need justice.

A prominent religious leader from Garowe stated, "I believe as the Qur'an says, fight them and do to them what they did to you and not more, but to forgive is better for you." For forgiveness, however, there are conditions, as outlined by a researcher from Galkayo: "The first thing required from the perpetrators is to confess and regret [their action]. That is the key." A businessman from Mogadishu added that it "depends on the victims, as the issue is more of a personal nature. But to reach forgiveness we need to have a transparent discussion to get an idea of what can be done and how to go about resolving it." An academic from Garowe added, "I think South Africa and Rwanda are very good examples of how forgiveness can result in good outcomes, but at first the accused must come out, admit their fault, and ask for forgiveness."

These positions were countered by numerous other voices. A judge from Galkayo argued, "While in Somali culture there is something called forgiveness, I have a different opinion which is that everyone must suffer for what they did." This was echoed by an Al-Shabab defector from Mogadishu who stressed, "No, they should not be forgiven. Forgiveness can only be reached after crimes are accounted for."

In a similar vein, a former member of the Rahanweyn Resistance Army (RRA) from Baidoa said, "The criminals should not be forgiven: the people whom they made suffer are still alive and need justice." This position was shared by numerous other respondents.

Even if forgiveness was advocated, it depended first on repentance, which was seen as key pre-condition for forgiveness. A former Al-Shabab member explained, "Forgiveness is vital for effective social integration and interaction, while it would also help address the grievances of the victims of past crimes. Repenting of crimes plays a key role in reducing violent criminal behaviours and the motivation of criminals to commit crimes. It would encourage perpetrators to abstain from committing violent crimes." In combination, repentance and forgiveness could—in the eyes of numerous respondents—pave the way towards reconciliation. All three concepts (repentance, forgiveness, and reconciliation) were understood by the vast majority of respondents as strongly grounded in Islamic provisions.

As a result, while forgiveness may have traction as a religious concept and one that Somalis may aspire to, it is clear that not all Somalis feel they can deliver forgiveness unconditionally, nor do many of them feel that it is right that perpetrators should be forgiven unconditionally. Accountability for past violence is therefore seen as a necessary aspect of letting go of the past—as much as of preventing future violence. Consequently, a transitional justice mechanism that is designed should be conscientious of the sensitivities around forgiveness and the use of amnesty, and consider the need for a victim-led and informed approach, which may mean that notions of forgiveness may not be indulged.

5.16 PRELIMINARY ASSESSMENT OF THE INTERVIEW DATA

The research conducted for this report only involved a small number of people in five urban locations in south-central Somalia. The research design aimed at inclusivity regarding gender and social background; although still almost three quarters of the respondents were men, and out of 73 interviewees only 5 belonged to so-called 'minority' groups. Also, the younger generation (between 15 and 30) is underrepresented in this survey. Nevertheless, some relevant insights for a Somali understanding of dealing with the violent past can be gained. They are outlined briefly here:

- Most respondents stated that dealing with the violent past was important. Many respondents demanded that interpersonal crimes and injustices had to be dealt with, to ensure justice which, if unaddressed, would keep feeding mistrust in wider Somali society.
- Respondents tended to focus in on the violence perpetrated during the 1990s. While some respondents referred to atrocities committed by Al-Shabab and foreign troops in recent years, the violence committed by warlords and clan militias was more often treated as the issue that needed redress.
- Many admitted that it was complicated—if not impossible—to deal with all past crimes and injustices. Some suggested dealing only with the main perpetrators (i.e., former warlords—some of whom are holding political offices today).
- Women stressed that GBV/sexual violence had a long-term negative impact on the victims and that, even after 30 years, women should have a chance at least to speak out about experiences of GBV and be heard. But everybody speaking about the matter agreed that it was extremely difficult to deal with GBV/sexual violence due to the culturally engrained stigmatisation of victims of GBV/sexual violence among Somalis.
- Most respondents emphasised that property crimes should be dealt with—no matter when and how they happened, and that seeing someone holding stolen property often perpetuates grievances. Immovable property, i.e., houses and land, should be returned. This was, as many admitted, still complicated because of the lack of reliable title deeds and because of the determination of illegal owners to defend 'their' property that they were occupying, often continually for decades.
- For the respondents, the most relevant and preferred source of law for dealing with the violent past is *Shari'a*. In particular, many felt that conflicts over property were best resolved through Islamic law. In more general terms, individual accountability could most clearly be established under *Shari'a*. Somali customary law (*Xeer*) was seen as suitable for inter-group reconciliation. While several men in the research mentioned that they received compensation for some crimes under *Xeer*, female respondents almost unanimously expressed reservations about Somali customary law. They stressed that it primarily benefits men and that it can be unfair, since it privileges stronger over weaker groups and only provides 'settlements'—not justice.
- Statutory law was seen as too weak at the moment to help in dealing with the violent past or achieving reconciliation. Respondents clearly expressed a wish for a clear, effective, and fair overarching legal structure. Yet, equally clearly, they mentioned that the current state system existing in Somalia was far from providing such a structure. Against this backdrop, *Shari'a* and *Xeer* provided at least some orientation. Given the stress on *Shari'a* by participants, it will be down to whoever develops a transitional justice mechanism for Somalia to explore how best to integrate *Shari'a*, given its trust amongst citizens to deliver the type of accountability they desire.
- A number of respondents saw international law as a suitable instrument to deal with the main perpetrators. Several respondents mentioned that the International Criminal Court, or a special tribunal for war crimes in Somalia, should adjudicate the warlords and those powerful actors in the government today who had committed crimes or ordered atrocities in the past. While some felt that an international mechanism could transcend domestic clannism, which could be an important challenge to a fair process, other respondents also cautioned that an external process could create more insecurity in an already volatile political situation in Somalia.
- Regarding dealing with the past, most respondents stressed that the process had to be comprehensive, fair, and transparent. They emphasised that clan solidarity was strong among Somalis and that every patrilineal descent group would defend its members against accusations and persecution.

Only a comprehensive process of dealing with the violent past that was well communicated among the population could be acceptable.

- Foreign troops were seen ambiguously. Some mentioned that they had been helpful in fighting Al-Shabab in 2007 and the year thereafter. Numerous respondents mentioned atrocities and abuses against Somali civilians committed by foreign forces—in a fair amount of detail. It will be down to the design of the TJ mechanism to determine the extent to which violence perpetrated by foreign troops should be prioritised, and the type of legal instrument that should be utilised.
- Reflections on the structural marginalisation of women and minorities and its connection to past violence were limited. Despite the question being raised, many respondents lacked a clear understanding of what violence marginalised groups had specifically faced—let alone what kind of justice, accountability, or reparations for women or minority groups might be needed or entail.

Several contradictions emerged from the interview data. On the one hand, respondents found it important to deal with the violent past and to hold individual perpetrators accountable. On the other hand, a majority advocated 'forgiving and forgetting' as an appropriate way of dealing with many past crimes. This was mostly underpinned with reference to Islamic provisions and examples from the life of the Prophet Mohammed. Related to that, many demanded at least that stolen and looted immovable property was returned. Women also added that the GBV/sexual violence they experienced had to be considered. Yet, most respondents also stressed that remembering past violence at an individual level was potentially harmful and would prevent any personal or societal progress. *Shari'a* and, to a lesser degree, *Xeer* were mentioned as most appropriate legal bases for dealing with the violent past; but respondents also emphasised that a strong and fair judiciary administered by an effective state was necessary to come to terms with past crimes. This latter point seems to express the 'confusion' of many Somalis regarding the non-hierarchical situation of plural legal orders in the country. Somalia is one of the few contexts where different legal orders not only exist side –by –side—but also without a clear hierarchy.

Finally, the research showed that most respondents focused on violence perpetrated in the 1990s. This can be perceived as surprising, given that widespread violence is still ongoing in Somalia and many atrocities have happened from 2007 onwards, when terrorism and counterterrorism took a foothold in Somalia. While some respondents referred to atrocities committed by-Al Shabab and AMISOM more recently, the former was rarely mentioned as a prominent group of perpetrators. More often, warlords and clan militias were mentioned. It is unclear what the reason for this was. One explanation would be that people were afraid of speaking about violence committed by Al-Shabab because the group is still powerful in the country; another reason could be that most respondents evaluated that Al-Shabab's violence was not the 'primary' problem of Somalia, even today. When looking at who started the violence, this was primarily deemed to be former political elites and clan leaders and their militias. Several of them still play a political role today—and some indeed hold office.

Dealing with problems of structural marginalisation and their connection to past violence was clearly an important omission by the respondents. While we explicitly asked what kind of violence women and minority group members had endured in the past and how they could find justice, most respondents' replies about these issues remained vague. It seems clear, however, that justice with regard to women and especially minority group members would not only have to include dealing with past violations at an individual level, but also at a collective, structural, level. This would require a different legal framework that not only provided for truth-telling and adjudication of perpetrators, but also entailed provisions for affirmative action. Indeed, it would require ending the current so called '4.5 formula' that awards all minority group members combined just half of the seats and positions that the majority clans can claim. This formula has been introduced at a peace conference in Arta (Djibouti) in 2000 and had been cemented during the peace conference in Kenya in 2004. Similarly, the deeply engrained patriarchal structures of Somali society would have to be tackled when dealing with the violence women and girls experienced over the past decades in the context of civil war and war in Somalia.

6 THE SOMALILAND EXPERIENCE

Over the past three decades, the people of Somaliland have gathered valuable experiences with a process that could be described as a form of TJ, without a formal process, but entailing important aspects of region-wide reconciliation and transnational dealing with the violent past, albeit limited to intra-Somaliland issues.

When the SNM took over much of the north-west, it engaged in a long series of inter-clan meetings throughout the region, during which they discussed the grievances of local groups. Traditional authorities, who already played a role in the politics of the SNM and other groups, acted as mediators. They used *Xeer* to settle these conflicts. The key problem was that during the war of the Issaq-based SNM against the Somali government, most non-Isaaq in the north-west had sided with the government. The Gadabuursi and Ise (in today's western Somaliland) and Dhulbahante and Warsangeli (in today's eastern Somaliland) had formed militias supported by the government and had fought against the SNM. This civil war had disrupted the close-knit social and economic relations of the exogamous descent groups in the region, who were used to sharing water and grazing land.

The main issues on the agendas of the various peace meetings were about the restitution of property, particularly livestock, vehicles, houses, and gardens. Due to the significant number of casualties on all sides, it was agreed not to compensate for any killings (Farah and Lewis, 1993). According to *Xeer*, typically, 'blood money' (Somali: mag; Arabic: diya) would have to be paid by the group of the killer to the group of the killed. It is noteworthy that *Xeer* usually establishes collective responsibility for any crime committed by a person (Lewis, 1961: 167). In this way, however, killing becomes relatively 'cheap' for the killer, who only pays a small part of the blood compensation (the total payment is usually 100 camels for a man and 50 for a woman). While the normative matrix of *Shari'a* also issues judgements which include compensation (diya), it generally establishes individual responsibility. *Shari'a* even allows for the execution of the killer by the closest relative of the victim.

In contrast, Somali custom allows generalised revenge killings, meaning that even distant relatives of the victim may try to kill a member of the extended family of the perpetrator (Hoehne, 2011: 100–101; Schlee, 2013).

A decisive innovation of the *Xeer* agreements introduced in many parts of Somaliland in the early 1990s was that the elders deliberately decreed harsh punishments according to *Shari'a* to deter future violators of the peace. This was important against the backdrop of the general lawlessness that followed the Somali state collapse in 1991. Several of the former SNM fighters in Somaliland, particularly those who had joined the movement in the last years as youngsters, had turned from guerrillas to ordinary gangsters engaged in drugs, rape, and looting. Farah and Lewis (1993: 57–58) observed that:

[t]o dissuade armed militias from seizing herds of opposing groups, the elders decreed that the responsibility of paying damages inflicted by armed groups should be shouldered by the immediate families of the perpetual offenders (the family of the offender, his father, his brothers and uncles). This presumably unprecedented ruling that placed the responsibility for acts of violence upon the family and the immediate kin of the villain, undoubtedly discouraged the practice of blatant and opportunistic raiding of property.

The authors also added that, "The introduction of capital punishment appears to be gaining currency in northern Somalia as an effective instrument to curtail homicide" (ibid.: 58). It is important to note here that for these changes in *Xeer* to be effectively implemented, the elders must have forged a consensus in their respective patrilineal descent groups. Building consensus is not a transparent process; it involves lengthy discussions and negotiations behind closed doors. Most important is that at the end, the members of a group who have influence (e.g., religious leaders, businessmen, respected elders, intellectuals, young fighters) all agree to support the decision that eventually is announced by the lineage or clan head. Another measure used to create peace after war in Somaliland was an amnesty.[11]

At a major clan conference in Bur'o in May 1991, where representatives of all clans residing in north-western Somalia came together, an unconditional amnesty was granted to those who were from the region and had committed war crimes and crimes against humanity between 1981 and 1991 (Adam Haji Ahmed, 2010). The idea behind it was that in an emergency situation, with southern Somalia falling apart and groups in north-western Somalia (essentially the SNM and other smaller clan militias of Dhulbahante and Warsangeli) heavily armed and facing each other, a quick way of stabilising the situation had to be found. The only condition for amnesty was therefore an immediate stalemate. This meeting in Bur'o was also where Somaliland's independence was declared. The peacebuilding model here, therefore, included reconciliation, property restitution, amnesty, and provisions to prevent future violence. Many of these are critical components of TJ. In Somaliland, all of these measures were taken at inter-clan conferences, legitimised under *Xeer*, and guarded by traditional authorities who, back in the 1990s, were the de facto governing actors in much of the region (Hoehne, 2006). It is noteworthy that these measures were taken upon the initiative of local people and were not stimulated by foreign intervention. The decisive normative space constructed here for dealing with the recent violent past was local and did not exceed north-western Somalia.

This transitional phase in Somaliland in the early 1990s involved many political compromises and deliberate silences. It did not hold seek to hold to account those who were responsible for killing and raping. The more significant issue of systematic state repression and gross human rights violations in the 1980s was not on the agenda of the peace meetings in Somaliland in the early 1990s. The main reason for these gaps was that, initially, the situation in Somaliland was highly volatile. Everybody was armed and ready to defend particular clan interests. The only 'civilian' authority lay in the hands of the elders, who themselves represented a clan-based order (Hoehne and Sanchez, 2020). At this point, much of what had been undertaken was to establish peace and stability with a view to looking forward, as opposed to redressing the past outside of property restitution.

In the late 1990s, the government of Somaliland established the War Crimes Investigation Commission (WCIC) (Somali: *Xafiiska Badhitaanka Xasuuqa*) to investigate atrocities committed by the Somali Army against civilians in the north-west in the 1980s. The commission compiled many testimonies of survivors, but the reports remained 'strictly confidential'. The commission was also severely underfunded. In this way, the government could show the public that it was doing something about past atrocities, but it also made sure not to disturb the informal 'pact of silence' on which the fragile status quo of Somaliland was built between those who liked to see themselves as 'victims' of past atrocities (mostly Isaaq), and the others (mostly Darood and also some Dir) who feared being blamed as 'perpetrators' (Hoehne and Sanchez, 2020).[12] For many years, peace and stability (Somali: *nabad iyo degenaansho*) was, in fact, the priority among Somalilanders, particularly given the escalating violence in southern Somalia (Hoehne, 2011). There was no individual accountability for crimes committed before 1991.

The first legal steps to hold individual perpetrators of past human rights violations in north-western Somalia accountable were taken abroad by Somali diaspora actors in the US. The Centre for Justice and Accountability (CJA) in San Francisco, which supported the investigations against General Mohamed Ali Samatar, aided them beginning in 1999. General Samatar had been Minister of Defence and the first vice-president of Somalia between 1980 and 1986. From 1987 to 1990, he was Somali prime minister and a close ally of President Barre. After the fall of the Somali government, Mohamed Ali Samatar fled to Italy and then, in 1997, to the US where he was identified by some diaspora Somalis. Preparations for legal proceedings started around 2000. A scholar working with the CJA conducted online research, contacted human rights NGOs in Somaliland, and finally, in 2004, visited Somaliland to collect information. The CJA also cooperated with the War Crimes Investigation Commission in Hargeisa (Hoehne and Sanchez, 2020). The case was opened in 2004 in front of the district court in Virginia. It followed civil proceedings. Its legal basis was the Torture Victim Protection Act and the Alien Tort Claims Act. There was no legal basis for criminal prosecution in the USA. In 2007, General Samatar successfully moved to dismiss the case on immunity grounds under the Foreign Sovereign Immunities Act.

This decision was appealed and finally, in June 2010, the US Supreme Court affirmed that individual foreign government officials did not fall within the scope of the immunity granted under this Act.

The case proceeded, and after the last motion to stay the proceedings had failed, General Samatar filed for bankruptcy on 19 February 2012. On 23 February, General Samatar appeared in court to enter his default, conceding both liability and damages, thereby admitting responsibility for the military actions against civilians in north-western Somalia in the 1980s (Roberts, 2013: 27). Afterwards, the CJA simultaneously released an enthusiastic statement:

On February 23, 2012, after aggressively defending the case for more than seven years, litigating it to the U.S. Supreme Court and back, General [Samatar] appeared in a federal court in Virginia and did something that no high-ranking person from the former military dictatorship of Siad [sic] Barre has ever done – he accepted liability for torture, extrajudicial killing, crimes against humanity, war crimes, and other human rights abuses committed against the civilian population of Somalia during the 1980s. This is the first time that anyone has been held to account anywhere in the world for atrocities committed by General Samatar and the military dictatorship that ruled Somalia for over 20 years.[13]

It is noteworthy that during the process, supporters of the General demonstrated in front of court buildings to stop what they considered an unjustified persecution. Muuse Yuusuf (2021: 175) mentioned that: "The anti-trial group argued that Brigadier General Samatar was a national hero who was a member of a legitimate and internationally recognised government." Once the case was concluded in 2012, its results were widely broadcast in Somali media. Most Somalis from southern Somalia found that the case against Mohamed Ali Samatar divided the Somalis when political unity was needed to cope with the various problems of (southern) Somalia, including militant Islamism, piracy, and humanitarian catastrophe. They accused the plaintiffs (all of whom were Isaaq) of moving against General Samatar, who belonged to a so-called 'minority' group (called Tumaal), on account of his 'inferior' origin. They argued that members of all Somali clans had committed atrocities in the past and that one should 'forgive and forget'. In Somaliland, the reactions were multifaceted. Some celebrated, while others found that this could only be a beginning, and that all perpetrators of the time of the dictatorship should be held accountable. Others again stressed that it was good for Muslims to forgive and have mercy.[14] This debate illustrates the contested nature of any attempt to deal with the past human rights violations in Somali territories. It also shows the potential for politicisation of the matter along clan lines or other forms of sub-national identities.

We suggest that the experience of Somaliland/north-western Somalia presents some important lessons for establishing peace in Somalia:

The process of dealing with past violence and injustice grew from the bottom up. It was based on locally legitimate, 'face-to-face' proceedings between relevant collectives (lineage or clans). A general amnesty complemented this for crimes committed by persons from the region during the first civil war in the 1980s, which helped build political buy-in for peace from those who would otherwise be most able to sustain conflict. While amnesty is a contested measure in the context of TJ, in this instance, it was a tool to move beyond violence. Importantly for Somalia, any utilisation of this tool will need to have careful preliminary reflection as to the suitability and appropriateness of it, especially from a victim and justice-focused lens, as although it may help to secure peace, and may even be beneficial in advancing historical truth—it may undermine justice.

- The process was phased over a long term. It would be unrealistic to expect that the complex histories of violence in Somalia could be dealt with in 'one go' and in a relatively short time frame (one, two, or three years). Instead, it may be useful to think about TJ in Somalia as a step-by-step approach with different components building on each other; from preparing the ground for local reconciliation meetings, to further measures that eventually, years down the line, could lead to trials against perpetrators from all groups involved. The complexity of transitional justice means that for many countries it can take years, and only when certain conditions are present will a society be "ripe" for undertaking measures to deal with past atrocities.

- Somaliland has seen different measures at different times, and it did not undertake all the possible steps for political reasons. However, building on this example, TJ in Somalia must consider the political economy of justice and the legitimacy of any TJ mechanism: Who wants what type of TJ and when, to what end? What kind of TJ do the concerned people envisage, and why? Politics and power are thus involved when considering 'whose priorities take priority' in dealing with the past. (Weinstein et al, 2010)


Image credit: ©AMISOM

7 KEY CHALLENGES AND IMPLICATIONS FOR TRANSITIONAL JUSTICE IN SOMALIA

Aggregating all the data collected and analysed for this research, we have identified six key challenges that have profound implications for TJ programming in Somalia:

- **Absence of overarching and legitimate legal and political structures, and lack of legitimacy of state institutions.** The political landscape in Somalia is fragmented, and there is no dominant legitimate authority. The reach of the government is limited; this challenges any approach to TJ that is solely dependent on overarching state power. The contested nature of politics in Somalia—with the government fighting with Al-Shabab, who remains the de-facto authority in the rural hinterland of south and central Somalia; foreign troops on the ground; clan militias controlling parts of south and central Somalia; the regional governments of Jubbaland and Puntland distanced from the government in Mogadishu; and Somaliland in the north-west having seceded unilaterally—suggests that, at present, a state-centred approach to TJ alone will not lead to a comprehensive dealing of the violent past in Somalia. It also means that TJ today or any time soon cannot be driven solely by state institutions. Therefore, it will be challenging for a national TJ framework to take root in Somalia in the present circumstances. However, the NRF could still provide a framework within which a few initial steps could be taken, as we advise below. Certainly, if in the near future an administration comes to power that manages to produce more popular legitimacy, the NRF or even the provisions in the provisional constitution (Article 111i) regarding the establishment of a Truth and Reconciliation Commission could be activated to provide an overarching framework for various TJ measures in Somalia.
- **Non-hierarchical plural legal situation and the strong influence of *Shari'a*.** Not one of the existing legal systems in the country prevails over the others. Elsewhere, typically, statutory law dominates, and religious or customary law fills particular niches or can be used by certain actors or in specific situations. In Somalia, *Shari'a*, statutory law, and *Xeer* exist side by side. In some areas, they can be accessed simultaneously. In others, statutory law is excluded (for example, in Al-Shabab–controlled terrain and the rural peripheries). This implies that any approach to TJ would have to accommodate elements of all three relevant legal systems. While it is not unusual to combine statutory and customary legal approaches within national TJ frameworks (e.g., in Rwanda and Liberia), to date, the incorporation of *Shari'a* as a third element has never been attempted. Given that the Somali Provisional Constitution established the primacy of *Shari'a* over other sources of law, including statutory, advancing a legal framework for TJ in Somalia will need to navigate this unexplored territory.
- **Clannism.** While allegiance towards ones patrilineal kin has a long tradition among Somalis, clans underwent a substantial transformation in their importance during the late 1980s and the early 1990s. Clannism—which considers narrow interests among patrilineal relatives in all spheres of daily life—inhibits open and balanced discussions about past violent incidents. Key events struggle to be discussed publicly without provoking the patrilineal relatives of those accused of crimes and atrocities to rush to a general defence of their fellow clan members. This constitutes a considerable challenge for typical TJ procedures such as truth-telling, criminal persecution, and vetting. In other contexts, group identities also superseded all others (e.g., in Rwanda and South Africa), but in these contexts there was a clear political settlement providing more enabling conditions.

- **Structural violence against women and minorities.** Structural violence is a form of violence wherein a social structure or social institution may harm people by preventing them from meeting their basic needs. This is the case in Somalia concerning women and members of minority groups, particularly when dealing with their past violent experiences. Gender-based violence is often associated with the stigmatisation of the victims in Somalia. Violence and injustices against minorities are often not considered in the same way as violence and injustices among 'equals' (i.e., men belonging to similarly strong majority groups). These long-established inequalities in Somali society will likely also impinge on any TJ initiative in Somalia. Generations of entrenched norms around power and position in society cannot be undone through short-term measures. A TJ process in Somalia that does not address structural violence and injustice will therefore fail to address key dimensions.

- **The ambiguous role played by the international community.** External actors have been involved in Somalia at various points over the past 35 years. While much of this has contributed towards humanitarian relief and peacekeeping, there have also been times when foreign actors have been a direct party to the conflict. During the 1980s, the military regime received strong military and other support from foreign states. In the early 1990s, international peacekeepers were known to have perpetrated human rights violations (HRW, 1995). At times, foreign support has strengthened warlords. More contemporarily, foreign troops through AMISOM have harmed civilians through actions in pursuit of their mandate, or through sexual violence (Wilson, 2014). Already Canada has undertaken prosecution against troops who were sent to keep the peace in 1993 but who instead tortured and killed a Somali youth (Amnesty, 1995). Similarly, under the Human Rights Due Diligence Policy, AMISOM now documents and makes reparations for civilian casualties that have emerged from its own actions (UNSOM, 2019). Going forward, any TJ process will need to acknowledge the full legacy of past violence in Somalia regardless of who the perpetrator may be. If, or where, this relates to foreign states and troops, a TJ process will need to consider whether, where, and through which instruments it may be beneficial to pursue accountability.

- **Competing Trauma Narratives.** There is a multitude of partly opposed collective trauma narratives which different clans or lineages hold onto. Frequently in these narratives, the 'murderer' of one group is the 'hero' of the other. This provides little space for shared and nuanced accounts of what happened and shared responsibility. It also upholds the clear-cut and politicised boundaries between 'victims' and 'perpetrators', which again inhibits more complex discussions about ambiguous realities regarding who did what. This situation is not exceptional to Somalia and is common to many conflicts and other processes of transitional justice. However, it is important that the challenge of documenting the past and establishing the facts in such context is not underestimated.

8 LEARNING FROM OTHER COUNTRIES

Societies that underwent conflict and massive human rights violations are not always immediately ready to deal with the past. Several decades passed before Spain discussed crimes by the fascist Franco regime (Bernecker, 2007; Schlee, 2008) or before Germans engaged more comprehensively with their Nazi past (Reichel, 2001; Kundani, 2009). These two examples underline the absence of a causal relationship between TJ and political stability and socio-economic welfare.

Rwanda illustrates the selectiveness of TJ processes. Only the deeds by the previous regime against the Tutsi (and some oppositional Hutu) were investigated, but not the massacres by the Rwandan Patriotic Front (RPF) of Paul Kagame, which ended the genocide and displaced hundreds of thousands of Hutus. The Arusha tribunal established in Tanzania in 1994 by the UN made very slow progress. It was also too distant for ordinary Rwandans. Rwandan state courts were unable to deal with the massive number of suspects who were often held for years without due process. Finally, the Rwandan government resorted to a traditional strategy of dispute settlement known as 'Gacaca', which Rwandans originally used to deal with family and inheritance disputes. In 2000, approximately 11,000 such community courts were established. They were presided over by community leaders and endowed with coercive powers, hearing cases of murder, manslaughter, assault, and property offences committed during the genocide. After some initial success, many Rwandans lost interest in the lengthy and unprofessional proceedings, complicated by threats to witnesses in many localities where Hutus were dominant. Eventually, the Gacaca courts silenced more than they revealed, and their capacity to reconcile local communities or 'the nation' was minimal (Goldstein-Bolocan, 2004; Buckley-Zistel, 2005; Hankel, 2006; Waldorf, 2006 and 2010; Cobban, 2007: Chapter 6; Burnet, 2008).

Proceedings in Sierra Leone showed that the reintegration of former community members who had committed crimes against their people was more important than uncovering past crimes. Ex-combatants instrumentalised public testimonies not to admit past deeds—but in order to present themselves as acceptable community members for the purposes of reintegration (Shaw, 2010).

South Africa saw the establishment of a Truth and Reconciliation Commission (TRC) that became paradigmatic for many subsequent cases of TJ worldwide. Under Archbishop Desmond Tutu, it was designed as a centre for enlightening the public about past crimes and, simultaneously, for forgiveness. The idea was to 'heal' the nation and, from there, to overcome the past and build a 'new nation'. Many of the rather idealistic ideas related to the TRC in South Africa did, in retrospect, not materialise (Buur, 2000; Wilson, 2001). Yet, it still stands as an example for the importance of 'truth-telling'.

In Peru, between 1980 and the mid-1990s, a protracted armed conflict split the society. The Maoist insurgency led by Sendero Luminoso recruited its followers—particularly among indigenous people in the Andean highlands, who were politically marginalised. In response, the government in Lima and its supporters, who mainly belonged to the rich and powerful groups living along the coast, sent the army to the highlands, where it began a regime of state terror. The harsher the counterterrorism measures, the more grew the support for the insurgents. Eventually, Sendero Luminoso controlled considerable parts of the Peruvian Andes and parts of the Amazon and in the early 1990s took a foothold even in Lima, from where it conducted terror attacks. The movement stopped functioning shortly after its leader, Abimael Guzman, and his closest associates had been captured in Lima in early 1993. For several years after, however, measures of state terror against suspected 'terrorists' continued. Only in 2001, a Truth and Reconciliation Commission (TRC) was established that for around two years looked into the past violence and recommended measures to reconcile the population and compensate the victims. The TRC in Peru was special in the regard that it involved a number of distinguished, ambitious, and open-minded commissioners—some of whom had a long personal track record of human rights activism.

The TRC commissioned considerable basic research in all regions of the country to first, document the violence that had happened; and second, gather voices of those affected to discuss their priorities regarding dealing with past violence. Thus, the TRC managed to create a certain popular momentum and was sensitive to diverse—and occasionally contradictory—perspectives and demands. It also went a considerable way to give voice to the structurally marginalised—i.e., indigenous groups from the highlands and the Amazon. Yet, in the aftermath of the TRC, and as a result of the change in government in Peru, many measures proposed by the commission begun to be slowly implemented. As of 2021, legal reforms to deal with the violent past in Peru are still unfolding. One important measure was to deal with repressed memories of past violence (Burt, 2007; Degregori, 2012; Feldman, 2021). In 2015, the Lugar de la Memoria (LUM) was opened in Lima. It is a national museum of the armed conflict in Peru between 1980 and 2000. It sets out to tell a more complex history of the political violence, giving a voice to many individuals who experienced the violence in different ways. Peru has also seen a number of legal reforms in the aftermath of the TRC's operations (2001–2003) that provide victims of the violence and their relatives with compensation in the form of free and preferential access to higher education and health care. The state also put additional resources into searching for and identifying those who were disappeared during the civil war, and for those buried anonymously to be reburied officially.

To deal with the violence in former Yugoslavia, a special tribunal called the 'International Criminal Tribunal for the former Yugoslavia' (ICTY) was established in 1993. It operated until 2017 in The Hague, based on international law, and dealt with around 150 cases of which it adjudicated roughly two thirds, issuing numerous sentences between acquittal and life (Clark, 2014). The mandate of the Tribunal was to "bring to justice those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991 and thus contribute to the restoration and maintenance of peace in the region. […] In accordance with its Statute, the ICTY [had] jurisdiction over the territory of the former Yugoslavia from 1991 onwards. It [had] jurisdiction over individual persons and not organisations, political parties, army units, administrative entities or other legal subjects. The Tribunal [had] authority to prosecute and try individuals on four categories of offences: grave breaches of the 1949 Geneva conventions, violations of the laws or customs of war, genocide and crimes against humanity. The ICTY [had] no authority to prosecute states for aggression or crimes against peace; these crimes are within the jurisdiction of The International Court of Justice."[15]

Regarding TJ in Somalia, it makes sense to draw on these experiences and approaches implemented in other countries or settings to identify a range of different tools and approaches that can balance truth, justice, and peace in the pursuit of post-conflict reconciliation:

1. **South Africa and truth-telling:** Truth-telling could be one approach to deal with the masses of 'ordinary' perpetrators in Somalia. Over the past four decades, many individuals committed many crimes during different periods of the Somali conflict, making the pursuit of justice through normal channels unlikely. This situation is not dissimilar from the crimes of the Apartheid regime in South Africa from the 1960s to the early 1990s. To allow individual and low-rank/no-rank perpetrators to admit to their crimes—for example as members of the Somali National Army in the 1980s, as members of warlord militias, as members of smaller gangs or as members of one of the extremist groups (Hizbul Islam, AS, and earlier Al Ittihad)—would do two things: first, it would shed light on episodes of violence that are otherwise difficult to grasp and verify; second, it would give the victims of these violent acts (rape, killings, and lootings) an opportunity to give testimony. However, a critical caveat needs to be noted here: 'telling the truth' can be detrimental to 'face-saving'. The latter is a deeply culturally engrained value in Somali society. To admit a crime or tell something potentially shameful (for the perpetrator or the victim) might involve overcoming considerable personal and collective hurdles which many Somalis are not used to overcoming (concerning the expanded families of victims and/or perpetrators). Islamic provisions might be also helpful to encourage truth-telling.

2. **Rwanda and Sierra Leone and the integration of customary and other legal proceedings:** In Somalia, *Xeer* and *Shari'a* must play a role in the dealings with the violent past. They should be integrated into a larger, multi-legal framework for TJ in the country. *Xeer* could be part of reconciliation efforts between groups at a local or regional level; while *Shari'a* has its strength regarding holding individual perpetrators accountable and the adjudication of property-related crimes.

But we are conscious that neither *Shari'a* nor *Xeer* are compatible with international legal standards in many regards. The spheres of responsibility for each legal system within a multi-legal framework for TJ in Somalia must be clearly demarcated. This may suggest the need for an extraordinary legal mechanism that draws on customary, *Shari'a*, and statutory law to identify a judicial framework for the specific purposes of TJ. Moreover, reintegration in Somalia (akin to some rituals in Sierra Leone or elsewhere) could be pursued by reference to the importance of repentance followed by forgiveness in Islam, which is—theoretically—accepted by most Somalis. A ritual could be derived from repenting, asking for forgiveness, and then, ideally, for forgiveness under the auspices of widely recognised and appreciated Somali sheikhs. The risks of retributive violence must be considered given the prevailing insecurity in Somalia, and caution should be made so that victims do not feel pressured to comply with a forgiveness discourse and agenda. For forgiveness to be genuine it must be voluntary on the part of the victim, and anything else, may be coercive to an already traumatised and harmed individual.

3. **Peru, establishing an inclusive TRC and collecting a complex collective memory and legal reform:** In Somalia, there is clearly a need for creating space or spaces for complex narratives of the conflict. To develop a single and integrated narrative (as is attempted in Rwanda under President Kagame) may not fit Somalis' needs. Any representation of the past violence, for example in museums or in books or podcasts, must account for the multiplicity of experiences and the blurred boundary between victims and perpetrators in Somalia—more similar to the example of the LUM in Lima. A process to allow complex and partly contradictory narratives about the past violence to emerge and to be discussed further would have to be managed and partly monitored by a dedicated forum of experts, if not—provided the political structures in the future will be stable enough—a Somali TRC. Yet, such a TRC in Somalia would have to be designed carefully and exclude any semblance of clannism or ideological parochialism.
4. **Former Yugoslavia and holding the main perpetrators accountable under international law:** It would be possible to combine locally driven transitional justice with an international tribunal adjudicating a group of main perpetrators from the different periods, groups, and clans discussed in the research. For such a process to succeed, it must avoid any impression of 'clan bias'; the standards of establishing the truth must be transparent to all observers; and the Somali public must be able to follow the proceedings. The persecution of main perpetrators should be as inclusive as possible, and a certain perception 'balance' between clans must be safeguarded. At least at a higher level of legal philosophy, an international tribunal should pay respect to *Shari'a* as relevant legal orientation for most Somalis. Any impression of 'victor's justice' or of following the interests of a small group (including outside actors, e.g., regarding adjudicating 'Islamists' rather than warlords) has to be avoided. The moment Somalis perceive a tribunal to be unfair, a significant resistance maybe mobilised.

Image credit: ©AMISOM



9 PROPOSED NEXT STEPS

Against this backdrop, any TJ process in Somalia should start in a low-profile way but ensure that it is designed in an inclusive and transparent manner. It could also initially be localised in the sense that in different regions of the country, different priorities regarding dealing with the violent past could be recognised. Drawing from the experiences outlined above, the preliminary steps that international partners could undertake to advance TJ in Somalia could be:

LOCALISING TJ IN SOMALIA:

Given that the various regions of the country have different histories of violence, consideration should be given to a locally and/or regionally differentiated approach to TJ in Somalia, recognising also that different states are also at different stages regarding their security and political stability. While Somaliland/north-western Somalia is largely stable, many parts of southern Somalia still face active conflict and protracted insecurity. Violence in northern Somalia escalated mainly in the 1980s and early 1990s, while in south and central Somalia, violence erupted mainly around 1990 and is partly still ongoing. The main actors of violence in the north (including Puntland) were government forces and a small number of relatively well-organised clan militias. In Puntland, additionally, Al Ittihad Al Islamiya and later Al-Shabab played a certain role, but not to the degree that the latter group continues to shape dynamics of violence in southern Somalia. Southern Somalia has seen the most complex layers of violence, from clan militias to militant Islamists to foreign intervention and Somali government forces. Against this backdrop, a localised, bottom-up TJ process in Somalia that takes these differences into account may be more effective. A starting point for such a TJ process would include the localised documentation of past violations and crimes. Researchers familiar with the local context could be trained to collect legally and socially relevant evidence—prior to which the standards of proof would have to be agreed. Local documentation centres may need to be created and witness protection measures may need to be considered.

ESTABLISHING A FORUM OF EXPERTS:

- Create an inclusive but concise discussion forum with a quota for relevant groups, consciously including women and minorities. Women could be either involved as members of a certain patrilineal descent group or as 'fifth clan'—i.e., as an independent social group. However, both options may be challenging since even as a particular social group, Somali women can get involved in clan politics of their own patrilineal descent groups.
- Initially this could be an expert forum that does not comprise too many individuals. It should include credible representatives of victims' groups and highly capable experts, civil society, and religious leaders.
- From Somaliland, not only the Isaaq should be invited, since Somaliland is genealogically more diverse and members of non-Isaaq groups have had their own experiences of past violence from the late 1980s onward.
- In the sense of localising TJ, the 'central committee' for TJ in Somalia should facilitate the establishment of regional sub-committees that coordinate the abovementioned work of evidence collection and documentation of the local and regional histories of violence based on witness statements and other forms of evidence.
- This concise committee of Somali experts would ideally not have any decision-taking powers and would initially convene discussion forums without making their deliberations public, as the publicity of initial debates could lead to a rise of tensions. Only once certain issues have been identified as most relevant could the committee consider making them public. At an appropriate time, it should tour through Somalia to explain its ideas and concerns in several major towns of Somalia and engage local communities. Rural communities are to be made aware of the events and offered support to attend.
- If the Somali committee decides that international law should play a role in dealing with past violence in Somalia, an international legal framework would have to be devised that is coherent with important *Shari'a* principles. Politically and practically, any approach to TJ in Somalia must also take *Shari'a* into consideration.

THE ROLE OF THE STATE AND EXTERNAL DONORS:

The National Reconciliation Framework provides the space for the forum of experts, and the Provisional Constitution provides orientation, in mentioning the need for the establishment of a Truth and Reconciliation Commission in the future, and the primacy of *Shari'a* Law over statutory and customary law.

However, the process should seek to not become politicised. Both the FGS and its donors should avoid influencing the agenda of the central experts' forum and the regional forums. Financial support could be given to documenting past violations and crimes, facilitating research, establishing documentation centres, protecting them, and also guaranteeing the security of the witnesses.

Both the FGS/FMS and the donors should avoid steering the process, but rather ensure that it is Somali-led. This should involve a mixture of actors credibly representing the diverse sections and milieus of Somali society coming together and openly discussing the matters at hand, allowing for a successful TJ process to unfold that is Somali-owned and thus has legitimacy in the eyes of the people concerned.

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11 ANNEXES

11.1 QUESTIONNAIRE 1: LEGAL EXPERTS - POLITICAL ELITES

GENERAL/INTRODUCTORY QUESTIONS

1. What are the relevant forms of law in Somalia? How do they relate to each other?
    a. Please explain the differences and/or similarities between *Shari'a* and *Xeer*.
    b. Please explain the differences and/or similarities between *Shari'a* and state law or international law?
    c. What conceptions of human rights can be found in *Shari'a*? Are internat. Human rights and *Shari'a* compatible? In which way (regarding persecution of crimes)?

ACCOUNTABILITY

2. What do you think about individual accountability compared with collective accountability for crimes in Somalia?
    a. What does *Shari'a* say about individual accountability for wrongs/crimes?
    b. What about individual accountability under *Xeer*?
    c. How do ordinary Somalis react if they are held accountable individually, e.g., for a killing? What role does clan solidarity play in this context?

ABOUT PAST VIOLENCE

3. Which were the most relevant violent events/episodes of violence in Somalia in the past, and how should one deal with it?
    a. Who was/is responsible for the past violence?
    b. Have you personally suffered? If so, explain.
    c. What does *Shari'a* say about crimes committed in the past—e.g., 10, 20, or 30 years ago?
    d. In which way can the facts about past crimes (e.g., in the times of Siad Barre, under the warlords, or afterwards) be established?
    e. Do you personally think that it is important and desirable to look into past violence in Somalia to hold perpetrators accountable? Why? Why not?
    f. According to your opinion: shall the sexual violence/rapes committed in the past (e.g., 1990s) against many Somali women be persecuted and adjudicated today? How (procedures?)
    g. How can Somalis deal with violence perpetrated against them by external intervention forces?

ABOUT IMPORTANT CONCEPTS

4. Explain the most relevant legal and religious concepts under *Shari'a* related to dealing with the violent past.

    a. What is the role of forgiveness regarding past wrongs/crimes?

    b. What role does repentance play?

    c. What is the role of finding the truth regarding past violence/crimes?

    d. What do you think about "remembering" violence? Is it good/not good? Why?

    e. What does Islam say about reconciliation?

    f. What is justice? How can people find justice?

    g. Have you ever heard about "transitional justice"? If so, what do you think of it?

Explain the most relevant legal concepts under Xeer related to dealing with the violent past

FUTURE OF SOMALIA

5. How can a peaceful, just, and stable society be reached against the backdrop of decades of violence in Somalia?

    a. Is it necessary to deal with past crimes to lead Somali society into a stable and prosperous future? Why? Why not?

    b. How about many women, many members of minority groups and others who suffered enormous violence in the past decades? How can they find healing?

    c. What are the main obstacles to come to terms with the violent past at the local and national level?

    d. Do you think former perpetrators of past crimes, like the warlords, who partly have powerful positions today, should held accountable?

11.2 QUESTIONNAIRE 2 - ORDINARY PEOPLE

1 PERSONAL BACKGROUND

1.1 Name (magacaa)?

1.2 Age (goormaad dhlatay)?

1.3 Sex: O lab O dhedig

1.4 Current address/city (Xageed degen tahay?)

1.5 Malcaamad, dugsiga hoose/dhexe/saare miyaad ka baxday, jamacadda miyaad dhameysey?)

1.6 Xageed ku dhalatay?

1.7 Xageed ku barbartay?

1.8 Qolo maad tahay? Yaad ka si tahay

2 ABOUT PAST VIOLENCE

2.1 In your opinion: which were the worst crimes and/or gross human rights violations that were

2.2 committed in Somalia in the past decades (1970s and 2021)?

2.3 What is the greatest injustice that happened in Somalia in the past (1970s until today)?

2.4 What violence have you experienced/witnessed?

2.5 What about looting/taking of property: have you or people you know well been looted?

2.6 Have you yourself been active in the civil war?

2.7 What role have you played in the civil war?

2.8 How did this experience (as victim OR perpetrator) impact your life? Is the experience still relevant today? How?

3 POLITICAL OR LEGAL REACTIONS

3.1 What has been done to deal with these crimes or injustices which you just mentioned?

3.2 Are you aware of any collective effort in Somalia to deal with the violent past? If so, explain…

3.3 Regarding your own experiences of violence and injustices: what has been done to provide you with justice? Have you received compensation or any other form of justice? If so, from whom or how? Were you satisfied? Why/why not?

4 ABOUT JUSTICE AND ACCOUNTABILITY

4.1 How should the past wrongs be addressed?

4.2 What is "justice" in your eyes? How can it be reached?

4.3 If you yourself experienced a violation of your rights, how should it be addressed? In which way would you expect to receive justice for what you experienced?

4.4 There are many people in Somalia who committed crimes in the past decades: warlords, militiamen, gangsters, politicians… Should they individually be held accountable? Why/why not?

4.5 Do you think it is good for you personally to remember the violent past? Please explain…

4.6 Should the past be remembered collectively—among all Somalis? Explain…

4.7 Should there be any punishment for the well-known perpetrators in Somalia—the warlords, the terrorists, the rapists etc.? Explain…

4.8 Should property—e.g., houses in Mogadishu—be given back to former owners? Explain…

4.9 **Obstacles**

4.10 What are the main obstacles to come to terms with the violent past at the local and national level?

4.11 How could they be overcome?

4.12 How do you see the presence of foreign military actors in Somalia? Does it help to find peace and justice or not? Please explain…

4.13 What about Somali culture?Are there any obstacles on the way to find justice (e.g., also for women or girls who experienced sexual violence)?

4.14 Can perpetrators of violence—e.g., rape, murder, looting—today speak about their crimes openly? Explain

5 LEGAL PROVISIONS

5. Which form of law do you personally prefer if you need to settle a conflict or legal issue? Explain why…

6. Can individual perpetrators be held accountable under *Xeer*? If so, how?

7. Can individual perpetrators be held accountable under *Shari'a*? If so, how?

8. Can individual perpetrators be held accountable under state law? If so, how?

9. Which role does international law play in this regard?

10. Should perpetrators of past crimes in Somalia in the context of war and civil war be forgiven or not? Explain?

6 CONCLUSION

6.1 How can one find the truth about what happened (e.g., 1991–1993 in Mogadishu, Baidoa etc.)?

6.2 Do you think that stability for Somalia could be attained without addressing past crimes/injustices? Explain…

6.3 If you had the power to change one thing in Somalia, what would you change?

1.1 ENDNOTES

1 Lugar de Memoria is known in English as the 'Place of Memories, Tolerance, and Social Inclusion'.

2 Somalia's Constitution of 2021, retrieved from https://www.constituteproject.org/constitution/Somalia_2012.pdf?lang=en, on 13 November 2021 at 07:34 CET.

3 It took several decades until the ideals of Nuremberg became generally accepted. The period of the Cold War was a setback in this regard, since it favoured strong states and political alliances over non-violence and human rights (Hankel, 2008: 8–9).

4 Of course, there are many more debates within the wide filed of TJ research. The debates picked here were selected because they have a particular relevance to the topic at hand: TJ in Somalia.

5 In the Somali context, it is clear that currently statutory law can at least be enforced. Given that the security apparatus, including the police, is heavily clan-based, policemen who shall execute an order of a court against the will of local lineage-elders face real challenges. These challenges are even direr since, still, large parts of the Somali populations have access to small arms. In principle, if elders under customary law come to a decision, they normally can enforce the decision, since all parties involved previously agreed on it (this is the advantage of 'consensual' decision-making over top-down decisions by state courts); however, this becomes increasingly problematic when dealing with disputes of scale.

6 For the purposes of this research, we have focused on recent Somali history and have not explored mass violence and gross violations during the colonial period.

7 The leader in the north was Sheekh Cali Warsame, an Isaaq man from Bur'o. His deputy was Dhulbahante. In general, Al Ittihad members came from all Somali clan families and even from caste and so-called 'minority' groups. The idea of the movement was to unite and fight on the basis of religion, not on the basis of 'clan'. The reality was sometimes different, and to overcome tol was a permanent struggle (Hoehne, 2009).

8 Other fall-back options in the Somali context would be religious congregations or other groups, including Al-Shabab.

9 We analyse the post-war process of reconciliation in Somaliland in Chapter 6.

10 The details of individual accountability are prescribed in Surah Al-Maaida (5: 45): "We ordained therein for them: "Life for life, eye for eye, nose or nose, ear for ear, tooth for tooth, and wounds equal for equal." But if any one anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (No better than) wrong-doers."

11 Amnesty is one of the usual measures taken within larger TJ processes. The basic idea is that victims of violence accept to 'forgive and forget' about the crimes and therefore influential perpetrators (e.g., military and/or political leaders) agree to social and political transformations. Thus, for the 'common good' some crimes shall go unpunished, because otherwise the desired transformations cannot take place. Yet, more recently, unconditional amnesty has become increasingly unacceptable, given strong international but partly also local drives for holding human rights violators individually accountable (Fijalkowski: 2020: 126–127).

12 In Spain, after General Franco's death in 1975, left and right-wing parties agreed on the pact of forgetting (Spanish: el pacto del olvido) to avoid dealing with the legacy of Francoism. In Somaliland, we argue, it was not about 'forgetting', which hardly can be agreed upon, but about remaining silent, which is based on a conscious decision and includes remembering.

13 < https://law.stanford.edu/event/yousuf-v-samantar-defending-human-rights-through-extraterritorial-litigation-room-90/> accessed 25 July 2021. See also the summary of the case by Pamela Merchant, former Executive Director of CJA, in The Worldpost (a part of Huffingtonpost), available at <www.huffingtonpost.com/pamela-merchant/general-samantar-trial_b_1305733.html> accessed 25 July 2021.

14 Cf., among others, Qur'an Sura 21 (al-Anbiyā'), Verse 107: وَمَآ أَرۡسَلۡنَٰكَ إِلَّا رَحۡمَةٗ لِّلۡعَٰلَمِينَ.

15 Mandate and Crimes under ICTY Jurisdiction, retrieved from https://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction, on 13 November 2021 at 09:04 CET.

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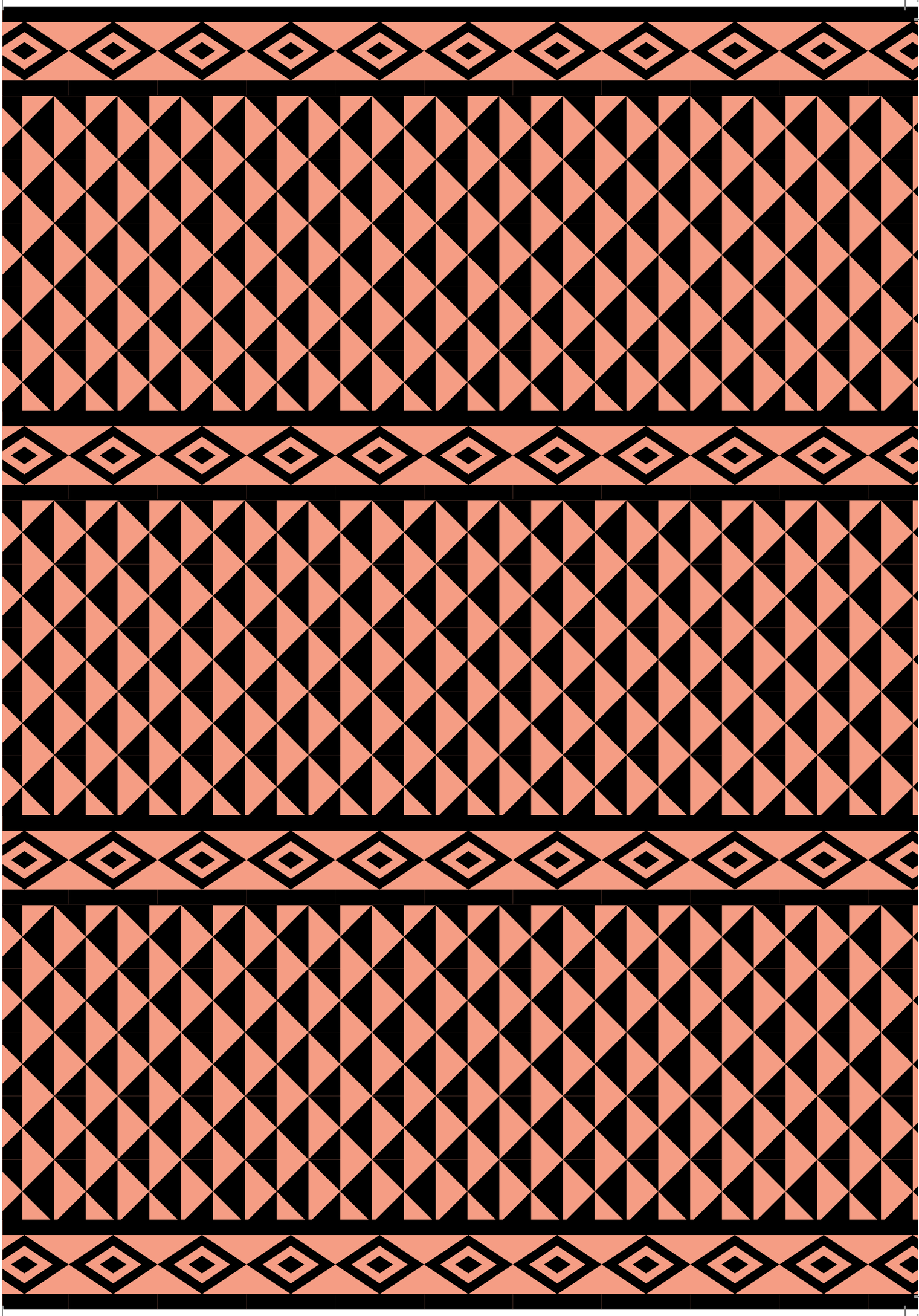
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