

ARTICLE

POLITICS OF JUSTICE, HUMAN RIGHTS AND RECONCILIATION IN THE COLLAPSED STATE OF SOMALIA

*Ahmed Ali M Khayre**

ABSTRACT

For societies emerging from repressive regimes or violent conflict, finding an appropriate response to deal with past gross and flagrant abuses of human rights have been dauntingly challenging. Undoubtedly, the situation is much more precarious and complex in totally collapsed states where there is no functioning central authority. By and large, most studies on accountability mechanisms for past human rights violations focus on the situations of transition from repressive regimes to democracy. In consequence, the questions and different challenges emanating from on-going violent conflicts in collapsed states, and the role of criminal accountability in those situations are not sufficiently examined. In view of that, the focus of this article is to investigate the role that transitional justice can play in the protection and promotion of human rights in the collapsed state of Somalia. Furthermore, this article also examines the intrinsic interplay between politics, human rights, peace, justice and reconciliation in such situations. Finally, the article suggests that instead of a haphazard application of accountability mechanisms that often exacerbate the situation, what is imperative is a policy that takes past atrocities into account and devises mechanisms geared towards both dealing with the past and preparing for future stability.

Introduction

In the preamble of the United Nations Charter, the member states pledge “to save succeeding generations from the scourge of war, which twice in our lifetime have brought untold sorrow to mankind”.¹ Since the establishment of the United Nations, the number of inter-state wars and other related violent conflicts has declined. At the same time, there has been a considerable

**Dr. Ahmed Ali M. Khayre is a human rights and humanitarian law researcher. He holds a PhD from the Birkbeck School of Law, University of London; MA in International and European Legal Studies (University of Utrecht, Netherlands). An earlier version of this paper was presented at the 2012 Dealing with the Past and Transitional Justice Conference, Human Rights Law Centre, University of Nottingham. Email: Ahmedakhayre@gmail.com.*

¹ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, <http://www.unhcr.org/refworld/docid/3ae6b3930.html>.

proliferation of internal conflicts with devastating effects on the world population.² Admittedly, this high profile pledge has not sufficiently succeeded in preventing an estimated 250 internal conflicts that have occurred since the Charter was adopted. These devastating conflict situations have claimed more than 86 million victims.³

During the period between the criminal trials in the aftermath of World War Two in Nuremberg and Tokyo, and the end of Cold War, there were no major prosecutions for widespread human rights violations. In fact, many egregious atrocities were purposefully perpetrated with impunity.⁴ The existence of states' treaty-based positive obligation to investigate, prosecute or punish the violators of some egregious crimes notwithstanding, the issue had not, surprisingly, been a main concern to either human rights advocates or states until the end of the Cold War.⁵ On the one hand, the appalling crimes committed within states were not the concern of other nations due to the paramount importance attached to the notion of national sovereignty and other expedient political considerations.⁶ Consequently, the exceedingly polarising political rivalry between the superpowers had not been conducive to the creation of a general consensus on how to deal with the massive human rights violations internationally.⁷

Meanwhile, the end of military rule in South America and the end of the Cold War created an opportunity for individual states, and the international community as a whole, to devise suitable ways to deal with heinous crimes of previous regimes.⁸ Although the establishment of two ad hoc international criminal tribunals and several hybrid courts signalled the seeming willingness on the part of the United Nations to take the issue of justice seriously, numerous atrocious human rights abuses are still being carried out with impunity in different parts of the world.⁹

The notion of transitional justice is defined by Ruti Teitel as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."¹⁰ Noticeably, this definition is narrow on two accounts. First, it covers only the situations where human rights violations are noticeably perpetrated by state agents and the old regime is succeeded by a more democratic one. Second and more importantly, non-judicial mechanisms seem to be excluded. In a more optimistic vein, the United Nations adopted a more expansive definition of the concept of transitional justice explicitly encompassing:

² J. Balint, 'An Empirical Study of Conflict, Conflict Victimization and Legal Redress' in C.C. Joyner and C.M. Bassiouni (eds.), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights*, Pau: L'Association Internationale de Droit Penal 1998, 101-124, p. 107.

³ M.C. Bassiouni, 'Searching for Peace' and Achieving Justice: The Need for Accountability', *Law and Contemporary Problems* 1996, p. 10.

⁴ T. Meron, 'International Criminalization of Internal Atrocities', *The American Journal of International Law* 1995-3, p. 554; J.L. Balint, 'The Place of Law in Addressing International Regime Conflicts, Law and Contemporary Problems', *Law and Contemporary Problems* 1997-4, pp. 103-104; C.C. Joyner, 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability', *Denver Journal of International Law and Policy* 1997-1998-4, p. 593.

⁵ N. Roht-Arriaza, 'Combating Impunity: Some Thoughts on the Way Forward', *Law and Contemporary Problems* 1996-4, p. 93.

⁶ T. Forsberg, 'The Philosophy and Practice of Dealing with the Past: Some Conceptual and Normative Issues', in N. Biggar (ed.), *Burying the Past: Making Peace and Doing Justice after Civil Conflict*, Washington, D.C: Georgetown University Press 2007, 57-72, p. 58.

⁷ A. Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', *European Journal of International Law Journal* 1998, p. 8.

⁸ 'Questions of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)', Revised Final Report prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

⁹ Amnesty International, Amnesty International Report 2014/2015: The State of the World's Human Rights, Index: POL 10/0001/2015, 25 February 2015.

¹⁰ R. G. Teitel, 'Transitional Genealogy', *Harvard Human Rights Journal* 2003, p. 69.

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 (and none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.¹¹

For the purposes of this article, the latter definition will be the basis for our inquiry. In the meantime, many post-conflict societies still tenaciously struggle to deal with past atrocities and in that respect the debate about the transitional justice and how best to implement it remains unabated.¹² In the case of Somalia, even though the UN Security Council has been disturbed "by the magnitude of the human suffering caused by the conflict" and recognised that "the continuation of the situation in Somalia constitutes threat to international peace and security", no meaningful attention has been given to dealing with past human rights violations.¹³ In fact, Somalia has been devastated by unremitting human rights abuses for the last thirty years. In the last decade of its rule from 1980 to 1990, the military government in Somalia became increasingly repressive. For instance, according to the 1989 Human Rights Watch report on Somalia and the reports of a number of other human rights organisations, over several hundred thousand civilians were unlawfully killed by the military government. These reports also reveal that rebel groups perpetrated massive human rights violations.¹⁴ After the ouster of the military regime in 1991, the rebel leaders were unable to agree on power sharing and the country was divided into fiefdoms controlled by warlords, clan elders, and regional administrations. As a result, human rights and humanitarian law violations continued and further intensified.¹⁵

Not only Somali perpetrators have been involved in human rights violations, but foreign troops under UN command have also been implicated. For example, in 1993 the Commission on Human Rights received reports alleging that United Nations troops in Somalia perpetrated gross violations of human rights and humanitarian law.¹⁶ Subsequently, the United Nations were urgently asked to initiate an independent and impartial investigation into the abuses and loss of life caused by the UN forces.¹⁷ Unfortunately, no meaningful investigations were carried out as a result either by the United Nations or by individual troop contributing countries.¹⁸ Furthermore,

¹¹ United Nations, 'The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies', Report of the Secretary-General, S(2004), 616, para. 8.

¹² N.J. Kritz (ed.), *Transitional Justice: How emerging Democracies Reckon with Former Regimes*, Vol. 3, Washington, D.C: United States Institute of Peace Press 1995; N. Biggar (ed.), *Burying the Past: Justice, Forgiveness, and Reconciliation in the Politics of South Africa, Guatemala, East Germany, and Northern Ireland*, Washington, D.C: Georgetown University Press 2003; B.A. Leebaw, 'The Irreconcilable Goals of Transitional Justice', *Human Rights Quarterly* 2008, pp. 95-118; M.J. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', *Harvard Human Rights Journal* 2002-39; Teitel, 'Transitional Justice Genealogy'.

¹³ UN Security Council Resolution 746, S/RES/746 (1992) of 17 March 1992; UN Security Council Resolution 767, S/RES/767 (1992) of 24 July 1992; UN Security Council Resolution 775, S/RES/775 (1992) of 28 August 1992; UN Security Council Resolution 1838, S/RES/1838 (2005) of 7 October 2005.

¹⁴ Africa Watch, *Somalia: Government at War With its Own People*, New York: Africa Watch 1990; Amnesty International, 'Somalia: A Long-term Human Rights Crisis', AL Index: AFR/52/26/88.

¹⁵ Human Rights Watch Africa, *Somalia Beyond Warlords: The Need for a Verdict on Human Rights Abuses*, Vol. 3, New York: Africa Watch 1993; Physicians for Human Rights, 'No Mercy in Mogadishu: The Human Cost of the Conflict and the Struggle for Relief', 26 March 1997; Amnesty International, 'Somalia: A Human Rights Disaster', AL Index: AFR 52/01/92.

¹⁶ Commission on Human Rights, 'Report by the Independent Expert, Mr. F.F. Kozoguzi, on the Condition in Somalia', Prepared in Accordance with Paragraph 6 of Commission on Human Rights Resolution 1993/86, E/CN.4/1994/77, para. 14; UN Security Resolution 794, S/RES/794 (1992) of 3 December 1992 mandated US led Unified Task Force(UNITAF), later UNOSOM II took over from UNITAF.

¹⁷ Commission on Human Rights, 'Report of the Special Rapporteur, Ms. M. Rishmawi', E/CN.4/1998/86, 16 January 1996, para. 97; Amnesty International, Human Rights and Peacekeepers, AL INDEX: 1OR 40/01/94, para. 21; African Rights, 'Somalia: Human Rights Abuses by United Nations Forces', London, July 1993.

¹⁸ Amnesty International, 'Human Rights and Peacekeepers', (1994) para. 21.

in late 2006, Ethiopian troops invaded Somalia with United States' financial and political support.¹⁹ Subsequently, Ethiopian troops, Somali Transitional Government troops and to a lesser extent insurgent militias perpetrated massive violations of human rights and humanitarian law including war crimes and crimes against humanity. The most frequent violations of humanitarian law included, among others, indiscriminate bombardment of densely populated areas, unlawful killing of thousands of unarmed civilians, rape, and the use of civilians as human shields.²⁰ However, as Georgette Gagnon, Africa Director of *Human Rights Watch* rightly observed: “[t]he world has largely ignored the horrors unfolding in Somalia, but Somali families are still left to confront violence that grows with every passing day.”²¹ Additionally, the current African Union troops deployed in Somalia are also accused of perpetrating human rights violations including sexual violence and exploitation with impunity.²² By and large, most studies on accountability mechanisms for past human rights violations focus on the situations of transition from repressive regimes to democracy. In consequence, the questions and different challenges emanating from on-going violent conflicts in collapsed states, and the role of criminal accountability in those situations are not sufficiently examined.

The focus of this article is to investigate the role that transitional justice can play in the protection of human rights in totally collapsed states. The argument in this article proceeds in three parts. Part I considers the failure of Somali ‘stakeholders’ and the international community to include human rights violations in negotiations aimed at ending the protracted conflict in Somalia. It seems that impunity is seen as a reasonable political price worth paying for peaceful settlement. Part II compares different transitional justice mechanisms including judicial prosecutions, truth commission, lustration and amnesty, and their applicability to totally collapsed states. Part III explores the role that universal jurisdiction can play in compensating the lack of capacity in dealing with massive human rights abuses in collapsed states. The article argues that instead of a haphazard application of accountability mechanisms that often exacerbate the situation, what is imperative is a policy that takes past atrocities into account and devises mechanisms geared towards both dealing with the past and preparing for future stability.

I. Failure to Discuss Past Atrocities during Somali Peace Negotiations

In more than the fifteen reconciliation conferences that have been organised to date for Somali groups since 1991, the issue of justice has not been addressed. This, in spite of the fact that the Security Council noted with profound regret and concern “the continuing reports of widespread violations of international humanitarian law and the general absence of the rule of law in Somalia.”²³ Furthermore, the Secretary-General of the United Nations lamented “the indiscriminate use of force and the killing of civilians, mostly non-combatants.”²⁴ In his book *Crimes against Humanity*, Geoffrey Robertson quotes the following joke: “[w]hen someone kills a

¹⁹ B. Slavin, ‘US Support Key to Ethiopia’s Invasion’, *USA Today*, 8 January 2007; for a discussion on the legality of the Ethiopian intervention, see A.A.M. Khayre, ‘Self-Defence, Intervention by Invitation, or Proxy War? The Legality of the 2006 Ethiopian Invasion of Somalia’, *African Journal of International and Comparative Law* 2014-22.

²⁰ Human Rights Watch, “‘So Much to Fear’: War Crimes and the Devastation of Somalia”, 8 December 2008; Human Rights Watch, ‘Shell-Shocked: Civilians under Siege’, 13 August 2007.

²¹ Human Rights Press Release, ‘Somalia: War Crimes Devastate Population’, 8 December 2008.

²² S. Raghavan, ‘Rising Civilian Toll Ignites Anger at African Force as it Battles Somali Militants’, *Washington Post*, 18 July 2010; Amnesty International, ‘Civilians in Somalia Face Ongoing Human Rights Violations’, AFR 52/003/2010, 25 March 2010; Human Rights Watch, ‘The Power These Men Have Over Us: Sexual Exploitation and Abuse by African Union Forces in Somalia’, 8 September 2014.

²³ United Nations Security Council Resolution 814, S/RES/814 (1993) of 26 March, 1993.

²⁴ United Nations, ‘Report of the Secretary-General on the Situation in Somalia’, S/1997/135, 16 September 1997, p. 32; see also UN Security Council, ‘Report of the Secretary General on Somalia’, S/2016/27, 8 January 2016, paras. 50, 52.

man, he is put in prison. When someone kills 20 people, he is declared mentally insane. But when someone kills 200,000 people, he is invited to Geneva for peace negotiations.”²⁵ Sadly, it seems that in the Somali context this has been a strategy that has been frequently applied with deadly consequence. It is noteworthy to state that the United Nations acknowledged “the continued outbreaks of hostilities are motivated by individual rivalries of faction leaders and criminal activities rather than wider issues.”²⁶ Most strikingly yet, some diplomats involved in the Somali peace conference acknowledge in hindsight that “they might have overstated the importance of the warlords and their capacity to deliver any sort of stability.”²⁷ Evidently giving warlords a legitimacy to dominate peace conferences and be seen as the sole representatives of the Somali population was not a correct approach. Consequently, it can be argued that the United Nations and other organisers of past peace conferences for Somalia inadvertently encouraged and promoted violence by legitimizing anyone who utilised it and made a prerequisite to be accepted as a representative leader.²⁸ In the first decade after the collapse of the central government of Somalia in 1991, anyone who assembled militias or initiated a war to capture a territory automatically got an invitation to attend the next peace and reconciliation conference organised for Somalia. As a result, there had been a proliferation of warring factions in Somalia. For example, “the Addis Ababa agreement of 27 of March 1993 was signed by 15 factions.”²⁹ In October 1996, the Ethiopian government brought together 27 faction leaders in Sodere to attend another reconciliation conference.³⁰ The United Nations recognised that “this multiplication of factions will complicate further the prospects for the preparatory meeting and the subsequent national reconciliation conference and must be overcome without further delay.”³¹ In that respect, as Akhavan argues, stigmatising criminal conduct and setting other criteria for representation than participation of the violence may massively contribute to reconciliation.³²

It is not peculiar to Somalia that perpetrators of heinous crimes enjoy impunity. In general, even though the violent conflicts, whether internal or international, have sadly victimised millions of innocent people, unfortunately negligible attention has been paid to the investigation and prosecution of these crimes.³³ Only a very limited number of individuals were held accountable for the crimes they allegedly perpetrated irrespective of the severity and magnitude of the violations involved. The primary reason that these perpetrators have been escaping accountability for their human rights violations is that more importance is attached to political settlements. In most (post)conflict situations, impunity is seen as a reasonable political price to be paid to reach a political settlement intended to ensure an end to ongoing costly violent confrontation or repressive regimes.³⁴ In fact, the rights of victims and their legitimate longing for justice are subordinated to

²⁵ G. Robertson, *Crimes against Humanity: The Struggle for Global Justice*, London: Penguin Press 1999, p. 190.

²⁶ United Nations, ‘Report of the Secretary-General on the Situation in Somalia’, S/2003/231, 26 February 2003, para. 54.

²⁷ S.Healy, *Lost Opportunities in the Horn of Africa: How Conflicts Connect and Peace Agreements Unravel*, London: Chatham House 2008 p. 27.

²⁸ A.I. Samatar & A.I. Samatar, ‘Somali Reconciliation: Editorial Note’, *Bildhaan*, 2003; See also UN Security Council, ‘Report of the Secretary-General on the Situation in Somalia’, S/2000/1211, 19 December 2000.

²⁹ UN Security Council, ‘Report of the Secretary General on the Situation in Somalia’, S/2000/1211, 19 December 2000, paras. 8, 9.

³⁰ UN Security Council, ‘Report of the Secretary-General concerning the situation in Somalia Part II’, S/1997/135, 17 February 1997, para. 25.

³¹ UN Security Council, ‘Report of the Secretary-General to the Security Council on Somalia’, S/1994/977, 17 August 1994, para. 23.

³² P. Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’, *American Journal of International Law* 2001, p. 7.

³³ Bassiouni, ‘Searching for Peace’, p. 11.

³⁴ M.S. Ellis, ‘Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability: The Role of International War Crimes Tribunals’, *Journal of National Security Law & Policy* 2006-2008-2, pp. 111-12.

political trade-offs.³⁵ Mostly negotiating with the individuals who are accused of gross violations of human rights is necessary for the sake of achieving peace.³⁶

The quandary faced by mediators and others who are involved in negotiations is whether to prioritise peace or justice. Reconciliation after war and a grotesque pattern of gross violations of human rights is a matter of creating peace in the present, and of sustaining peace in the future.³⁷ For a start, peace is not simply a matter of stopping physical violence. It is also a matter of helping people overcome what has been done to them and of overcoming what they have done, so that a future might be built. In that respect, the UN Report on Peace Operations recognised that peace building is “more than just the absence of war” and that it encompasses, among others “promoting conflict resolution and reconciliation techniques”.³⁸

Some scholars observe that “without justice there can be no lasting peace”, arguing that peace entails more than a cessation of hostilities.³⁹ In light of that, Bassiouni contends that if justice is neglected any peace achieved will undoubtedly be temporary.⁴⁰ Similarly, Casesse suggests that “[u]ntil the persons responsible for horrific crimes that shock the conscience of mankind are brought to book, ethnic and nationalistic hatred, the desire for revenge and the seeds of armed violence will survive and threaten internal and international peace.”⁴¹ Equally, other scholars have emphasised the positive effects of prosecution and relentless pursuit of justice. In view of that, Goldstone, while recognising the possibility of detrimental effect that insistent pursuit of justice may have on peace negotiations, is yet convinced that the benefits of justice outweigh the eventual costs. He asserts that the threat of prosecution and actual indictment of senior political figures have helped rather than hindered peace negotiations with respect to Bosnia Herzegovina.⁴² In contrast, other scholars do not recognise a dilemma and are convinced that peace takes priority. For instance, Andrew Rigby argues that, in actuality, peace and justice are incompatible and it is impossible to pursue both goals simultaneously. In his opinion, pursuit of justice is only possible in peaceful societies.⁴³ Equally, others suggest that the pursuit of criminal prosecution will hamper efforts at reconciliation.⁴⁴ In that connection, some commentators postulate that this dichotomy between peace and justice is untenable, misconceived and often repugnantly misleading.⁴⁵ In actuality, there is an intrinsic interplay between peace and justice. By the same token, if there is no peace and security it will be difficult to carry out any

³⁵ P.R. Williams & K.M. Waller, ‘Coercive Appeasement: The Flawed International Response to the Serbian Rogue Regime’, *New England Law Review* 2002, pp. 825-7; M. Scharf & P. Williams, ‘The Functions of Justice and Anti-Justice in the Peace-Building Process’, *Case Western Reserve Journal of International Law* 2003, p. 164; Bassiouni, ‘Searching for Peace’, p. 12.

³⁶ M.S. Ellis, ‘Combating Impunity’, p. 112.

³⁷ Scharf & Williams, ‘The Functions of Justice’, p. 165.

³⁸ United Nations, ‘Report of the Panel on United Nations Peace Operations’, UN Doc./A/55/305-S/2000/809, 21 August 2000, para. 3; this Report is generally referred to as ‘Brahimi Report’ after its main writer, L. Brahimi.

³⁹ F.E. Allen, ‘Peace through Justice’, *University of Cincinnati Law Review* 1948, p. 247.

⁴⁰ M.C. Bassiouni, ‘Justice and Peace: The Importance of Choosing Accountability over Realpolitik’, *Case Western Reserve Journal of International Law* 2003; Bassiouni, ‘Searching for Peace’, p. 12.

⁴¹ A. Casese, ‘Reflections on International Criminal Justice’, *Modern Law Review* 1998, p. 10.

⁴² R. Goldstone, ‘Peace versus Peace’, *Nevada Law Journal* 2005-2006, p. 421.

⁴³ A. Rigby, *Justice and Reconciliation: After the Violence*, Boulder: Lynne Rienner 2001.

⁴⁴ K. Henrard, ‘the Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law’, *Michigan State University DCL-Journal of International Law* 1998, p. 595, 635.

⁴⁵ C. Bell, *Peace Agreements and Human Rights*, Oxford: Oxford University Press 2008, p. 303; A. Seibert-Fohr, ‘Reconstruction through Accountability’, *Max Planck Yearbook of United Nations Law* 2005, p. 559.

accountability measures.⁴⁶ It seems that this above discussion pertains to countries with functioning governments.

In Somalia's case, domestic prosecution is not an option because there are no functioning institutions to implement such mechanisms. Even if a functioning government is instituted it may be unavoidable to delay any plans to deal with past atrocities.⁴⁷ In addition, if the new authority makes an effort to hold everyone who played a part in the heinous atrocity accountable, the newly created situation may be "wholly unmanageable and extremely destabilising to the transition."⁴⁸ The only option for Somalia at the moment to deal with past atrocities is an international tribunal or a truth commission to be established by the United Nations.⁴⁹ However, its selection of a certain conflict situation to establish a tribunal on is not entirely determined by the severity of the atrocity or the magnitude of the conflict. Such important decisions are based upon the possibility of obtaining political consensus to pass a resolution under Chapter VII of the United Nations Charter.⁵⁰ Worse yet, political motivations rather than remedying human rights abuses often underlie and motivate the decision to name and choose which conflict to focus on.⁵¹ In view of that, Mahmood Mamdani pertinently illuminates the reasons why the similar deaths of civilians in Iraq and Darfur are named differently; counter-insurgency in Iraq's case and genocide in the Darfur conflict. By the same token, the Congo conflict which claimed the lives of more than four million victims is simply identified as civil-war, in comparison with Darfur conflict which is similar in nature, although less grave in some ways.⁵² That point is vividly demonstrated when the UN Security Council condemned "the gross and systematic violation of human rights" and recently referred the situation of Libya to the International Criminal Court, immediately after the hostilities between the government and rebel forces started.⁵³ In stark contrast, the Somali situation, which was worse than that of Libya in terms of duration and casualties, was conveniently ignored.⁵⁴ According to the United Nations the situation in Somalia constitutes "the worst humanitarian crisis in Africa."⁵⁵ In fact, a UN humanitarian officer admitted that "if this were happening in Darfur, there would be a big fuss. But Somalia has been a forgotten emergency for years."⁵⁶

In 2006, immediately after the Ethiopian invasion of Somalia, the Secretary-General of the United Nations proclaimed that "the current situation may present the best opportunity that Somalia has had in years to find a long term solution to its protracted conflict by putting in place a functioning and effective state [...]"⁵⁷ Ironically, it is the period when the defeated warlords were returned and allowed to occupy all positions of power in the transitional government.⁵⁸

⁴⁶ J. Snyder & L. Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', *International Security* 2003, p. 6.

⁴⁷ D. Wippman, 'Atrocities, Deterrence, and the Limits of International Justice', *Fordham International Law Journal* 1999, p. 480.

⁴⁸ T.L.H. McCormack, 'Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law', *Albany Law Review* 1996-1997, p. 683.

⁴⁹ The possibility of establishing different transitional justice mechanisms in Somalia will be discussed in the next section of this article.

⁵⁰ Meron, 'International Criminalisation of Internal Atrocities', p. 554, 555.

⁵¹ J.E. Alvarez, 'Crimes of States/ Crimes of Hate: Lessons From Rwanda', *Yale Journal of International Law* 1999, pp. 452-58.

⁵² M. Mamdani, 'The Politics of Naming: Genocide, Civil War, Insurgency', *London Review of Books* 2007, pp. 5-8.

⁵³ United Nations Security Council Resolution 1970, S/RES/1970 (2011), of 26 February 2011.

⁵⁴ 'Libya Revolution Casualties Lower than Expected, Says New Government', *The Guardian*, 8 January 2013.

⁵⁵ 'Somalia: A Humanitarian Crisis Disregarded', *Refugee Rights News*, 2008-4, at: <http://www.refugee-rights.org/Publications/RRN/2008/June/V4.I4.Somalia.html>.

⁵⁶ G. Gettleman, 'Somalia Worst Humanitarian Crisis in Africa, UN Says', *New York Times*, 19 November 2007.

⁵⁷ United Nations, 'Report of the Secretary-General on the Situation in Somalia', S/2007/115, 23 February 2007, para. 62; see also United Nations, 'Report of the Secretary-General on the Situation in Somalia', S/2007/659, 7 November 2007, para. 42.

⁵⁸ Sally Healy, *Lost Opportunities in the Horn of Africa*, p. 26.

Perhaps more strikingly still, it was the same period that Human Rights Watch vociferously reported that the violent conflict in the country “generated a human rights and humanitarian crisis on a scale not seen since 1990s.”⁵⁹ Nevertheless, the Secretary-General of the United Nations seemed to belatedly recognise the importance of gathering of evidence of past atrocities in the Somali context. In that respect, he recorded his support for “the proposal to document the most serious violations committed as an essential step in the fight against impunity and for the creation of justice and reconciliation mechanism.”⁶⁰ It is important to recall, however, that almost eight years earlier, the independent expert, Ghanim Alnajjar urged the Security Council to “consider a proposal for the establishment of a committee of experts to investigate allegations of past atrocities in Somalia.”⁶¹ The request of the independent expert was not heeded. Consequently, the past heinous human rights violations in Somalia are not subject to any investigation. It is not only criminal prosecutions that can be used to address past atrocities, there are other mechanisms that can be employed.

II. Comparing Different Approaches to Justice, Judicial Prosecution, Truth Commissions and Amnesty

There is a range of ways of dealing with massive past human rights violations including, among others, judicial mechanisms, truth commissions, lustration, compensation, amnesty whether blanket or de facto.⁶² Nonetheless, the manner in which people in a certain country deal with the past has a fundamental determinant effect not only on the present but inescapably on whether that society will realise durable peace and political stability and governance.⁶³ The type of mechanism a certain country chooses is heavily influenced by the contextual situation and the type of political transition. In that regard, the United Nations has rightly recognised the need and importance “to eschew one-size-fits-all formulas and importation of foreign models [...]” and instead ardently encouraged the support of domestic assessments, needs and aspirations.⁶⁴ Furthermore, even though the domestic situation is partially significant, the decisions are also profoundly informed by particularities associated with specific “periods of political flux.”⁶⁵ Jeremy Sarkin catalogues three broad possible transition scenarios, namely reform, compromise and overthrow.⁶⁶

The first scenario of reform is contemplated when the old regime still wields considerable power and plays a fundamental part in moving from repressive government to a democratic one. In this case, if justice is relentlessly pursued it may threaten the fledgling government trying to bring about positive change.⁶⁷ The lopsided power balance is a substantial impediment to the implementation of proper transitional justice. In such situations, judicial prosecutions are often

⁵⁹ Human Rights Watch, ‘Shell-Shocked: Civilians Under Siege’, August 13 2007.

⁶⁰ United Nations, ‘Report of the Secretary-General on Somalia’, S/2010/447, 9 September 2010, para. 83.

⁶¹ Commission on Human Rights, ‘Report of the Independent Expert, Mr. G. Alnajjar’, E/CN.4/2002/119, 14 January 2002, para. 136.

⁶² Bassiouni, ‘Searching for Peace’, pp. 19-22; For a detailed discussion on the development in the search for justice see, N.J. Kritz, *Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation*, 2002, p. 21.

⁶³ J. Sarkin, ‘The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide’, *Journal of African LAW* 2001, p. 143; R.J. Goldstone, ‘Justice as a Tool for Peacemaking’, p. 486.

⁶⁴ United Nations, ‘The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies’, Report of the Secretary-General, S(2004), 616.

⁶⁵ Teitel, ‘Transitional Justice Genealogy’, p. 94.

⁶⁶ Sarkin, ‘The Tension between Justice and Reconciliation’, p. 145.

⁶⁷ Stephen Landsman, ‘Alternative Responses To Serious Human Rights Abuses: Of Prosecution and Truth Commissions’, *Law and Contemporary Problems* 1996, p. 85.

forsaken and amnesties are adopted to placate the demands of the old rulers.⁶⁸ Similarly, the second scenario entails a situation in which the transition is brought about by political negotiations and compromise because there is no clear winner and parties are interdependent in achieving their common goal. In this context, the old regime normally demands and is awarded immunity from future investigation and prosecution of certain past human rights violations.⁶⁹ The third scenario occurs when one faction completely defeats the other parties in the conflict and unilaterally forms the new government. The new government can implement systematic reform and can vigorously deal with the past without hindrance from any party.⁷⁰ The trials in Nuremberg and Tokyo after the Second World War fall into this category. Sarkin fails to acknowledge a fourth political scenario where the old regime is overthrown but there is no effective government to replace it. Like the case in Somalia, the war and atrocities have been ongoing and perpetrators have been constantly invited to attend reconciliation and peace conferences organised in different capital cities. In such circumstances, state institutions are destroyed or are in a feeble and precarious situations, judicial institutions need to be reformed and sturdily rebuilt before any proceedings can commence; otherwise it will be a case of wanting to police the past without literally any police force.⁷¹ In that respect, the independent expert on the situation of human rights in Somalia appropriately observed that “the absence of an accountable government and the lack of infrastructure in the country [...] made the capture and bringing to justice of the perpetrators of gross human rights violations an impossible task.”⁷²

However, the lack of functioning institutions or fear of previous government reorganising to abort new initiatives cannot be grounds to forgo or suspend prosecutions. It may be possible to postpone the prosecution until institutions are strong enough to carry out proceedings consistent with international human rights standards. For example, in El Salvador the International Commission of Inquiry acknowledged that the national judiciary was dismally unable to deal with massive human rights abuses perpetrated by previous oppressive regime.⁷³ Likewise, in Cambodia, decades after the crimes committed by Khmer Rouge, a court was established with the help of the United Nations to prosecute the leaders of Khmer Rouge.⁷⁴ It is also important to note that decisions to determine which justice mechanism is suitable for a particular situation need to be grounded in legal, moral, political and ethical deliberations. Nonetheless, these different measures are supplementary to one another and can be used in any given combination. For instance, in Greece, the new government that replaced the military junta prosecuted former officials and their associates and purged others from government departments.⁷⁵ Similarly, in Liberia, the Truth and Reconciliation Commission, after thorough investigation recommended the establishment of a hybrid criminal tribunal to try individuals responsible for the worst crimes.⁷⁶ The following section will examine the individual accountability mechanisms, each on its merits.

II.1 The Applicability of Judicial Prosecution Mechanism in Collapsed States

⁶⁸ Sarkin, ‘The Tension Between Justice and Reconciliation’, p.145, such situations were witnessed in Chile, Hungary and Spain.

⁶⁹ Idem, p. 146.

⁷⁰ Ibid; Rwanda is clear case in point.

⁷¹ Landsman, ‘Alternative Responses’, p. 85.

⁷² ‘Report of the Independent Expert, Mr. M. Charfi, on the Situation of Human Rights in Somalia’, E/CN.4/1996/14, 22 February 1996, submitted in Accordance with Commission Resolution 1995/56, para. 15.

⁷³ J.M. Pasqualucci, ‘The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity, and the Inter-American Human Rights System’, *Boston University International Law Journal* 1994-321, pp. 334-5.

⁷⁴ ‘The Khmer Rouge Trials: Justice Late, Better than Never’, *Economist*, 7 August 2014. Chambers in the Courts of Cambodia, see: <http://www.eccc.gov.kh/en/about-eccc/introduction>.

⁷⁵ Kritiz, *Transitional Justice*, p.xxii.

⁷⁶ Human Rights Watch, ‘Justice for Liberia: The Truth and Reconciliation Commission’s Recommendation for an Internationalized Domestic War Crimes Court’, December 2009.

Criminal prosecution has been the dominant conventional reaction to such atrocities in the past. The United Nations Security Council has chosen criminal trials when confronted with shocking horrors of ethnic cleansing in Bosnia and genocide in Rwanda.⁷⁷ The United Nations General Assembly urged member states to either extradite or prosecute individuals accused of war crimes and crimes against humanity. The resolution goes on to state that refusal to do so is “contrary to the United Nations Charter and the generally recognised norms of international law”.⁷⁸ While conceding that there may be situations where judicial prosecutions are unsuitable for practical, pragmatic or other policy considerations, Landsman observes that for certain categories of crimes prosecution is the only viable option.⁷⁹ Other commentators argue that holding perpetrators of human rights accountable for their crimes can create a culture of human rights observance. Additionally, it can send a very strong signal to the society at large that no one is beyond the reach of the writs of law. Furthermore, judicial prosecution can contribute to establishing a reliable public record of what had happened.⁸⁰ However, it is uncertain whether judicial trials in the aftermath of massive human rights violations are capable of establishing undisputed comprehensive historical record.⁸¹

It seems that occasionally, the human rights movement is particularly uncompromising and holds that only criminal prosecution can deliver justice, inflexibly jettisoning all other options. As Barkan warns, holding such rigid positions may establish unrealistic expectations that might in the long run prove an insurmountable threshold for post-conflict justice.⁸² Acknowledging the legal ethical and moral dimensions of the accountability measures, it is an immense mistake if the human rights movement permits itself to be painted into the corner of either “legalistic” or “moralistic” position. Furthermore, human rights organisations are also accused of superficially separating international law from international politics.⁸³ As Ramesh Thakur points out, the interplay between politics, justice and morality is more complicated than meets the eye.⁸⁴ Moreover, it is sometimes inevitable and necessary to take political constraints into account when proposing justice mechanisms. For example, if one measure is not available other solutions involving accountability should not be rejected outright.⁸⁵ Occasionally human rights organisations seem to hold on to their ‘legalistic’ rhetoric while on the other hand, perhaps inadvertently, accepting the realities on the ground. The quandary frequently faced by international and local human rights organisations is made painfully plain by unheeded appeal issued by Amnesty International on the eve of the selection of members of interim parliament by participants of Somali peace and reconciliation conference in Nairobi in 2003. While particularly

⁷⁷ Landsman, ‘Alternative Responses’, p. 82.

⁷⁸ UN General Assembly Resolution 2840 (1971), See also, Article 18 of the Vienna Convention on the Law of Treaties addressing the obligation not to defeat the object and purpose of a treaty.

⁷⁹ Landsman, ‘Alternative Responses’, p. 83.

⁸⁰ J. Benomar, ‘Confronting the Past: Justice after Transitions’, *Journal of Democracy* 1993, p. 4; Landsman, ‘Alternative Responses’, p. 83; N. Kritz, *Where We Are and How We Got Here*, p. 25; Goldstone, *Justice as a Tool for Peace-making*, p. 489; D. Robinson, ‘Serving Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’, *European Journal of International Law* 2003, p. 489; M.P. Scharf, ‘Swapping Amnesty for peace: Was There a Duty to Prosecute International Crimes in Haiti?’, *Texas International Law Journal* 1996, p. 14.

⁸¹ M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston: Beacon Press 1998, p. 47.

⁸² E. Barkan, ‘Peace versus Justice’, *International Studies Review* 2002, p. 159.

⁸³ K.A. Rodman, ‘Is peace in the Interest of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court’, *Leiden Journal of International Law* 2009, p. 101.

⁸⁴ R. Thakur, ‘Politics Vs Justice at The Hague’, *International Herald Tribune*, 15 August 2002.

⁸⁵ J.E. Mendez, ‘Accountability for Past Abuses’, *Human Rights Quarterly* 1997, p. 256; A. Seibert-Fohr, ‘Reconstruction Through Accountability’, p. 576; K. McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’, *Journal of Law and Society* 2007, p. 440.

aware that the conference is overwhelmingly dominated by notorious warlords and their allies who have been consistent and flagrant human rights violators, Amnesty International nonetheless unmistakably stated that:

It would be unacceptable for faction leaders or former officials responsible in the past for crimes against humanity, war crimes and gross human rights violations to be given blanket impunity or amnesty and to be part of a new government obliged to abide by the Universal Declaration of Human Rights and the international human rights treaties ratified by Somalia in the past, which are still binding.⁸⁶

Ironically, the organization went on to state that it is imperative that "[p]arliamentary and presidential candidates should be asked to explain their human rights record and to pledge their personal commitment to protecting human rights in the future and the rule of law."⁸⁷ Evidently, the human rights record of the majority of the participants of the conference had been public knowledge, painstakingly documented by Amnesty International and other human rights organizations.⁸⁸ There are several obvious problems with the position taken by Amnesty. First, it expects infamous warlords who have been incessantly victimizing vulnerable populations to become their saviours overnight. Second, it gives the warlords an undeserved legitimization for their attempt to acquire power or hold on to it. Finally, it inadvertently circumscribes any possibility of successfully challenging the power of self-proclaimed leaders.

It is trite to state that the warlords will surely be buoyed by these statements and will be encouraged to pay lip service to human rights protection to placate seemingly perfunctory and contradictory demands of human rights organizations. It is contradictory because, on the one hand, the appeal suggests that warlords and other people accused of war crimes cannot be part of the new government. On the other hand, while accepting the inevitability of warlords becoming leaders, it asks them to pledge their personal commitment to safeguard the human rights of the population. Perhaps and more strikingly still, the warlords and faction leaders had already made countless public promises and previously proclaimed to have reached an understanding with respect to "[r]espect for and preservation of, fundamental human rights and democratic principles."⁸⁹ It is clear that if perpetrators are not held accountable for their past crimes and are allowed back into positions of authority without any safeguards, they will probably commit further human rights violations. Human Rights Watch thoroughly documented human rights abuses committed by the police force of the Transitional Federal Government of Somalia (TFG) in 2008. The report detailed extensive human rights violations including "widespread acts of murder, rape, looting, assault, arbitrary arrest and detention, and torture."⁹⁰ It is extremely troubling to learn that the government in question was dominated, from the president to the police chief, by warlords who had a history of perpetrating massive human rights abuses during Somali protracted civil war.

⁸⁶ Amnesty International, 'Somalia: Call for a human rights-committed interim parliament', press release of 12 June 2003, AI Index: AFR 52/005/2003, at: <http://www.amnesty.org/en/library/asset/AFR52/005/2003/en/ecbf14bb-d6d0-11dd-ab95-a13b602c0642/afr520052003en.html>.

⁸⁷ Ibid.

⁸⁸ Human Rights Watch, 'Somalia: No Mercy in Mogadishu, The Human Cost of the Conflict and The Struggle for Relief', 26 March 1992; Human Rights Watch, 'Somalia: Beyond the warlords, The Need for a Verdict on Human Rights Abuses', 1 March 1993; Human Rights Watch, 'Somalia Faces the Future: Human Rights in a Fragmented Society', 1 April 1995; Amnesty International, 'Somalia: A Human Rights Disaster', Report, AFR52/001/1992; Amnesty International, 'Somalia: Building Human Rights in the Disintegrated State', Report, AFR/52/003/1995.

⁸⁹ United Nations Security Council, Further Report of the Secretary-General on the United Nations in Somalia, submitted in Pursuance of Paragraph 14 of Resolution 897 (1994), S/1994/614, 24 May 1994, para. 8.

⁹⁰ Human Rights Watch, 'So Much to Fear'.

Some scholars forcefully contend that one of the fundamental purposes of judicial prosecution and other accountability mechanisms geared toward attainment of peace is deterrence and their ability to prevent future human rights and humanitarian law violations.⁹¹ Similarly, the General Assembly of the United Nations is convinced that “[t]he effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security”.⁹² In the same vein, the Security Council in establishing the (Former) Yugoslavia Tribunal asserted its belief that “the prosecution of persons responsible for [...] violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively rendered.”⁹³

Conversely, other commentators argue, however, that there is an insufficient evidence that the threat of or actual criminal prosecutions will deter future violators of human rights to commit heinous crimes, as there is no evidence that capital punishment deters crimes.⁹⁴ In that respect, the Allies’ threat to criminally prosecute the German perpetrators did not stop the atrocities being committed unhindered. Likewise, gross violations continued unabated in Kosovo after the Chief Prosecutor of the Yugoslavia Tribunal informed the Yugoslav authorities of the intention to investigate and prosecute the perpetrators of these horrible crimes.⁹⁵ In a more recent example, the judicial trials in Rwanda by both international as well as domestic courts did not prevent continuous gross human rights abuses perpetrated by the remnants of the deposed extremist government forces, and to a lesser extent by the current government army.⁹⁶

The other advantage of judicial prosecution is to individualise guilt and remove the stigma of collective guilt. It ensures that innocent members of a particular group are not blamed for crimes committed by others.⁹⁷ By the same token, criminal prosecutions forestall any inclination to implement vigilante justice. Criminal trials of individuals accused of massive human rights abuses give a very powerful signal that particular individuals are criminally responsible for the heinous crimes suffered by the victims, but there is no collective blame for the whole community or ethnic group.⁹⁸ In Somalia, representatives of some clans blame other clans collectively for atrocities perpetrated by individual warlords.⁹⁹ Holding individuals, who were responsible for human rights abuses, responsible may help Somali communities to recognise that the whole clan cannot be held responsible for crimes of individuals.

⁹¹ D. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, *Yale Law Journal* 1991, p. 2542; N.J. Kritz, ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’, *Law and Contemporary Problems* 1996, p. 137; Bassiouni, ‘Searching for Peace’, p. 18.

⁹² Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, General Assembly Resolution 2391 (XXIII), annex, 23 UNGAOR Supp. (No. 18) at 40, UNDoc. A/7218 (1968), entered into force Nov. 11, 1970.

⁹³ UN Security Council Resolution 827, S/RES/827(1993) of 25 May 1993.

⁹⁴ C. Villa-Vicencio, ‘Why Perpetrators not Always be Prosecuted: Where the International Criminal Court and the Truth Commission Meet’, *Emory Law Journal* 1998, p. 210; D. Wippman, ‘Atrocities, Deterrence’, p. 474-76.

⁹⁵ M. Kamminga, ‘Lessons Learned From the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences’, *Human Rights Quarterly* 2001, p. 943; T. Merton, ‘From Nuremberg to the Hague’, *Military Law Review* 1995, p. 107, 110.

⁹⁶ S. Vandeginste, ‘Rwanda: Dealing With Genocide and Crimes against Humanity in the Context of Armed Conflict and Failed Political Transition’, in N. Biggar (ed.), *Burying the Past: Making Peace and Doing Justice after Civil Conflict*, Washington, D.C: Georgetown University Press 2007, 223-53, p. 224; P. Gourevitch, *We Wish to Inform You that Tomorrow we Will be Killed with Our Families*, London: Picador 2000, pp. 291-341.

⁹⁷ Goldstone, ‘Justice as a Tool for Peace-making’, p. 488.

⁹⁸ N. Kritz, ‘Where We Are Now and How We Got Here’, p. 25.

⁹⁹ M.M. Ulusow, ‘Somaliland: Blaming and Debasing Southerners is Unfair Game’, *Hiraonline*, 25 June 2012, at: http://www.hiraan.com/op4/2012/jun/24687/somaliland_blaming_and_debasing_southerners_is_unfair_game.asp

It is also evident that insisting on criminal trials or social justice without thorough reform of the system of government, particularly ‘institutions of rule’ to prevent recurrence of the past atrocities, will be undoubtedly ineffective.¹⁰⁰ Similarly, ‘show trials’ carried out haphazardly and hurriedly and their concomitant harsh punishment will definitely not serve to contribute to the peace, stability and reconciliation in the future.¹⁰¹ The current Ethiopian government, for example, embarked upon prosecuting members of the former military regime who were accused of committing gross human rights violations.¹⁰² After the complete defeat of the Ethiopian military dictator Mengistu, thousands of former officials were arrested. These individuals were charged with horrible crimes including genocide, disappearance and crimes against humanity. Thousands of those accused had been in detention without trial for more than a decade.¹⁰³ However, such public prosecutions did not prevent the current government perpetrating the egregious, massive human rights violations both inside and outside the country with impunity.¹⁰⁴ The very poor human rights record of the Ethiopian “emerging democracy” indicates that trials and prosecutions alone do not necessarily deter violations from occurring. Similarly, the highly publicised trial of Saddam Hussein and his associates by the Iraqi Tribunal have not prevented thousands of deaths and other massive human rights abuses perpetrated in Iraq during or in the aftermath.¹⁰⁵ As Martha Minow persuasively points out: “trials should not be pursued where there is no chance for fairness or perception of fairness [...]”.¹⁰⁶ In Somalia’s case, since there is no functioning government that can carry out investigations and domestic courts to adjudicate the cases, it is not impossible to implement judicial prosecutions to deal with past human rights violations. In addition, the international community has not shown any willingness to establish an international tribunal for Somalia. Consequently, any haphazard judicial prosecution attempts will not be successful. Is it possible to implement other non-judicial transitional justice mechanisms like truth commission in Somalia?

II.2 Truth Commissions as a Tool to Deal with Past Atrocities in Collapsed States

Criminal proceedings are not the only option available when dealing with past atrocities. Many countries emerging from repressive regimes have opted for an alternative accountability method known as “truth commission”.¹⁰⁷ The number of countries that adopted non-judicial accountability mechanisms has proliferated tremendously. It appears that their decision is not only driven by legal or moral reasons but was rather necessitated and informed by practical considerations.¹⁰⁸ For instance, as Goldstone argued, if the African National Congress (ANC) in South Africa stubbornly demanded criminal prosecutions for leaders of apartheid regime “there

¹⁰⁰ M. Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, Princeton: Princeton University Press 2002, p. 273.

¹⁰¹ Landsman, ‘Alternative Responses’, p. 86; J. Alvarez, ‘Crimes of States’, p. 370.

¹⁰² Benomar, ‘Confronting the Past’, pp. 112-13.

¹⁰³ N.J. Kritz, *Where We Are Now and How We Got Here*, p. 26.

¹⁰⁴ Human Rights Watch, ‘Collective Punishment: War Crimes and Crimes against Humanity in the Ogaden Area of Ethiopia’s Somali Region’ (12 June 2008); T. Porteous, ‘Ethiopia’s Dirty War: A Humanitarian Crisis has Developed in the Horn of Africa’, *Guardian*, 5 August 2007; C. Albin-Lackey, ‘Why Turn Blind Eye to Tyranny?’, *New York Times*, 4 July 2005; Human Rights Watch, ‘Shell-Shocked: Civilians Under Siege in Mogadishu’, 13 August 2007; Amnesty International, ‘Somalia: Routinely Targeted: Attacks on Civilians in Somalia’, AFR 52/006/2008.

¹⁰⁵ N. Davies and J. Steele, ‘Iraq War Logs: Secret Files Show How Us Ignored Torture’, *Guardian*, 22 October 2010; J. Peterson, ‘Unpacking Show Trials: Situating the Trial of Saddam Hussein’, *Harvard International Law Journal* 2007.

¹⁰⁶ Minow, ‘Between Vengeance and Forgiveness’, p. 50; Landsman, ‘Alternative Responses’, p. 85.

¹⁰⁷ For an in-depth discussion on Truth commissions see, P. Hayner, ‘Fifteen Truth Commissions-1974 to 1994: A comparative Study’, *Human Rights Quarterly* 1994.

¹⁰⁸ Landsman, ‘Alternative Responses’, p. 84.

would have been no peaceful transition to democracy.”¹⁰⁹ The fact is that leaders of the apartheid government were in charge of the military and most other government institutions and if they felt that they were being targeted and started to resist, that could plunge the country into a civil war. Some conspicuous benefits of the criminal prosecutions notwithstanding, there are situations in which, for practical or other pragmatic, or political considerations, alternative non-judicial proceedings like truth commissions are more appropriate to deal with past atrocities.¹¹⁰ Furthermore, truth commissions are sufficiently capable of not only creating truth and trustworthy public records of egregious past human rights violations, but can also catapult system reform which is indispensable in deterring atrocious abuses from recurring in the future.¹¹¹ In actuality, truth commissions are used in two settings. First, truth commissions are used in circumstances where atrocities like torture and disappearances were perpetrated clandestinely. In these cases such as Argentina, Chile and El Salvador the purpose was to inform the public about the crimes of the previous regime. In other situations, atrocities were committed publicly but there are different versions of the truth as the examples of Liberia and Sierra Leone show.¹¹² Moreover, past experience has sufficiently shown that truth commissions seem to be “a potentially valuable complementary tool in the quest for justice and reconciliation, taking as they do a victim-centred approach and helping to establish a historical record and recommend remedial action.”¹¹³

Truth commissions organised in different countries over the years have employed various methods. The conditional amnesty laws recently promulgated by South Africa and Guatemala were distinctly different from the previous blanket amnesties passed in 1970s and 1980s by government in Latin America during the transitional periods from repressive regimes to fledgling democracy.¹¹⁴ The South African Truth and Reconciliation Commission offered conditional amnesty. The accused was required to come clean and provide all the details of the crimes he or she is alleged to have committed after which the commission decides on the eligibility for amnesty. In Guatemala, certain crimes like disappearance, torture or genocide were purposely excluded from amnesty, while courts were authorised to grant amnesty for some politically motivated and other common crimes perpetrated during the civil war.¹¹⁵ Similarly, the Commission for Reception, Truth and Reconciliation established in 2002 in East Timor, while evidently drawing heavily on the experience of its South African predecessor, have decided to exclude major crimes like murder and rape. However, lesser crimes like burning, looting and minor assault can be eligible for amnesty.¹¹⁶ It is vitally important, though, to acknowledge that to the victims whose livelihoods were destroyed, it may not be a negligible crime, but rather a matter of life and death.

¹⁰⁹ Goldstone, *Justice as a Tool for Peacemaking*, p. 493.

¹¹⁰ Landsman, ‘Alternative Responses’, p. 83.

¹¹¹ I. Šimonović, ‘Dealing with the Legacy of Past War Crimes and Human Rights Abuses: Experiences and Trends’, *Journal of International Criminal Justice* 2004, p. 703; for a detailed discussion the pros and cons of Truth Commissions see P. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, New York: Routledge 2001; Landsman, ‘Alternative Responses’, p. 82, 88; Robinson, ‘Serving Interests of Justice’, p. 484.

¹¹² N.J. Kritz, *Where We Are and How We Got Here*, p. 37; ‘Truth and Reconciliation Commission Report: Sierra Leone’, at: <http://www.sierra-leone.org/TRCDocuments.html>; ‘Final Report: Truth and Reconciliation Commission of Liberia’, at: <http://trcofliberia.org/reports/final-report>.

¹¹³ United Nations, *The Rule of Law and Transitional Justice in Post Conflict Societies*, (2004), 616; Minow, ‘Between Vengeance and Forgiveness’, pp. 76-82.

¹¹⁴ Minow, ‘Between Vengeance and Forgiveness’, pp. 54-7.

¹¹⁵ Roht-Arriaza, ‘Combating Impunity’, p. 94.

¹¹⁶ I. Šimonović, *Dealing with the Legacy of Past War Crimes*, p. 703; see also D. Orenlichter, ‘Independent Study on Best Practices, Including Recommendations, To Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity’, submitted to the commission on Human Rights, E/CN.4/2004/88, 27 February 2004, p. 6.

Truth denotes knowing sufficiently about and formally recognising past atrocities. This official recognition can be a catalyst for a productive dialogue and understanding between various individuals and groups within society. It is important to note that there may be situations where judicial prosecutions are not suitable like Somalia where there is no functioning government that controls the whole country. For example, fledgling democracies and feeble transitional authorities may not withstand politically motivated trials and their destabilising effects.¹¹⁷ Some commentators observe that disclosing the truth should suffice and trials and judicial prosecutions are not conducive for reconciliation.¹¹⁸ For instance, Mendez argues that even if the state is legitimately unable to mete out punishment, the state is under an obligation to investigate and furnish complete facts about the past atrocities.¹¹⁹ However, others contend that knowledge of the facts alone will not suffice, because the interpretation of the facts is more important to foster a shared past.¹²⁰ Similarly, for a truth commission to have any reasonable chance of success, it may be necessary to create “a powerful political consensus behind the reconciliation [...]” prior to establishing any truth commission.¹²¹

Meanwhile, deciding on the composition of members of truth commissions may be an insurmountable hurdle, particularly in situations where the multifaceted social and political divisions are acute. In Somalia, even though all the provisional constitutions since 2000 provide for the establishment of an independent truth and reconciliation commission, all governments failed to constitute it because of lack of consensus on the criteria to select members of the commission.¹²² As experience elsewhere demonstrates, if local political actors fail to agree on the composition of truth commission, they may use outside experts to ensure the process is seen as objective. For example, in El Salvador, the truth commission consisted entirely of foreigners to ensure objectivity. However, detractors can claim that truth established by foreigners has inadequate impact on the local population. To utilise the expertise of both nationals and foreigners and to combine their efforts may be a better option as was the case in Guatemala.¹²³ Nevertheless, naming and officially identifying the perpetrators may compel them to acknowledge the responsibility for their violations and thereby recognise ‘the dignity of the victims’. Moreover, making public the atrocities carried out by state agents to achieve political goals will help delegitimize the activities of the previous regime. In that manner, both past and potential victims are reassured that the same egregious crimes will not be committed.¹²⁴ If victims are asked to forgive the perpetrators, then it is necessary for the victims to know who to forgive and what for, otherwise it will be a mockery of justice and a facade employed to enable the claim that something has been done.¹²⁵ However, it is vitally important that there is no consensus about the positive effects of truth finding on reconciliation.¹²⁶ The other problem with regards to truth

¹¹⁷ Sarkin, ‘the Tension between Justice and Reconciliation’, p. 147.

¹¹⁸ C. Krauthammer, ‘Truth Not Trials: A way for newly liberated to deal with the crimes of the past’, *Washington Post*, 9 September 1994.

¹¹⁹ Mendez, ‘Accountability for Past Crimes’, p. 269.

¹²⁰ T. Forsberg, ‘The Philosophy and Practice of Dealing with the Past’, p. 61.

¹²¹ M. Ignatieff, ‘Truth, Justice, and Reconciliation’, Lecture to the Canadian Bar Association, Toronto (30 August 1996), quoted in Goldstone, *Justice as a Tool for Peace-making*, p. 496; H. van der Merwe, ‘National and Community Reconciliation: Competing Agendas in the South African Truth and Reconciliation Commission,’ in Nigel Biggar (ed.), *Burying the Past: Making Peace and Doing Justice after Civil Conflict*, Washington, D.C.: Georgetown University Press 2007, 85-106, p. 86.

¹²² The Federal Republic of Somalia, Provisional Constitution, adopted on 1st of August 2012, Mogadishu Somalia, article 111I, at: <http://unpos.unmissions.org/LinkClick.aspx?fileticket=RkJTOSpoMME=>; The Transitional Federal Charter of the Somali Republic, Nairobi, Kenya, February 2004, article 68,3(b), at: <http://www.ilo.org/dyn/travail/docs/2177/Transitional%20Federal%20charter-feb%202004-English.pdf>.

¹²³ Ivan Šimonović, *Dealing with the legacy*, p. 704.

¹²⁴ Biggar, ‘Making Peace and Doing Justice’, p. 12.

¹²⁵ Landsman, ‘Alternative Responses’, p. 84; Minow, ‘Between Vengeance and Forgiveness’, p. 16.

¹²⁶ P. Hayner, ‘International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal’, *Law and Contemporary Problems* 1996, pp. 173-80.

commissions is that, after decades of conflict, parties may subscribe to different narratives while talking about the same event. For example, in Somalia, every clan or group believes that they are the absent victims of an impartial investigation.¹²⁷

The lack of peace, security and political stability may sometimes stymie attempts to gather reliable evidence pertaining to previous violations. Furthermore, there may be legitimate and sound reasons to abstain from prosecutions if the majority of the population deem prosecution, through referendum or through their legitimate representatives, will not serve the best interests of peace and stability.¹²⁸ In stark contrast, during one of the peace and reconciliation conferences for Somalia, clan representatives and faction leaders were asked to collectively forgive each other without disclosing any facts nor what actions warranted forgiveness. The tragic irony is that some warlords who were allegedly responsible for gross atrocities themselves refused to sit with members of other clans because their clan supposedly committed crimes against another. In that manner, the perpetrators attempted to avoid individual criminal responsibility by skilfully promoting it collectively. It goes without saying that any attempt by others rather than the victim to forgive miserably fails to take the suffering of the victims into proper consideration.¹²⁹ For a successful truth commission to be established there is a need for a functioning government to be in place to institute the truth commission, and subsequently deal with the outcome of the investigation.

II.3 Can Lustration Work in Somalia?

One of the mechanisms that have been employed to deal with human rights abuses is lustration. In some situations it was considered impractical and destabilising to start judicial proceedings against all the individuals involved. For instance, the transition from communist rule in the late 80s and early 90s used lustration to deal with past human rights abuses.¹³⁰ It meant purging former officials who were implicated in the atrocities. However, it is important to state that such approaches were not confined to Central and Eastern European Countries. For example, in El Salvador hundreds of senior military officials were compelled to take early retirement, after thorough reviews of the individual records. One of the obvious advantages of the purge schemes is the possibility of dealing with a large number of cases in a very short time without being handcuffed by the requirements of criminal process standards. Furthermore, they are comparatively cheaper in terms of financial and human resources. For example, in Bosnia the majority of the former police officers who were implicated in the ethnic conflict were excluded from local new police forces.¹³¹

There are several weaknesses and deficiencies with respect to lustration that need to be considered. First, no due process guarantees consistency with international human rights standards. Second, the system is susceptible to mistakes and calculated political misuse.¹³² Moreover, in collapsed states like Somalia, all government institutions are entirely ruined, so there are no officials to flush out; however, it is possible to exclude them from coming back to the fold when and if people are recruited in the reconstruction of vital state institutions. Arguably, the

¹²⁷ A recent book by L. Kapteijns, *Clan Cleansing: the Ruinous Legacy of 1991*, Philadelphia: University of Pennsylvania Press 2013, blames one particular clan for carrying out what she calls clan-cleansing. However, the book seems to misinterpret many events to suit the author's argument. For a critical discussion of the book, see, D.D. Laitin, 'Some Reflections on Lidwien Kapteijns's *Clan Cleansing in Somalia: The Ruinous Legacy of 1991*' (2013), in *Patterns of Violence in Somalia*, Notes from the Seminar, 26-28 September 2013, The Fletcher School of Law and Diplomacy.

¹²⁸ Landsman, 'Alternative Responses', p. 86.

¹²⁹ Minow, 'Between Vengeance and Forgiveness', pp. 17-20.

¹³⁰ K. Williams et al., 'Explaining Lustration in Eastern Europe: "A Post-Communist Politics Approach"', Sussex European Institute, SEI Working Paper No. 62.

¹³¹ N.J. Kritz, *Where We Are and How We Got Here*, p. 36.

¹³² I. Šimonović, *Dealing with Legacies*, p. 704.

danger of this seemingly arbitrary system is that it tends to deal with classes or categories of people without regard to individual criminal responsibility, thus lustration may produce a number of cases of injustice of its own.¹³³ Moreover, in Somalia where the current conflict is characterised as clan-based, it can fuel further violence and antagonism because clans that the purged individuals belonged to could claim that they were unfairly targeted.¹³⁴ However, for lustration to be suitable in Somalia, it must be preceded by an independent investigation to establish the full truth of what and the individuals who perpetrated it. Based on the outcome of that investigation, it might be eventually possible to exclude individuals from official rule in the newly reconstituted state institutions. Nevertheless, given the duration of the conflict and lack of any documentary evidence it would dauntingly challenging to carry out a full and fair investigation into all past human rights violations. If all the aforementioned transitional justice mechanisms like judicial prosecution, truth commission and lustration are not suitable for Somalia at the moment, can amnesty be utilised to achieve peace and reconciliation?

II.4 Is Amnesty a Panacea to Somali's Post-Conflict Crisis?

Amnesty for human rights violations consists of a range of variations including blanket amnesty, individual amnesty for certain leaders of previous regimes, or amnesty in exchange for truth as prominently applied by South Africa. There are arguments for and against amnesty. Some commentators passionately argue that amnesties are not compatible with human rights or the quest for justice.¹³⁵ Others submit that, in certain cases, an amnesty may be an indispensable exchange for peace. In that light, any amnesty offered should be utilised only when all other options fail, and applicable only to limited situations.¹³⁶

It is important to mention that amnesty has been frequently used since the 1970s. Since then, approximately 14 countries have adopted amnesty as an accountability mechanism and passed amnesty laws shielding perpetrators of human rights abuses against criminal prosecution or other liability emanating from the crimes concerned.¹³⁷ Giving human rights perpetrators immunity from prosecution, however, clearly contravenes the victims' rights to justice. In that regard, article 2 of the International Covenant on Civil and Political Rights urges state parties to ensure that anyone whose rights enumerated in this instrument is infringed "[s]hall have an effective remedy..." Protocol II to the Geneva Conventions proposes amnesty to ensure cessation of hostilities. In that respect, article 6(5) stipulates that: "[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

However, it is argued that the amnesty in question only concerns minor violations and does not apply to grave violations of international humanitarian law. In that respect, the International Committee of the Red Cross (ICRC) argues that the amnesty provision should only apply to those

¹³³ R. David, 'From Prague to Baghdad: Lustration Systems and Their Political Effects', *Government Opposition* 2006, pp. 354-5.

¹³⁴ I.M. Lewis, 'Historical Aspects of Genealogies in Northern Somali Social Structure', *Journal of African History* 1962, pp. 35-48.

¹³⁵ Bassiouni, 'Searching for Peace and Achieving Justice', p. 9; Diane Orentlicher, *Settling Old Accounts*, p. 2537; N. Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights under International Law', *California Law Review* 1990, p. 449.

¹³⁶ M. Scharf, 'Accountability of International Crime and Serious Violations of Fundamental Human Rights: The Scope of the International Legal Obligation to Prosecute Human Rights Violations', *Law and Contemporary Problems* 1996, p. 41; M. Scharf, 'The Amnesty Exception to The Jurisdiction of the International Criminal Court', *Cornell International Law Journal* 1999, p. 512.

¹³⁷ W. Burke-White, 'Performing Impunity: Applying Liberal International Law Theory on an Analysis of Amnesty Legislation', *Harvard International Law Journal* 2001, p. 467.

combatants who did not violate international humanitarian law.¹³⁸ Furthermore, it is also argued that granting violators of certain serious human rights violations is unlawful under international law.¹³⁹ Along the same lines, the Human Rights Committee, in one of its comments on article 7 of International Covenant on Civil and Political Rights (CCPR) held that, as far as the crime of torture is concerned, amnesties granted are “generally incompatible with the duty of states to investigate such acts.”¹⁴⁰ Similarly, the European Court of Human Rights held that the Convention against Torture does not permit granting amnesties which inoculate individuals, accused of torture, from criminal or civil trials or other penalties.¹⁴¹

In conjunction with ongoing conflicts like Somalia, some argue that it is necessary to offer amnesty to perpetrators in order to ensure the cessation of hostilities and facilitate a smooth transition. Furthermore, the current Somali government is fragile and is not in control of the whole country and has to contend with warlords and regional leaders who may still wield considerable power within the nascent army and militias.¹⁴² However, it is important to thoroughly assess whether amnesty can have the desired effect in an idiosyncratic context before committing to such an arrangement. For instance, the government in Uruguay decided to honour the amnesty law promulgated by the military government and also declined to significantly disclose the truth of what actually happened. After a relentless campaign organised by parts of the citizenry the government agreed to hold a referendum on whether to keep or rescind the amnesty law. The majority of the population decided to keep the impunity in place.¹⁴³ It is imperative to assiduously acknowledge that such popular decisions are capable of bringing the society together and promoting reconciliation. Additionally, if amnesty is tied to other non-judicial accountability mechanism like a truth commission, it can be effective and cannot be equated with impunity.¹⁴⁴

Amnesty has often been used as a political carrot to end conflicts. In such situations, more importance is attached to arresting ongoing violence. For example, even though US president Bill Clinton undiplomatically characterised the authority in Haiti as “plainly the most brutal, the most violent regime anywhere [...]” in the northern hemisphere, his administration brokered “a good agreement for the United States and for Haiti” which granted amnesty from prosecution to the Haitian military leaders.¹⁴⁵ That was in clear contrast to the previous promise that the return of the exiled Haitian president Aristide, will take place “under conditions of national reconciliation and mutual respect for human rights.”¹⁴⁶ However, the US administration and the United Nations and other regional organisations enormously pressured Aristide to accept the amnesty for the military leaders.¹⁴⁷ It is crucial to state that the agreement led to the military junta peacefully

¹³⁸ Roht-Arriaza, ‘Combating Impunity’, p. 97, citing a letter personally received from Dr T. Pfanner, Head of Legal Division, ICRC Headquarters, Geneva (April 15, 1997); I. Martin, ‘Justice and Reconciliation: Responsibilities and Dilemmas of Peace-makers and Peace-builders’ in A.H. Herkin (ed.), *The Legacy of Abuse: Confronting the Past, Facing the Future*, New York: The Aspen Institute and New York University School of Law 2002, pp. 81-96, p. 82.

¹³⁹ N. Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’, *California Law Review* 1990, p. 451, 485.

¹⁴⁰ General Comment on art. 7, General Comment No. 20, UNGAOR, Human Rights Committee, 44th Sess., UN Doc. CCPR/C/21/Rev.1/Add.3.

¹⁴¹ *Selmouni v. France*, 25803/94, decision of 28 July 1999, Council of Europe: European Court of Human Rights, at: <http://www.unhcr.org/refworld/docid/3ae6b70210.html>.

¹⁴² J. Benomar, ‘Confronting the Past: Justice after Transitions’, pp. 4-5.

¹⁴³ J. Zalaquett, ‘Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations’, *Hastings Law School* 1991-1992, p. 1432.

¹⁴⁴ Scharf, ‘The Amnesty Exception’, p. 512.

¹⁴⁵ G. Gibbons, ‘Clinton Vows Haiti Military Will Leave’, *Reuters*, 14 September 1994; President Bill Clinton, Oval Office Address to the Nation (15 September 1994), quoted in Scharf, ‘Swapping Amnesty for Peace’, p. 2.

¹⁴⁶ G. Ifill, ‘Haitian is Offered Clinton’s Support on an End to Exile’, *New York Times*, 17 March 1993.

¹⁴⁷ Scharf, ‘Swapping Amnesty for Peace’, p. 39; for a comprehensive account of the unhelpful role the United States played in the crisis and the subsequent pressure brought to bear on the Haitian exiled leader to accept the

handing over power to the civilian authority and that the human rights violations came to an end.¹⁴⁸ Furthermore and more importantly, the Haitian democratically elected representatives enacted laws in support of the amnesty which they believed were “likely to reconcile the nation [...]”.¹⁴⁹

In an attempt to end the civil war in Sierra Leone, the rebel Revolutionary United Front led by Foday Sankoh signed a peace agreement with the Sierra Leonean government in July 1999.¹⁵⁰ The Lomé Agreement offered unconditional blanket amnesty “[t]o all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the agreement”.¹⁵¹ The UN representative attached a caveat before signing the agreement which read: “[t]he United Nations interprets that the amnesty and pardon in the article nine of this agreement shall not apply to the international crimes of genocide, crimes against humanity, war crimes and other various violations of international humanitarian law.”¹⁵² The UN representative who added this reservation to the agreement before signing heavily rebuked human rights organisations for chastising the amnesty clause, claiming that without the offer of the amnesty the war would have continued with dire consequences for the civilian population.¹⁵³ By the same token, much of the Sierra Leonean civilian population supported the amnesty in the hope that the agreement would end the hostilities and herald a period of peace and stability. Likewise, representatives of civil society groups endorsed the agreement and the amnesty at a national conference.¹⁵⁴ However, the Lomé Agreement, like its predecessor three years previously, collapsed before the ink was properly dry.¹⁵⁵

In my judgement, it is wrong to solely blame the failure of the Lomé Agreement on the fact that it offered amnesty to the perpetrators of the human rights violations. It is difficult indeed to determine whether the collapse of these peace agreements lay in the strategy of offering blanket amnesty itself or in its implementation. In that respect, a more plausible explanation would be the precariousness of the security situation of the country and the lack of a strong authority to satisfactorily implement the terms of the agreement.¹⁵⁶ In other situations, amnesties offered to the combatants facilitated peace and the disarmament of the armed groups. For example, in Mozambique the government and rebels signed an agreement after almost 16 years of devastating civil war. Amnesty was offered to all the parties of the conflict and as a consequence the rebels agreed to disarm. The agreement was equally observed by the two sides and there has not been

amnesty, see, M. Morley and C. McGillion, “‘Disobedient’ Generals and the Politics of Redemocratization: The Clinton Administration and Haiti”, *Political Science Quarterly* 1997; Martin, ‘Justice and Reconciliation,’ p. 81.

¹⁴⁸ M. O’Kane, ‘After the Yanks Have Gone’, *Guardian*, 18 February 1995.

¹⁴⁹ J. B. Frazier, ‘Haiti’s Parliament OKs Amnesty, Paving the way for Aristide’s Return’, *L.A. Times*, 9 October 1994, cited in Scharf, ‘Swapping Amnesty for Peace’, p. 15.

¹⁵⁰ 1999 Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra (Lomé Accord), Lomé, Togo at: <http://www.sierra-leone.org/lomeaccord.html>.

¹⁵¹ Lomé Accord, article IX; see also, Martin, ‘Justice and Reconciliation’, p. 81; N.J. Kritz, *Where We Are and How We Got Here*, p. 33.

¹⁵² Human Rights Watch, *The Sierra Leone Amnesty under International Law*, 3 August 1999, at: <http://www.hrw.org/campaigns/sierra/int-law2.htm>.

¹⁵³ C. Schuler, ‘A Wrenching Peace: Sierra Leone’s ‘See No Evil’ Pact’, *Christian Science Monitor* 1999.

¹⁵⁴ Schuler, ‘A Wrenching Peace’.

¹⁵⁵ For a comprehensive analysis of the amnesties in Sierra Leone, see K. Gallagher, ‘No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone’, *Thomas Jefferson Law Review* 2000-2001; for information about the Abidjan Accord, see 1996 Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front, in Abidjan, Ivory Coast, <http://www.sierra-leone.org/abidjanaccord.html>.

¹⁵⁶ Lomé Accord.

any civil war since 1992.¹⁵⁷ Similarly, in Spain, after the death of Franco, an amnesty was implemented and the transition was orderly.¹⁵⁸

To be sure, offering amnesty in exchange for confessions, as employed by the South African Truth and Reconciliation Commission, can be a very good instrument to establish trustworthy records of past human rights abuses. However, it is not necessary to implement justice mechanisms as soon as the new regime comes to power, but it might be necessary to delay any planned action till the time is ripe and conditions on the ground permit. In view of that, Nigel Biggar ambitiously suggests that thinking of a criminal justice system not merely as a tool to punish perpetrators but as an instrument to take victims' sufferings into account and drastically placate them remedies the seemingly unbridgeable difference between justice and negotiating peace.¹⁵⁹ Similarly, Mamdani argues in the African context "where relentless pursuit of justice in the post-independence period had all often turned into vengeance", it is not prudent to follow Nuremberg example, but South African model would be more suitable seeking "to reconcile rather than punish, to look forward rather than backward."¹⁶⁰

However, as the situation in Somalia clearly demonstrates, amnesty alone is not sufficient. This formula of offering unconditional amnesty to the perpetrators of human rights abuses has been recurrently tried and tested during peace and reconciliation conferences for the last two decades and it did not produce any meaningful peace or feasible political settlement.¹⁶¹ The only time that justice for past atrocities was vaguely mentioned in a Somali peace agreement was the agreement between the transitional federal government and the alliance for the re-liberation of Somalia in 2009. Article 9 of the agreement stated that "a high level committee, chaired by the UN, shall be established...to follow up on issues relating to the political cooperation between the parties and concerns over *justice and reconciliation*."¹⁶² However, there have been no follow up and the issue of dealing with past human rights abuses did not get any further attention.

II.5 Can Universal Jurisdiction Compensate for the Lack of Domestic Judicial Capability?

The concept of universal jurisdiction could compensate the unwillingness or lack of capacity of some states to prosecute people accused of egregious violations of human rights.¹⁶³ It confers on every state with jurisdiction of certain international crimes irrespective of the nationality of both the victim and perpetrator or the place where the crimes have taken place.¹⁶⁴ In light of that, the General Assembly of the United Nations declared that "war crimes and crimes against humanity, wherever they are committed shall be subject to investigation", and furthermore, individuals "whom there is evidence that they have committed such crimes shall be subject to tracing, arrest,

¹⁵⁷ Gallagher, 'No Justice, No Peace', p. 170.

¹⁵⁸ E.A. Posner and A. Vermeule, 'Transitional Justice as ordinary Justice', Chicago Public Law and Legal Theory Working Paper No. 40(2003), p. 10; Kritiz, *Transitional Justice*, XXIV.

¹⁵⁹ Biggar, *Peace and Justice*, p. 178.

¹⁶⁰ Mamdani, *Saviours and Survivors: Darfur, Politics and the War on Terror*, London: Verso 2009, p. 7.

¹⁶¹ K. Menkhaus, 'The Crisis in Somalia: Tragedy in Five Acts', *African Affairs* 2007.

¹⁶² 2008 Agreement between Transitional Federal Government of Somalia(TFG) and The Alliance for the Re-Liberation of Somalia (ARS), Djibouti, at: http://peacemaker.un.org/sites/peacemaker.un.org/files/SO_080609_Agreement%20between%20the%20TFG%20and%20the%20ARS%20-%20Djibouti%20Agreement.pdf.

¹⁶³ For human rights and humanitarian violations subject to universal jurisdiction, see, M. Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction'.

¹⁶⁴ M.P. Scharf, 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States', *New England Law Review* 2000-2001, p. 368; for a discussion on international crimes that rise to the level of jus cogens, see M.C. Bassiouni, 'International Crimes: Jus Cogens and Obligato Erga Omnes', *Law and Contemporary Problems* 1996.

trial and, if found guilty, to punishment.”¹⁶⁵ However, a very small number of states recognised and enacted legislation enabling domestic courts to adjudicate these crimes irrespective of where they occur.¹⁶⁶ It is important to keep in mind that countries are not obliged to start proceedings grounded in the principle of universal jurisdiction, in that respect “allowing states having jurisdiction not to bring the case before their courts for reasons of expediency.”¹⁶⁷

The principle of universal jurisdiction can be misused and politically motivated indictments and prosecutions can be pursued. Increasingly, prosecutors of foreign countries have started investigations and sometimes prosecutions of individuals accused of committing gross human rights violations on the basis of universal jurisdiction.¹⁶⁸ More strikingly still, after the legitimate representatives of the country decided to forgo criminal trials and opt for other accountability mechanisms, some victims who are not satisfied with that approach can start proceedings outside the country.¹⁶⁹ However, such interference and evident disregard for domestic decisions can have sweeping political consequence if the judges and prosecutors of a third country are allowed to meddle in the internal affairs of other countries without adequate knowledge of all the issues involved.¹⁷⁰

Conversely, others argue that ‘a bona fide amnesty’ like the one implemented in South Africa would not expect any difficulties and the prosecutors of other countries could take them into account when determining whether to bring charges.¹⁷¹ The obvious trouble with that proposition is that judging the authenticity of any given amnesty by outside authorities is in itself prone to political considerations. What is indisputable, however, is the fact that the overwhelming majority of the universal jurisdiction cases were adjudicated in wealthy states, while individuals on trial have been mostly from poorer countries.¹⁷² This indicates that there is an apparent inequality and developing countries are unable to bring perpetrators from powerful states to trail for international crimes.¹⁷³ For example, a Belgium judge issued a warrant for the arrest of then the incumbent Foreign Minister of Democratic Republic of the Congo, Abdulaye Yerodia Ndombasi, accusing him of committing grave breaches of Geneva conventions as well as crimes against humanity. Subsequently, the Congo legally challenged the issued arrest at the International Court of Justice (ICJ). In ruling for the Congo, the ICJ held that Belgium “by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.”¹⁷⁴ Given the troubled history between the two countries it cannot be ruled out

¹⁶⁵ UN General Assembly Resolution 3073 (1973), Principles of International Cooperation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, 3 December 1973.

¹⁶⁶ K. Randall, ‘Universal Jurisdiction under International Law’, *Texas Law Review* 1988, pp. 785, 834; L. Reydam, ‘Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice’, *European Journal of Crime, Criminal Law & Criminal Justice* 1996, pp. 18-47; L.A. Casey and D.B. Rivkin, ‘The Limits of Legitimacy: The Rome Statute’s Unlawful Application to Non-State Parties’, *Virginia Journal of International Law* 2003-2004, p. 80.

¹⁶⁷ Reydam, ‘Universal Jurisdiction over Atrocities’, p. 22.

¹⁶⁸ C.C. Jalloh, ‘Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction’, *Criminal Law Forum* 2010, pp.1,2

¹⁶⁹ N.J. Kritz, *Where We Are and How We Got Here*, p. 29; for a detailed discussion on the impact of the Pinochet Case domestically as well as internationally see, J. Zalaquett, ‘The Pinochet Case: International and Domestic Repercussions’ in A.H. Herkin (ed.), *The Legacy of Abuse: Confronting the Past, Facing the Future*, New York: The Aspen Institute and New York University School of Law 2002, pp. 47-69.

¹⁷⁰ Ivan Šimonović, *Dealing with the Legacy*, p. 706.

¹⁷¹ Kamminga, ‘Lessons Learned from the Exercise of Universal Jurisdiction’, p. 958.

¹⁷² Exception of the rule was the failed proceedings started in Senegal against president of Chad, Hussein Habré. However, it is important to mention that the extradition proceedings was started at the behest of Belgium judge request, see *idem*, p. 963.

¹⁷³ Can anyone imagine Egypt or Iran holding American leaders responsible for the deaths of tens of thousands of Iraqi citizens?

¹⁷⁴ Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, p. 3, para. 78; for thorough discussion on the legal issues raised by the case see, K.R.Gray, ‘Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)’, *European*

that the decision to issue the arrest warrant was politically motivated.¹⁷⁵ In a similar vein, the government of Serbia unsuccessfully sought the extradition of former Bosnian vice president, Ejup Ganic, from Britain accusing him of commission of war crimes during the war in Former Yugoslavia in 1992. It is significantly important to note that the allegations set forth in the extradition request had already thoroughly been investigated and rejected by the International Criminal Tribunal for former Yugoslavia.¹⁷⁶ However, the judge blocked the extradition for lack of evidence and observed that his trial could be “politically motivated”.¹⁷⁷

This apparent power imbalance makes the whole universal jurisdiction exercise seem unfair and lopsided. To be sure, the nationals of powerful states cannot be tried by other states without risking retaliation. For example, when criminal indictments were filed against a number of US officials with respect to crimes allegedly committed in Iraq during the first Gulf War, the US defence secretary, Donald Rumsfeld stridently denounced what he termed as “divisive politicised lawsuits”. He then strongly warned Belgium authority to either drop the charges or face a boycott of NATO’s Brussels head office.¹⁷⁸ Subsequently, Belgium was finally and humiliatingly compelled to back down.¹⁷⁹ More strikingly still, the United States House of Representatives promulgated a law mandating the invasion of the Netherlands where the International Criminal Court is based, if any attempt was made to put an American soldier on criminal trial.¹⁸⁰ For instance, in 2005, a Belgian judge issued an international arrest warrant for the former Chadian president Hissene Habré and officially requested his host country Senegal to extradite him immediately.¹⁸¹ In that connection, the African Union recently vociferously complained about “blatant abuse of principle of universal jurisdiction” and called for “immediate termination of all pending indictments”.¹⁸² Later, the African union asked Senegal to prosecute Habré “on behalf of Africa”.¹⁸³ In 2011 and 2012 Belgium again tried to submit extradition requests to Senegal but failed to follow the required procedure.¹⁸⁴ After Senegal failed to extradite Habé, Belgium launched proceedings against Senegal at the International Court of Justice. In 2012, the court found that Senegal breached its obligation under article 6(2) of the Convention against Torture.¹⁸⁵

Journal of International Law 2002, p. 723; Even though the judgement of the ICJ concerned immunity of an official holding office, the Belgium case against Abdulaye Yerodia Ndombasi was based on Universal Jurisdiction.

¹⁷⁵ For a comprehensive account of plunders and crimes against humanity in Congo by Belgium colonial power, see A. Hochschild, *King Leopard’s Ghost: A Story of Greed, Terror and Heroism in Colonial Africa*, New York: Mariner Books 1999.

¹⁷⁶ C. Smith, ‘Britain at Centre of Extradition Row over Ex-Bosnian Leader Ejup Ganic’, *The Times*, 3 March 2010; R. Gutman, ‘Serbia Pursues Ejup Ganic for War Crimes: Or is it a Vendetta?’, *Christian Science Monitor*, 12 April 2010; BBC, ‘Ex-Bosnian Leader Ejup Ganic Granted Bail by UK Court’, 11 March 2010.

¹⁷⁷ *The Government of the Republic of Serbia v. Ejup Ganic*, City of Westminster Magistrate’s Court, [2010] EW Misc 11 (MC). The fact that attempts to misuse the principle of universal jurisdiction had been unsuccessful does not show that there was no abuse but points to the working of an independent judiciary. The fact that proceedings were initiated demonstrates the intention to abuse the principle.

¹⁷⁸ I. Black & E. MacAkill, ‘US Threatens To Boycott Belgium over War Crimes Law’, *Guardian*, 13 June 2003.

¹⁷⁹ R. Bernstein, ‘Belgium Rethinks Its Prosecutorial Zeal’, *New York Times*, 1 April 2003; G. Frankel, ‘Belgium War Crimes Law Undone by Its Global Reach’, *Washington Post*, 30 September 2003. The fact that Belgium was forced to change its laws following the threats of the United States clearly demonstrates that powerful countries have a means to fight back while any threat from a developing country would not have the same effect.

¹⁸⁰ K. C. Moghalu, *Global Justice: The Politics of War Crimes Trials*, London: Praeger Security International 2006, p. 2.

¹⁸¹ *Idem*, p. 101; Mahmood Mamdani, *Saviors and Survivors*, pp. 225-7.

¹⁸² African Union, Assembly of the African Union, Fifteenth Ordinary Session, July 2010, Assembly/AU/Dec.292 (XV)Doc.EX.CL/606 (XVII), para. 3.

¹⁸³ AU, Decision on the Hissène Habré Case and the African Union, Doc.Assembly/AU/3(VII).

¹⁸⁴ Human Rights Watch, ‘Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal’, 31 August 2015, para. 23.

¹⁸⁵ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgement of 20 July 2012, [2012] ICJ Rep. 2012 at 422, para. 122, p. 463. The court ordered that Senegal must “without further

As a result, on 20 July 2015, the trial of Hissène Habré started in Senegal.¹⁸⁶ It cannot be denied that, as Human Rights Watch acknowledges, that “it is a reality that international justice has been applied unevenly. Powerful countries and their allies have often been able to avoid justice when serious crimes are committed.”¹⁸⁷

Sometimes individuals who are accused of horrible violations of human rights in their country settle in other countries as refugees. In that manner, they try to stay outside the reach of domestic justice. In that light, the independent expert, Mona Rishmawi, encouraged third countries to make every possible effort to hold accountable those alleged to have committed grave human rights violations in Somalia.¹⁸⁸ The host countries of such individuals can act in accordance with their international obligations. For example, in 1996 Canada blocked Rwandan official, Leon Mugesera, who was accused of incitement to genocide from asylum in Canada and subsequently ordered his expulsion.¹⁸⁹ In contrast, Somali former officials and warlords who masterminded or instigated the civil strife and gross human rights violations in Somalia easily settled outside the country as refugees or frequently visit abroad for different purposes. It is argued that refusing them settlement or starting investigations into their past atrocities would send a very strong message that anyone who grossly violates human rights and humanitarian law will be held to book wherever they may be. However, the deterrent effect of the principle of universal jurisdiction is not certain.¹⁹⁰ The other aim of the applying the principle of universal jurisdiction is to achieve justice by shaming governments in the countries where the atrocities took place into action.¹⁹¹ Nonetheless, in situations where the state institutions completely collapsed like Somalia, that strategy is not effective for there is no authority to shame or prompt into action.

The standard of acceptable evidence in criminal proceedings is much higher than the evidentiary threshold of civil trials.¹⁹² In addition, investigating crimes committed in foreign countries requires not only particular skills but also expert knowledge of pertinent international criminal law.¹⁹³ For instance, in 2005 a Somali warlord was arrested in Sweden after some members of Somali Diaspora filed a criminal complaint against him, accusing him of committing war crimes that occurred in Somalia in 1991. Even though video evidence was presented the case never came to trial and the warlord was subsequently released due to lack of evidence.¹⁹⁴ In another case, some Somali individuals successfully brought civil suits, under the US Alien Tort Claims Act, against former Somali defence minister and vice president Mohamed Ali Samatar for serious human rights abuses including torture and extrajudicial killings that he allegedly committed in Somalia. Samatar argued that he was entitled to immunity from the US courts under the Foreign Sovereign Immunities Act (FSIA). The US Supreme Court unanimously held that government officials who perpetrate human rights abuses whilst in office do not enjoy immunity.¹⁹⁵

delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him.”

¹⁸⁶ ‘Ex-Chad Leader goes on Trial in Senegal over Atrocities’, *Aljazeera*, 20 July 2015. Given the fact that Belgium pressured Senegal to prosecute Habré and most of the funding of the Chamber comes from Western countries, one can question whether this is an African case, see ‘Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal’, para. 22, 23.

¹⁸⁷ ‘Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal’, para. 25.

¹⁸⁸ Report of the Special Rapporteur, Ms. Mona Rishmawi, E/CN.4/2000/110, 26 January 2000, Submitted in Accordance with Commission on Human Rights Resolution 1999/75, p. 5.

¹⁸⁹ W. A. Schabas, ‘Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems’, *Criminal Law Forum* 1996, p. 556, 557.

¹⁹⁰ Kamminga, ‘Lessons Learned from the Exercise of Universal Jurisdiction’, p. 943.

¹⁹¹ *Idem*, p. 944.

¹⁹² Sarkin, ‘the Tension between Justice and Reconciliation’, p. 148.

¹⁹³ Kamminga, ‘Lessons Learned from the Exercise of Universal Jurisdiction’, p. 954.

¹⁹⁴ Human Rights Watch, ‘So Much to Fear’.

¹⁹⁵ *Samatar v. Yousuf et al.*, [2010] No. 08-1555; The claim was based on The Alien Tort Claims Act (28 U.S.C 1350)

Nonetheless, even if the court rules in favour of the plaintiff, it is not certain that political considerations will not stymie the implementation of the findings of the court. For instance, in 1980, a Paraguayan national residing in the United States brought a civil suit against a former police official from his home country, at the time visiting the United States, accusing him of torturing a family member to death.¹⁹⁶ Unfortunately, US officials allowed the defendant to return to his own country before the court had chance to deal with the merits of the case. Consequently, the plaintiff received no compensation whatsoever, and the accused did not have to be held accountable for his alleged actions.¹⁹⁷

The concept of universal jurisdiction can be an effective tool to fight impunity and provide a good mechanism of transitional justice if properly, impartially and systematically applied. However, in situations like Somalia where protracted violence has been ongoing for decades, the few individuals indicted and isolated criminal and civil lawsuits will have a negligible impact on the efforts to end the impunity at best. First, the number of perpetrators who can be held accountable for their actions is negligibly limited. In addition, without proper investigation of the all the atrocities and their root causes, isolated indictment will be unlikely to contribute to reconciliation, nor the pursuit of peace and system reform that are prerequisite for the prevention of recurrence of such horrible atrocities.

III. Concluding Remarks

The objective of transitional justice is to give societies affected by conflict and gross human rights violation a suitable way to deal with the past effectively. In actuality, justice is generally erroneously associated with punishment of individuals who have committed massive human rights abuses. This article discussed a range of ways of dealing with gross human rights violations including judicial mechanisms, truth commissions, lustration, compensation and amnesty, taking different contextual situations into account. Justice is seen as a cornerstone for the creation of legitimacy for the state and its institutions. In Somalia's case, the United Nations repeatedly asserted that without holding perpetrators of human rights violations accountable for their crimes, peace will be only an interim situation. The article illustrated that for transitional justice to have any chance of success, domestic structures should be put in place first. As the Commission on Human Rights recognised: "the prevailing tragic circumstances in Somalia, particularly the lack of government authority" requires particular measures to safeguard the protection of human rights.¹⁹⁸ It is also important to establish the complete truth of past atrocities, the reasons that caused such crimes to be perpetrated and the identities of individuals who were responsible. Exposing the crimes of the past regime will discredit and delegitimize it in such a way that the necessity of system reform will be established.¹⁹⁹ The article argued that in Somalia where the conflict has been going on for decades, where both perpetrators and victims number in the hundreds of thousands if not in their millions, no proper documentation of past crimes exists. Restoration of law and order and stability takes priority. When the state institutions start to function, decisions based on political consensus and on victims' needs can deal with the past violations. If ill-considered decisions on criminal prosecution are rammed through early in the post-conflict period, it can unnecessarily rekindle the cycle of violence. What is required is to build an accountable and professional security system. A robust justice system will have a better chance of preventing the recurrence of human rights abuses. The article concluded that an

¹⁹⁶ *Filartiga v. Pena-Irala*, [2d Cir. 1980] 630 F.2d 876.

¹⁹⁷ P.J. Magnarella, 'Internationally Human Rights: Fact or Fiction?', *Human Rights and Human Welfare* 2004, p. 73.

¹⁹⁸ Office of the High Commissioner for Human Rights, Assistance to Somalia in the Field of Human Rights, Commission on Human Rights resolution 1993/86, 67th meeting, 10 March 1993.

¹⁹⁹ Biggar, 'Peace and Justice', p. 170.

obvious dilemma needs to be solved. Without some kind of accountability or premise thereof, it would be challenging to achieve durable peace and reconciliation. At the same time, without functioning state institutions it is impossible to administer justice. In that respect, a balance should be struck taking the past into account and at the same time rebuilding state institutions capable of preventing atrocities from recurring. As Soren Kierkegaard observed, “life can only be understood backwards, but it must be lived forward.”²⁰⁰ In that respect, what is required is a policy that takes past atrocities into account and devises mechanisms geared towards both dealing with the past and preparing for future stability. It is also clear from the above analysis that in order to implement one of the aforementioned transitional justice mechanisms, a functioning government is a prerequisite.

²⁰⁰ M. Malikow, *Being Human: Philosophical Reflections on Psychological Issues*, Lanham, Md: Hamilton Books 2010, p. 83.