

Community justice or ethnojustice? Engaging with customary mechanisms for the reintegration of ex-combatants in Somalia¹

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Abstract⁴

The inclusion of customary justice mechanisms is increasingly being invoked as an answer to the top-down, externally-driven approach to transitional justice. But the practice of engaging with customary justice systems proves complicated. The approach of governments and the international community has been criticized as ‘ethnojustice’, where a male-elderly version of customary justice is invented and imposed, based on a myth of community consensus. In Somalia, the government and international community are currently considering a role for customary justice systems in the re-integration of low-risk disengaged Al-Shabaab (AS) combatants. In this article we combine unique data on local perceptions regarding the return of ex-combatants in Somalia with insights from the literature, to critically examine the prospects of engaging customary justice mechanisms in South-Central Somalia in the reintegration of disengaged Al Shabaab combatants and of a supporting role for the international donor community and the government.

Introduction

The transitional justice industry is critiqued for its top-down approach, resulting in detachment from local reality and limited impact on local populations. Donor-driven programming was to be replaced with a more participatory approach, responsive to local needs and embedded in local norms and perceptions of justice. But the practice of engaging with local, customary,⁵ justice systems proved complicated. It has been analyzed as imposing instrumental, re-imagined notions of customary justice in countries as varied as Rwanda, northern Uganda, Aceh and East-Timor.⁶ Branch coins the term ‘ethnojustice’ to describe donor and government-sponsored re-traditionalization of the local society through the imposition of a male-dominated version of customary justice.⁷ Contrary to the lofty goals of engaging with customary justice, an

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⁵ In this article, we use the terms customary and traditional interchangeably.

⁶ Cynthia M. Horne, ‘Reconstructing ‘Traditional’ Justice from the Outside in: Transitional justice in Aceh and East Timor’, *Journal of Peacebuilding & Development* 9(2) (2014): 17-32; Lars Waldorf, ‘Mass Justice for Mass Atrocity: Rethinking local justice as transitional justice’, *Temple Law Review* 79(1) (2006): 1-87; Adam Branch, ‘The Violence of Peace: Ethnojustice in northern Uganda’, *Development and Change* 45(3) (2014): 608-630.

⁷ Branch supra n 2.

ethnojustice approach could reduce local initiative, popular participation and ownership, and reproduce local power differences and structures of exploitation. The latter carries with it the potential for renewed conflict.

In Somalia, the government and international community are currently considering a role for customary justice systems in the re-integration of low-risk disengaged Al-Shabaab (AS) combatants. A devastating civil war has raged in Somalia since the overthrow of dictator Siad Barre in 1991. In recent years, a strong surge of African Union Mission in Somalia (AMISOM) and government troops has led to tangible gains in security. Now that half of the country is under control of the government—while still extremely fragile—former combatants from AS and clan militia are returning to their communities.⁸ South-Central Somalia⁹ now faces the immense challenge of peacefully reintegrating low-risk disengaged combatants into their communities. This is an urgent national priority, as an effective reintegration process is essential to ensure that returning combatants do not destabilize newly recovered areas and set back the progress made in regaining territory from Al Shabaab. Conversely, positive experiences of disengaged combatants at the community level is hoped to have a domino effect on combatants yet to disengage. The extreme weakness of the central government in Mogadishu, largely consisting of former warlords and plagued by sectarian fights, necessitates an inquiry into a possible role for elders and the customary justice system in the reintegration of ex-combatants.¹⁰ Their role is complicated by the fact that the *Xeer*, Somalia's customary justice system upholds inequality between clans and between men and women. The contested involvement of the international community in peace-building initiatives in Somalia furthermore warrants a critical inquiry into a possible role for international actors in supporting or shaping such local processes.

The aim of this article is to critically examine the prospects of engaging customary justice mechanisms in South-Central Somalia in the reintegration of disengaged AS combatants and of a supporting role for the international donor community and the government. The article is structured as follows. In the next section we will describe the debates in the transitional justice field regarding the engagement with customary justice systems. After that, we will analyze literature describing countries that have opted for an active engagement with customary justice mechanisms specifically for the reintegration of returning combatants. This literature will give a grounded understanding of how war and post-conflict transitional justice programming alter the functioning of customary institutions and people's perceptions thereof. Then we will turn to Somalia, with a brief description of Somalia's customary justice system—its kinship structures, positions of authority, and its customary law (*Xeer*). This is followed by an analysis of unique data from four districts of Somalia about popular perceptions on the return of disengaged combatants, the problems this causes, and the issue of their reintegration into the communities. These data were collected by the Traditional Dispute Resolution Unit (TDRU) within the Somali Ministry of Justice with support from the international community in order to plan a more effective government (and donor) approach to engagement with customary justice systems and devise policies in this field.¹¹ As the volatile security situation makes doing empirical work in

⁸ In 2013 it was estimated that there were 5100 disengaged combatants residing in camps or facilities across South-Central Somalia, and many more quietly trying to return to their communities on their own (Government of Somalia, Inter-Ministerial Task Force on Disengaging Combatants, *National Programme for the Treatment and Handling of Disengaging Combatants and Youth at Risk in Somalia* (30 April 2013).

⁹ This article focuses on South-Central Somalia, not on the autonomous regions of Somaliland and Puntland.

¹⁰ Cf. Government of Somalia, Inter-Ministerial Task Force on Disengaging Combatants, *National Programme for the Treatment and Handling of Disengaging Combatants*, revised draft (July 2014).

¹¹ This work was supported by the International Development Law Organization (IDLO) and funded by the United States Government. One of the authors, Janine Ubink, was involved in the project as 'Traditional Dispute

Somalia a huge challenge, these data represent one of the few attempts at identifying local needs and perceptions regarding transitional justice in Somalia. Combining knowledge of local perceptions in Somalia with insights into experiences with customary justice mechanisms in the reintegration of ex-combatants in other countries, we then conclude on the role Somalia's customary justice system could play in the reintegration of ex-combatants, as well as on a contribution of government and donors to these local processes.

From western justice to ethnojustice

The transitional justice industry is largely conceived, financed and often staffed by the international society. With limited attention given to the needs and wishes of the victims and their communities, transitional justice mechanisms are often strongly detached from the wider socio-political reality of the countries concerned.¹² Robins describes how

[t]ypically, both the goals and mechanisms of transitional justice are delineated by local elites ... and supported by an international community remote from the context and from indigenous understanding. In many cases, processes of consultation with victims and communities are cursory.¹³

There are growing concerns in the field that top-down western justice scripts may displace and discourage local practices of promoting peace and reconciliation.¹⁴ Moreover, the transitional justice field obfuscates the underlying politics of interventions, and their connection to the distribution of power. By representing transitional justice initiatives as apolitical and culture-neutral, the 'difficult choices and tradeoffs required in the wake of conflict in order to further objectives such as development and the protection of human rights' are obscured, which inhibits local participation in and ownership of these decisions.¹⁵

The growing critique on the top-down, externally-driven transitional justice approach has led to a heightened interest within academic and policy circles in more bottom-up, participatory strategies, responsive to local people's needs.¹⁶ This endorsement in the field of transitional justice is part of a broader resurgence of traditional leadership and recognition of customary law and indigenous group rights.¹⁷ Lundy and McGovern advocate for local participation in all

Resolution Expert'. Methodology and findings of the fieldwork, as well as recommendations for reintegration of ex-combatants, are discussed in Federal Government of Somalia, Ministry of Justice and Constitutional Affairs, 'Proposed Community Process for the Reintegration of Disengaged Combatants' (unpublished policy paper, 10 December 2014, on file with authors).

¹² Barbara Oomen, 'Transitional Justice and its Legitimacy: The case for a local perspective,' *Netherlands Quarterly of Human Rights* 25(1) (2007): 141-148; Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking transitional justice from the bottom up,' *Journal of Law and Society* 35(2) (2008): 265-92.

¹³ Simon Robins, 'Challenging the Therapeutic Ethic: A victim-centered evaluation of transitional justice process in Timor-Leste,' *The International Journal of Transitional Justice* 2012:2.

¹⁴ Dustin N. Sharp, 'Interrogating the Peripheries: The preoccupations of fourth generation transitional justice,' *Harvard Human Rights Journal* 26 (2013): 149-178; Branch, *supra* n 2; Horne, *supra* n 2; Waldorf, *supra* n 2.

¹⁵ Sharp, *supra* n 10.

¹⁶ Ketty Anyeko et al., 'The Cooling of Hearts': Community truth-telling in Northern Uganda,' *Human Rights Review* 13 (2012): 107-124; Sharp, *supra* n. 10.

¹⁷ Janine Ubink, *Traditional Authorities in Africa. Resurgence in an era of democratization* (Leiden: Leiden University Press, 2008); Barbara Oomen, *Chiefs in South Africa: Law, power and culture in the post-apartheid era* (Oxford: James Currey, 2005).

phases of the process, from conception and design, to decision-making and implementation.¹⁸ The ‘discourse of the local’ also advocates a greater embrace of local mechanisms and perceptions of justice.¹⁹ Several authors posit that the legitimacy and impact of transitional justice mechanisms is determined by their endogeneity—‘their embeddedness in local cosmology, normative values, and rituals’²⁰—and their resonance with ‘local cosmological beliefs about morality, social responsibility, and norms regarding appropriate behavior.’²¹

As a result, transitional justice programming has shifted towards including customary justice mechanisms. While this adaptation was, in part, an answer to critiques on top-down programming, it is itself strongly criticized as ‘ethnojustice.’ This term refers to programming where a particular version of customary justice is invented and imposed by donors and governments, based on a myth of community consensus.²² While this term is coined by Branch, other authors underscore similar aspects of imposition and invention of customary justice systems, founded on notions of community consensus.

On the first account—imposition and intervention—Branch portrays engagement with local justice mechanisms in northern Uganda as donor and government-sponsored re-traditionalization of the local society through the imposition of a male dominated version of customary justice.²³ Horne speaks of ‘the instrumentalization of traditional practices’ in Aceh and East-Timor. She describes how customary transitional justice mechanisms that are generally designated as bottom-up, are in fact revitalized, reconstructed and sometimes even implemented by external actors. These programs ‘imposed reimagined notions of traditional justice.’ She concludes that merely ‘situating the locus of transitional justice at the community level does not make the program “bottom-up” in any authentic understanding of the process.’²⁴ In similar vein, Waldorf sees Rwanda’s gacaca courts as ‘state imposed informalism,’ shaped to expand the state’s reach into local communities. Indigenous customs referred to in gacaca programming are mostly invented traditions ‘designed to promote social control and political ideologies.’ In his opinion, the involvement of locally-based justice mechanisms in this manner decreases local initiative, popular participation and ownership.²⁵ Shaw and Waldorf point out the contrast between the increasing incorporation of local justice mechanisms and actors in transitional justice programming with the subordinate role local priorities and conceptions play in relation to national and international political agendas and norms.²⁶ The ‘invention of tradition’ starts in early phases of transitional justice programming, as many of the studies undertaken to enhance program design seem to identify norms and institutions that resemble western notions of courts and laws.²⁷

Regarding the myth of community consensus, Branch describes how programming in Uganda presumes a history of community consensus regarding justice and spirituality, disregarding the variety of traditions and contestations within societies. External support for or

¹⁸ Lundy and McGovern, *supra* n 8.

¹⁹ Sharp, *supra* n 10.

²⁰ Oomen, *supra* n 13 at 146.

²¹ Erin Baines, ‘Sprits and Social Reconstruction after Mass Violence: Rethinking transitional justice,’ *African Affairs*, 109(436) (2010), 412.

²² Branch, *supra* n 2.

²³ *Ibid.*

²⁴ Horne, *supra* n 2, at 17-18, 28.

²⁵ Waldorf, *supra* n 2.

²⁶ Rosalind Shaw and Lars Waldorf, *Localizing Transitional justice. Interventions and priorities after mass violence* (Stanford: Stanford University Press, 2010).

²⁷ Baines, *supra* n 17.

imposition of the male-elderly version of customary law will stymie local contestations and result in a suppression of the wishes and interests of women and youth for the sake of establishing a peaceful post-war order.²⁸ Lundy and McGovern emphasize that the rhetoric of participation in transitional justice programming may conceal power differences within communities, and could be the means through which they are entrenched and reproduced.²⁹ Macdonald similarly concludes that strengthening customary authority structures while disregarding the differing views, ideas and customary practices within communities, can create or recreate structures of exploitation.³⁰ While this is an outcome generally at odds with donor programming, it is particularly problematic when the conflict was driven by discontent with traditional roles and the position of traditional leaders. Recognizing the potential for renewed conflict, Sharp states that justice interventions, while they need to be sensitive to the local context, may also need to challenge 'some of the dynamics or actors that led to a breakdown of rule of law in the first place.'³¹ An additional consequence of a primary focus on customary justice mechanisms is that it may allow non-local actors to evade accountability for their role in the conflict.³² The ideal of community consensus obscures the fact that justice, also at the local level, is political, and that "judicial" elites are neither independent nor impartial'.³³ In customary systems, judicial power is entwined with political power, as traditional leaders often combine powers of lawmaking, administration and dispute settlement. The unwritten nature of customary law, its adaptability to changing circumstances, and its goal of creating harmony over strict rule abidance, offer ample opportunity for political manipulation.³⁴

The studies described above seem to share the conclusion that governments and international donors should resist the temptation to coopt or control local justice, as all the benefits to be expected from local mechanisms for post-conflict justice and reconciliation 'slip under the radar when the local is defined solely as a space for intervention, not comprehension, not knowledge, not capacity.'³⁵ Similar critical voices emanate from studies on donor engagement with customary justice in (non-transitional-justice related) rule of law programming. Harper argues that the amount of research required to gain in-depth knowledge of complex customary justice systems and local power relations makes for a labor-intensive approach that is not likely to sit well with expectations and approaches of many donors and development agencies.³⁶ Central to the complexity of customary justice systems is their unwritten, negotiable and relational nature, and that there are multiple, competing versions of certain customary norms within communities or groups.³⁷ This is especially so in contexts where large economic or social transformations have occurred that have altered the social fabric and economic structures of the community, giving rise to competing values about, for instance, the position of women,

²⁸ Branch, supra n 2.

²⁹ Lundy and McGovern, supra n 8.

³⁰ Anna Macdonald, 'From the Ground Up: What does the evidence tell us about local experiences of transitional justice?', *Transitional Justice Review* 1(3) (2015): 72-121.

³¹ Sharp, supra n 10, at 167.

³² Branch, supra n 2.

³³ Waldorf, supra n 2

³⁴ Horne, supra n 2. Janine Ubink, 'Negotiated or Negated? The rhetoric and reality of customary tenure in an Ashanti village in Ghana,' *Africa* 87(2) (2008): 264-287.

³⁵ Baines, supra n 17, at 430; Cf. Waldorf, supra n 2.

³⁶ Erica Harper, 'Introduction,' in *Working with Customary Justice Systems: Post-Conflict and fragile states*, ed. Erica Harper (Rome: IDLO, 2011).

³⁷ M. Chanock, 'Neither Customary nor Legal: African customary law in an era of family law reform,' *International Journal of Law and the Family* 3 (1989): 172-87.

youth or traditional leaders.³⁸ Legal development actors, and the state and non-state organizations they work with, often lack knowledge about the different versions of living customary norms, the negotiable nature of customary justice, and the implications this has for engagement with customary justice systems. Time and resource constraints easily result in quick studies that accept elite representations of customary law. Such accounts can overlook the fact that there are different versions of such law or that the elite version is contested. Projects that adopt such norms as their starting point may actually be strengthening the position of elites in the community while weakening the marginalized group they seek to empower. Likewise, power differentials may be strengthened where the negotiable nature of customary law is not taken into account and efforts subsequently fail to focus on harnessing weaker parties in the negotiated settlement processes.³⁹

This literature about donor engagement with customary justice, in both transitional and non-transitional justice settings, highlights the complexities of engaging with customary justice mechanisms. In the following section, we will zoom in on cases where customary justice mechanisms have been specifically employed for the reintegration of disengaged combatants.

'Customary justice' and the reintegration of disengaged combatants

Several countries that have been confronted with the challenge of post-war reconstruction have thus included active engagement with customary justice mechanisms. Of these countries, Uganda,⁴⁰ Sierra Leone,⁴¹ Angola and Mozambique⁴² have employed customary mechanisms

³⁸ See for example J M Ubink, *In the Land of the Chiefs. Customary Law, Land Conflicts, and the Role of the State in Peri-Urban Ghana* (Leiden: Leiden University Press, 2008).

³⁹ Janine Ubink and Benjamin van Rooij, 'Towards Customary Legal Empowerment: An introduction,' in *Customary Justice: Perspectives on legal empowerment*, ed. Janine Ubink (Rome: IDLO, 2011).

⁴⁰ Traditional reconciliation processes to reintegrate combatants from the Lord's Resistance Army (LRA) into their communities are often referred to as *matu oput*, which denotes a ritual that entails the drinking of a bitter root. However, '[t]he notion of *matu oput* has often been used metaphorically to refer to nearly every reconciliation process taking place in Acholi today' whereas it is 'normally carried out after a typically long process of mediation between the two involved parties' and is 'the final act which concludes the process of reconciliation that follows a ... killing'. In addition to a reconciliation of the parties involved, the ceremonies are meant to appease the spirit of the person killed, who would otherwise haunt the killer and cause distress in his family and clan (T. Harlacher, 'Traditional Ways of Coping with Consequences of Traumatic Stress in Acholiland, Northern Uganda: Ethnography from a western psychological perspective' (PhD diss., University of Freiburg, 2009).

⁴¹ *Fambul tok* ceremonies (which means 'family talk' in the national language of Krio) center on a truth-telling bonfire in the evening, where victims and offenders share their stories with their communities and can ask for and grant forgiveness, followed by a cleansing ceremony the next morning. *Fambul Tok* was a relative small program, initiated by a local NGO in partnership with a US-based foundation. In the first five years of programming over 155 reconciliation ceremonies have taken place across Sierra Leone, with more than 2700 people testifying to over 60,000 community members. (Elisabeth Hoffman, 'Reconciliation in Sierra Leone: Local processes yield global lessons,' *The Fletcher Forum of World Affairs* 32(2) (2008): 129-141; Lyn S. Graybill, 'Traditional Practices and Reconciliation in Sierra Leone: The effectiveness of Fambul Tok,' *Conflict Trends* 3 (2010): 41-47; 'Love and Forgiveness in Governance: Exemplars: Fambul Tok, <http://www.beyondintractability.org/lfg/exemplars/fambultok>.

⁴² In both Angola and Mozambique returned combatants are subjected to cleansing rituals that are to purify them from the pollution caused by anger of the spirits of the dead killed in the war. The rituals articulate an acknowledgement of atrocities committed and a symbolic break from the past. They are performed in the presence of family members and the broader community, but do not involve a focus on individual victims of the

specifically for the reintegration of returning combatants. The literature on these latter countries provides important starting points for discussing the viability of a similar customary approach to reintegration of disengaged combatants in Somalia. It highlights several ways in which the context of war and large-scale violence—and the transitional justice programming that follows it—alter the functioning of customary institutions and people’s perceptions thereof.

This literature manifests that reintegration ceremonies for disengaged combatants necessarily diverge from ‘regular’ traditional justice mechanisms. Traditional dispute settlement mechanisms employed in rural areas are generally not used to dealing with the extent or gravity of crimes committed during civil wars.⁴³ They are traditionally applied to settle disputes within the family or community, or address violence between clans that had, up to that point, maintained friendly relationships.⁴⁴ Furthermore, in a context of large-scale violence, perpetrators often cannot identify victims and the victims’ clans, particularly when the ex-combatants were forcibly conscripted or abducted at a very young age. These limitations inhibit individual approaches to truth telling and reconciliation.⁴⁵ Payment of compensation to the victim’s family by the perpetrator’s family, often a part of traditional dispute settlement ceremonies, is impractical and unaffordable in cases of large-scale violence and the presence of unknown or multiple victims. Forced conscriptions may furthermore mitigate the collective responsibility of clans for their member’s wrongdoing.

The return of disengaged combatants to their communities is generally characterized by a strong sense of distrust. Returning combatants are fearful of reprisal by warring parties, including the group from which they defected, particularly if the conflict is ongoing. Returning combatants are also afraid of detention or harassment by the government, as well as of provoking revenge by victims and their families and clans.⁴⁶ Community members in turn are often suspicious of the returnees and afraid of reprisal actions by the armed groups from which the combatants have disengaged. This environment of distrust impacts the processes of truth-telling and granting of forgiveness. Verbal exteriorization of crimes committed is seen as inviting only new tensions within communities, or as opening the door for harmful spirits.⁴⁷

As a result, reintegration ceremonies often diverge significantly from traditional reconciliation ceremonies. They may for instance be more communal, focusing on an acknowledgement of general guilt rather than specific crimes and victims, include only

ex-combatant (Alcinda Honwana, ‘Children of War: Understanding war and war cleansing in Mozambique and Angola,’ in *Civilians in War*, ed. Simon Chesterman (Boulder: Lynne Rienner Publishers, 2001)). ‘Gamba spirits’ – spirits of male soldiers who died during the civil war – over time became both harmful spirits and the most popular form of conflict resolution, in which spirits possessed perpetrators or their kin until the culprit acknowledges the misdeeds and makes reparations. The recognition of culpability is seen as a form of punishment, through losing face, but also allows for a rebuilding of trustful relations in its aftermath (Victor Igreja and Elin Skaar, ‘“A Conflict does not Rot”: State and Civil Society Responses to Civil War Offences in Mozambique,’ *Nordic Journal of Human Rights* 31(2) (2013): 149-175.

⁴³ Kamari Maxime Clarke, *Fictions of Justice. The International Criminal Court and the challenge of legal pluralism in sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009); Graybill, supra n 37.

⁴⁴ Clarke, supra; Harlacher, supra n 36.

⁴⁵ Hope Among, ‘The Application of Traditional Justice Mechanisms to the Atrocities Committed by Child Soldiers in Uganda: A practical restorative justice approach,’ *African Human Rights Law Journal* 13 (2013): 441-463.

⁴⁶ Lucy Hovil and Joanna R. Quinn, *Peace first, justice later. Traditional justice in northern Uganda*, Refugee Law Project (2005); Anyeko et al., supra n 12.

⁴⁷ Honwana (supra n 38) describes how in Mozambique people believe that spirits of those killed in the war will penetrate the communities to retaliate for the wrong done to them during the war. Rituals and cleansing ceremonies are aimed at seeking forgiveness and appeasing the souls of the dead.

ceremonial compensation or none at all, not involve identified victims, and be more of a stand-alone ceremony than the culmination of a protracted period of mediation.⁴⁸ The necessity of adapting the traditional ceremonies to the civil war circumstances is clear, but some commentators worry that some changes may negatively impact on the reconciliation between communities and returnees, particularly when truth-telling aspects or payment of compensation are seen as integral parts of restoring relations between the offended clans.⁴⁹ Meier, writing about northern Uganda, sees a separation of traditional rituals from their cosmological context, resulting in a loss of the rituals' binding force.⁵⁰

The destruction of many social and cultural structures during the conflict makes the inclusion of traditional elements in post-conflict reconciliation neither self-evident nor unproblematic. The internal displacement of people that often takes place in conflicts severely disrupted the social space where, through teachings surrounding everyday activities and community ceremonies, community members used to learn about traditional justice mechanisms.⁵¹ Traditional mechanisms and their underlying values and processes get displaced along with the people of the conflict-affected area. As a result, the younger generation in particular does not appreciate the position and relevance of traditional leaders, who play a vital role in the traditional justice mechanisms.⁵² This includes many ex-combatants. It is argued that "those who do not believe in spiritual redemption cannot be reconciled using traditional justice mechanisms."⁵³

The inclusion of traditional leaders is even more fraught when unpopular actions by traditional leaders, such as levying high taxes, requiring forced labor, unfair land management and sanctioning of dissenters, were a particular cause of dissatisfaction before the war. In Sierra Leone, for instance, youth discontent, stemming from feeling marginalized by both the government and the traditional leaders, is seen as one of the main drivers of the civil war.⁵⁴ Rebels often targeted and killed traditional leaders, defiled sacred places, and destroyed shrines and ceremonial objects.⁵⁵

The ambiguous position of traditional structures and leaders poses the question of what role they can play in the reintegration of ex-combatants, and whether and how donors and governments should engage with them. We saw that in Uganda, donor support for the

⁴⁸ Among, supra n 41; Hovil and Quinn, supra n 42; Barbara Meier "'Death does not rot": Transitional justice and local "truths" in the aftermath of war in northern Uganda", *Africa Spectrum* 48(2) (2013): 25-50; Tim Allen, 'Ritual (ab)use? Problems with traditional justice in Northern Uganda,' in *Courting Conflict? Justice, Peace and the ICC in Africa*, eds. N. Waddell and Ph. Clark (London: Royal African Society, 2008); Clarke, supra n 39.

⁴⁹ Anyeko et al., supra n 12; Hovil and Quinn, supra n 42; Meier, supra. A 2009 report states that 33 percent of respondents in northern Uganda believed that *matu oput* could not take place if compensation were not available, and 25 percent claimed that compensation would be taken forcibly from the perpetrator's clan if they did not pay (Matu Oput Project, Community perspectives on the matu oput process: A research Study by the Matu Oput Project, 2009).

⁵⁰ Meier, supra n 44.

⁵¹ James Ojera Latigo, 'Northern Uganda: Tradition-based practices in the Acholi region,' in *Traditional Justice and Reconciliation after Violent Conflict. Learning from African experiences*, eds. Huyse and Salter (Stockholm: International Institute for Democracy and Electoral Assistance (IDEA), 2008).

⁵² Hovil and Quinn, supra n 42; Among, supra n 41; Latigo, supra.

⁵³ Clarke, supra n 39, at 131.

⁵⁴ Mohamed Sesay, 'Harmonizing Customary Justice with the International Rule of Law? Lessons from post-conflict Sierra Leone,' in *Evaluating Transitional Justice. Accountability and peacebuilding in post-conflict Sierra*, eds. Kirsten Ainley, Rebekka Friedman and Chris Mahony (London: Palgrave Macmillan, 2015).

⁵⁵ Rebekka Friedman, 'Restorative Justice in Sierra Leone: Promises and limitations,' in Ainley et al, supra.

revitalization of local social and cultural structures led to the critique that the so-called “traditional justice mechanisms” used to deal with ex-LRA combatants are not traditional at all. They are instead imposed, reified ‘neo-traditional’ practices,’ which have lost their flexibility and natural evolution and in which the general population has little interest.⁵⁶ Meier notes an ‘apparent contradiction between the way *matu oput* was promoted by so many actors from outside the region and criticized and contested by so many from within Acholi communities.’⁵⁷ The most profound critique comes from Branch who describes the use of traditional rituals for the reintegration of ex-rebels in Uganda as part of a broader donor-sponsored and government-supported program of re-traditionalization of Acholi society. This broader program includes the establishment of new paramount chiefs and a council of chiefs, as well as the ‘positivization and formalization of traditional justice by collecting and writing down practices, rituals and ceremonies.’⁵⁸ This ethnojustice project starts from a fictional presumption of community consensus regarding justice and spirituality. While such consensus is perhaps not currently in existence, it is assumed to have existed prior to colonial and postcolonial state intervention and the civil war, and needs to be restored to bring genuine peace and order to the region. This a-historic depiction of Acholi society as harmonious and leadership structures as unchallenged ignores the contestation of norms and power configurations throughout Acholi history. The civil war and the population’s displacement formed contemporary arenas for such challenges to male elderly rule by women and youth. Branch argues that the support for or imposition of ethnojustice results not only in a suppression of the wishes and interests of women and youth to elderly males for the sake of establishing a peaceful post-war order, but leads to new violence itself. Violence against women and youth in the name of the traditional order—in the form of physical punishments, denial of access to land, expulsion from the community, and curses—as well as in the form of resistance from these groups, particularly from ex-LRA returnees.⁵⁹

In Sierra Leone, *Fambul Tok* tried to balance the need to rebuild local social structures and incorporate communal traditions to strengthen communal bonds on the one hand, with an understanding of the ambiguous position and standing of traditional leaders on the other. Its discourse of building on traditional practices gave prominence to traditional figures of authority, while also insisting on the inclusion of leadership from women, youth and other historically marginalized groups. Aiming to undercut youth discontent and enhance community bonding, youth have been given an important role in the reconciliation committees and are doing most of the groundwork for the reconciliation events.⁶⁰ Women were also included, ‘to ensure equal participation and treatment of women and counter Sierra Leone’s patriarchal cultural traditions.’⁶¹ Nevertheless, at the outset of *Fambul Tok*, there was little specific attention directed to women’s issues and inclusion. Moreover, women were unintentionally marginalized by social norms discouraging the public sharing of incidences of sexual violence. In response, the organization increased the representation of women on Reconciliation Committees at the district level and brought women from *Fambul Tok* communities throughout the country together to consider how they might best participate in peace-building activities.⁶² While acknowledging *Fambul Tok*’s attempts to open the process up to women and youth, Friedman sounds a

⁵⁶ Allen, supra n 44; Meier, supra n 44.

⁵⁷ Meier, supra.

⁵⁸ Branch, supra n 2, at 620.

⁵⁹ Returnees already report feeling marginalized in their communities and being denied access to land (Ibid.).

⁶⁰ Graybill, supra n 37.

⁶¹ Ibid., at 44.

⁶² Courtney E. Cole and Stephanie Norander, ‘From Sierra Leone to Kosovo: Exploring possibilities for gendered peacebuilding,’ *Women & Language* 34(1) (2011): 29-49.

cautious note on the re-establishment of local authority structures and warns against the risk of reinstating pre-war patrimonial power structures and hierarchies.⁶³ Mitton indicates that the

process of seeking forgiveness and acceptance by society has required ex-combatants to resubmit to the authority and traditions of recipient communities. Not unreasonably ... those expected to reconcile with ex-combatants expect them to abide by the rules and social conventions of their communities. However, to ex-combatants, this may appear to constitute not so much reconciliation as conformity to the very structures against which they had fought.⁶⁴ Perhaps not surprisingly then, many ex-combatants have decided to stay in larger urban areas with fellow ex-combatants instead of returning to their home communities.⁶⁵

The literature on Uganda and Sierra Leone thus underscores that, where traditional leaders were heavily involved in the conflict or where popular discontent with their role was a driver of the war, a return to pre-war *status quo* runs the risk of re-creating the situation that led to the war.

With this knowledge of the impact of a conflict context and of post-conflict transitional justice programming on the performance of traditional justice mechanisms in the reintegration of disengaged combatants, we now turn to Somalia. We will first discuss its customary justice system, then the unique data from four districts about popular perceptions on the return and reintegration of disengaged combatants. Finally, we will conclude on the role Somalia's customary justice system could play in this regard, as well as on a contribution of government and donors to these local processes.

Somalia: Kinship, authority and customary law⁶⁶

While Somalia is ethnically and culturally one of the most homogenous African countries and all Somalis share one language and religion,⁶⁷ Somali society is bifurcated into a patchwork of patrilineal clans.⁶⁸ The strongest clans are the Darod, Dir, Hawiye and Isaq. They are overwhelmingly nomadic pastoralists and therefore regarded as noble (*bilis*). The Digil and Mirifle (Rahanweyn) clans, who are predominantly agro-pastoralists and cultivators, traditionally held a subordinate position. In contemporary Somalia, they are well-armed, well-resourced and are said to hold similar power to the pastoralist clans.⁶⁹ A third tier consists of occupational

⁶³ Friedman, *supra* n 51.

⁶⁴ Kieran Mitton, 'A Pragmatic Pact. Reconciliation and reintegration in Sierra Leone,' in Ainley et al, eds., *supra* n 50, at 31. Cf. Laura Stovel "'There's no Bad Bush to Throw away a Bad Child": "Tradition"-inspired reintegration in post-war Sierra Leone", ' *Journal of Modern African Studies* 46(2) (2008): 305-324.

⁶⁵ Mitton, *supra*, at 218,233.

⁶⁶ An earlier version of this section can be found in: Federal Government of Somalia, Ministry of Justice and Constitutional Affairs (2014) 'Policy Paper on the Somali Customary Justice system' (unpublished policy paper, 23 November 2014, on file with authors), to which one of the authors contributed as Traditional Dispute Resolution Expert.

⁶⁷ Mary Harper, *Getting Somalia Wrong? Faith, war and hope in a shattered state* (London, New York: Zed Books, 2012).

⁶⁸ Andre Le Sage, 'Prospects for Al Itihad and Islamist Radicalization in Somalia,' *Review of African Political Economy* 28(89) (2001).

⁶⁹ Ali Ahmed, email message to author, April 2, 2016.

clans, who traditionally performed specialized occupations such as tanning, shoemaking or metalworking, which are considered to be ritually unclean, or other occupations such as fishing, trading and hunting.⁷⁰ Conflicts between clans, sub-clans and sub-sub-clans have played a prominent role in the history of Somalia from the pre-colonial period until the present.

Indigenous systems of governance and dispute resolution in Somalia, based on customary law or *Xeer*, date back to the pre-colonial era.⁷¹ Lewis characterizes *Xeer* as a form of social contract,⁷² which consists of customs and unwritten agreements that have evolved within and between Somali clan communities over generations. They are designed to prevent the escalation of conflicts when they arise over sharing and use of resources, war and peace, marriage, and other issues.⁷³ *Xeer* is closely associated with *diya*, blood money paid as compensation for misconduct. The *diya*-paying group is the basis of the lineage-based political divisions and the most stable political unit in the agnatic system. This is the unit, composed of a few hundred to a few thousand men, that shares the collective responsibility for its members' actions and can make claims for compensation for crimes committed against its members.⁷⁴ When compensation is not received, 'the victim's kin are expected to exact blood revenge not only on the perpetrator but also on *any member* of the perpetrator's lineage—which often touches off even more claims and counter-claims for *diya* payments or revenge.'⁷⁵ Collective responsibility does not completely exclude individual accountability. When a person repeatedly commits crimes, he can be denounced, and ultimately killed, by his *diya*-paying group.⁷⁶

Somali customary dispute settlement institutions have a fluid institutional structure. Dispute settlement panels of elders are formed when someone approaches an elder with a complaint, and the membership of a panel will depend on the nature of the case.⁷⁷ The oral clan agreements that form the basis of *Xeer* are memorized and communicated through poems, songs, sayings and proverbs, and storytelling.⁷⁸ *Xeer* functions unequally between strong clans who are well-armed and well-resourced and weak clans, particularly minority clans that are unarmed and possess few resources. In the words of Le Sage: 'Xeer is not a strictly "rule-based" system. A clan's political and military capabilities relative to its rivals ... ha[ve] always been a factor in reaching an acceptable and enforceable consensus.'⁷⁹ Stronger clans can often dictate the terms of agreements and compensation, which is a cause of severe mistrust between clans.

In the colonial period, Somalis continued to rely predominantly on customary law for the regulation of their affairs, as neither the Italian colonial administration in Somalia nor the British

⁷⁰ Hussein Solomon, 'Somalia's Clans and the Need to go beyond the Nation-state' (paper presented at the Africa Studies Association conference, San Diego, United States, 19-21 November 2015).

⁷¹ Mahdi Abdile, 'Customary Dispute Resolution in Somalia,' *African Conflict & Peacebuilding Review*, 2(1) (2012): 87-110.

⁷² I.M. Lewis, *A Pastoral Democracy. A study of pastoralism and politics among the northern Somali of the Horn of Africa* (Oxford: James Currey, 1999).

⁷³ Interpeace, *The search for Peace. Community-based Peace processes in South-Central Somalia*, n.d.

⁷⁴ Lewis, supra n 68.

⁷⁵ Brian Hesse, 'Lessons in Successful Somali Governance,' *Journal of Contemporary African Studies*, 28(1) 2010: 71-83, at 73.

⁷⁶ Discussion with TDRU-members, Mogadishu, Somalia, 2 July 2014.

⁷⁷ United Nations Development Programme Somalia, *Xeer Procedure in Somaliland. A study on the Somali customary law procedure in criminal and civil cases in Somaliland* (January 2007).

⁷⁸ Abdile, supra n 67.

⁷⁹ Andre Le Sage, *Stateless Justice in Somalia: Formal and informal rule of law initiatives* (Centre for Humanitarian Dialogue, 2005), at 16.

colonial administration in Somaliland sought to replace customary law—with the exception of larger crimes and other matters of public order.⁸⁰ The colonial powers integrated traditional leaders into their administrative system by paying financial stipends and replacing independent traditional leaders with loyal ones, which changed the structures of legitimacy of traditional leadership and the accountability and responsiveness of traditional leaders to their people.⁸¹ In 1960, when British Somaliland and Italian Somalia were united to form the independent Somali Republic, the new government aimed to integrate the four distinct legal traditions that were in operation: Italian civil law, British common law, *Sharia*, and *Xeer*.⁸² These reforms did not, however, have a significant impact on local practices that continued to be regulated mostly by *Xeer* and *Sharia*.⁸³ The post-colonial Somali elite considered traditional leaders as hampering modernization and development and aimed to marginalize their position. Notably, the military regime that seized power in 1969 under the leadership of General Mohamed Siad Barre officially disregarded anything traditional.⁸⁴ In the first years of its rule the regime introduced a unified civil code that aimed to sharply curtail *Sharia* as well as *Xeer*. It abolished 'tribalism' and key elements of *Xeer*, including its application to tribal land and water and grazing rights. The Barre regime determined that homicides were punishable by death and compensation payable only to the close relatives, thereby diverging significantly from the practice of *diya* payment by the collective of the culprit (the *diya*-paying group) to the collective of the victim.⁸⁵ In practice, while traditional authorities 'lost a considerable amount of freedom and authority to decide on matters related to their community'⁸⁶ dispute settlement by elders on the basis of *Xeer* continued to play an important role.⁸⁷ Already unpopular due to corruption, repression, severe clashes with Islamic scholars, and the collapse of Somalia's economy, Siad Barre was no longer able to withstand the militia factions led by disgruntled political and military leaders when the end of the Cold War significantly reduced foreign support to the Somali army.⁸⁸ In 1991 Barre was ousted.

Unlike Somaliland and Puntland, where political control over large parts of the territory was quickly established by two former militia factions, in South-Central Somalia, the militia factions that had worked together to overthrow Siad Barre turned against each other in violent competition for political supremacy, introducing a second phase of the civil war.⁸⁹ The role of elders extended significantly to fill the vacuum of authority created by the collapse of the state and the ensuing civil war and lawlessness.⁹⁰ Paradoxically, the authority of the elders was also weakened due to several factors: their inability to quell high levels of insecurity and violence; the proliferation of powerful clan-based leaders as well as AS leaders who did not respect their

⁸⁰ Ibid.

⁸¹ K. Menkhaus, 'Calm between the Storms? Patterns of political violence in Somalia, 1950-1980,' *Journal of Eastern African Studies*, 8(4) (2014).

⁸² Academy for Peace and Development, *The Judicial System in Somaliland*, Workshop report, April 2002, <http://www.mbali.info/doc178.htm>.

⁸³ Le Sage, supra n 75.

⁸⁴ Markus Hoehne, 'Limits of Hybrid Political Orders: The case of Somaliland,' *Journal of Eastern African Studies*, 7(2) (2013): 199-217.

⁸⁵ Academy for Peace and Development, supra n 78; Le Sage, supra n 75.

⁸⁶ Markus Hoehne 'From Pastoral to State Politics: Traditional authorities in northern Somalia,' in *State Recognition and Democratisation in Sub-Saharan Africa: A new dawn for traditional authorities?* Eds. Lars Buur and Helene Kyed (New York: Palgrave Macmillan, 2007), at 162.

⁸⁷ Hoehne, supra n 80.

⁸⁸ Le Sage, supra n 75.

⁸⁹ Ibid.

⁹⁰ Interpeace, supra n 69.

authority; the proliferation of elders, resulting from clan fragmentation as well as the creation of new (or 'fake') elders by political or military leaders trying to ensure clan support; the involvement of some elders in the mobilization of their clan militia for inter- and intra-clan fighting and their loss of impartiality, siding with their clansmen in conflicts even where they were the aggressors; and the breakdown of *Xeer* between pastoralists and agricultural communities that had protected the weaker agriculturalists to a certain extent.⁹¹ From approximately 1993 to 2006, Islamic courts played a leading role in the restoration of security after years of anarchy.⁹² In later years, AS has similarly been credited with providing some form of law and order in the areas under their control.⁹³ In this paradox of an extended, yet weakened role for the elders and customary dispute settlement, Somali customary law has continued to be the primary source of law and order for the majority of Somalis until the present day. This context informs people's current understanding of a role for elders and *Xeer* in the reintegration of disengaged AS members.

Popular perceptions in Somalia regarding reintegration

In 2014, a team of officials from the TDRU⁹⁴ of the Somali Ministry of Justice went to four districts of South-Central Somalia; Hamar Weyne, Hamar Jajab (both in Benadir Region), Baydhaba, and Kismayu (in Bay and Lower Juba regions respectively). They held group interviews with 284 informants, including clan elders, *ulumas*, and local authorities consisting of district commissioners, district judges and district police commissioners.⁹⁵ To guarantee a broader representation of the community other informants included women, youth, and peace

⁹¹ Ibid.

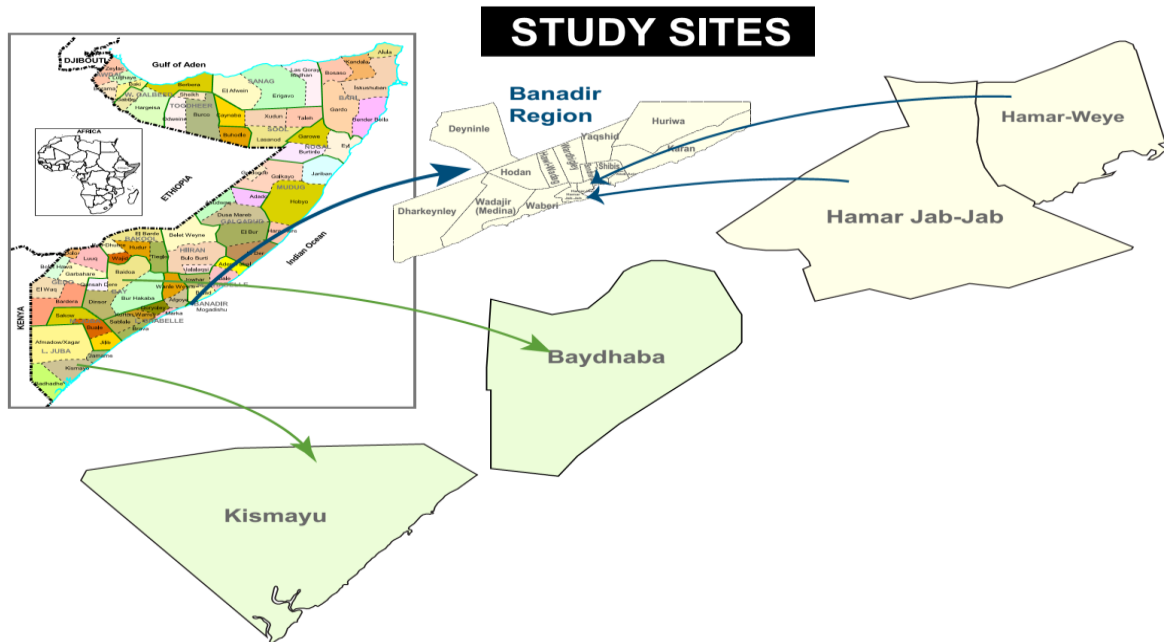
⁹² International Crisis Group, *Somalia's Islamists*, Africa Report 100, 12 December 2005.

⁹³ Christopher Anzalone, 'Al-Shabab's Tactical and Media Strategies in the Wake of its Battlefield Setbacks', *CTC Sentinel* 6(3) (March 2013) <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somalia/Somalias%20Islamists.pdf>.

⁹⁴ The mandate of the TDRU, a sub-department of the Judicial Department of the Ministry of Justice established in 2014, is "to support the government in its policy making and implementation efforts regarding the progressive development of TDR mechanisms, and act as a convening power between different governmental and non-governmental actors involved with TDR-mechanisms, with the ultimate goal of supporting the government of Somalia to improve local stability, peace and access to justice, in particular for vulnerable groups, including women, children and disadvantaged social groups." One of its three stated objectives is "[t]o support, facilitate and monitor the peaceful re-integration of disengaged communities in their communities through TDR processes." The TDRU is to implement its mandate through data collection and consultation, the formulation of policy guidelines, and acting as a focal point between various governmental and non-governmental actors with regard to implementation of these guidelines (Terms of Reference TDRU, Ministry of Justice and Constitutional Affairs, Office of the Deputy Minister, Mogadishu, Somalia, 2 June 2014).

⁹⁵ The semi-structured group interviews, which lasted between 45 minutes and almost four hours, were conducted in Somali by one or two TDRU-officials accompanied by one or two assistants who recorded and later transcribed the answers. These records were translated into English and discussed in meetings with the TDRU team and the consultants (including one of the authors), particularly their relevance for the formulation of policy guidelines regarding the reintegration of disengaged combatants, and to bring out the gaps in knowledge, with which the team defined interview questions for the second fieldwork round. After that, the TDRU officials conducted a second round of interviews with the same and new interviewees. While the fact that these data were collected by a division within the Somali Ministry of Justice may raise questions as to potential bias, the TDRU operated rather independently from higher cadres, who seemed to have very little knowledge of the topic as well as limited preconceived ideas. In fact, limited interest from the Ministry top was a real concern of those involved in the TDRU.

committees.⁹⁶ The goal of the study was to ascertain community views on *Xeer* justice generally, and on ex-AS combatants' return and reintegration.



Source: *Proposed Community Process for the Reintegration of Disengaged Combatants, Ministry of Justice and Constitutional Affairs, 10 December 2014, Annex A: Research Methodology, page 31.*

Results of the interviews emphasized that most people in the districts studied were ready to accept ex-combatants back in their communities. For the sake of bringing an end to the civil war, and believing that combatants will not disengage when they expect to be punished upon return, a restorative approach was advocated over a retributive one. During a group interview with elders in Baydhaba it was expressed that '[o]ur *Xeer* does not punish people who have been brainwashed by fanatics. We are a culture of forgiveness'.⁹⁷ However, several respondents made exceptions for leaders and those returnees who committed the worst crimes.

At the time of the study, elders accepted returning combatants back into the communities without any process for reintegration or reconciliation with the community.⁹⁸ Elders reported that safety concerns prompted them to take a hands-off approach and not ask too many questions. Respondents noted that the unregulated return of ex-combatants brings various problems to the locality. Ex-combatants fear retribution from AS, which has been successful in hunting down some defectors. They also fear community members who have grievances against the ex-combatants for specific crimes or for their participation in AS operations generally. In addition, respondents relayed that returnees were often targeted by government security agencies. The local community, and elders involved in the return of ex-

⁹⁶ Peace committees are boards consisting of members of local civil society groups who work closely together with elders, local authorities and the police in maintaining peace and order.

⁹⁷ Interview elders, Baydhaba, Somalia, 18 June 2014.

⁹⁸ Combatants who were captured on the battlefield or turned themselves in were sent to Somalia's National Intelligence and Security Agency (NISA) for screening. Those designated low-risk by NISA were then sent to Rehabilitation Centers to prepare them for return to their communities.

combatants, particularly those of minority groups, feared that AS would retaliate against them for accepting the returnees. They also feared ‘fake returnees’ who have not denounced AS, but in fact come to the locality on a mission for AS to eliminate a certain local figurehead. One instance of this happened in Kismayu, where an AS member posed as ex-combatant to murder a relative who was a high-ranking security officer in the interim Juba administration. This story was constantly repeated by respondents.

People expressed the need for some kind of process to address these security concerns. There was broad agreement that such a process should be initiated and executed by local institutions, and should build on local practices. State institutions were widely regarded as too weak and illegitimate to play a role. Moreover, many saw a restorative justice process as desirable ‘because we do not know who committed which crimes and who should receive the compensation.’⁹⁹ They envisaged a process that would establish sincerity of the returnees by requiring ex-combatants to acknowledge their wrongdoing and request community forgiveness. A community response would then signal the acceptance of the returnee and thus break through the cycle of revenge. Several respondents said that the situation would be more complicated for those returnees who committed known crimes in the community they were returning to. For these instances it was argued that the victims or their families needed to be involved, to make sure they would also forgive and accept the returnee and not exact revenge later. ‘General crimes can be forgiven, but specific crimes which are committed against individuals – be it murder or damage to property – only those victims have the power to forgive, or ask for compensation.’¹⁰⁰

While it was conceded that reintegrating returning combatants is not, as such, covered by *Xeer*, respondents emphasized that customary norms and institutions are constantly changing and could be built upon to deal with this challenge. For instance, several respondents reported the development of a new *Xeer* that addresses mass casualties. It stipulates that loss of life and property due to fire, storms, flooding, and large-scale clan conflicts shall be settled through agreement, and without compensation. The appearance of female titled elders is an example of the continued evolution of customary institutions.

While *Xeer* dispute settlement often revolves around notions of retribution, and compensation in its stead, both *Xeer* and *Sharia* are imbued with motifs and ideals of forgiveness, harmony and peace. It is these notions that could be built upon for the peaceful reintegration of ex-combatants. A non-punitive approach also has consequences for the role of fact-finding in the reintegration procedures. *Xeer* procedures usually start with a process of detailed fact-finding, to establish a shared truth upon which to base the punishment or compensation. In the case of returning combatants, full disclosure of atrocities committed and involvement in crimes is likely not beneficial to local stability.

Respondents saw both elders and *uluma* playing a role. Elders are already being approached by returning combatants, and are traditionally tasked with safeguarding local peace and justice. The *uluma* could possibly oversee the orientation of former AS combatants in the religious Islamic doctrine prohibiting use of evil acts and teaching of reverence to human dignity. In addition, respondents mentioned that a community declaration forgiving the ex-combatants and accepting them back into their midst would have greater authority and force with religious and traditional power behind it due to presence of *uluma* and elders at the communal gathering. Some respondents also suggested that the *uluma* oversee a swearing by ex-combatants on the Quran that they would not return to militancy, but others opposed this, afraid of the negative

⁹⁹ Interview elders, Baydhaba, Somalia, 18 June 2014.

¹⁰⁰ Interview *uluma*, Hamar Jajab, Somalia, 28 June 2014.

consequences if such oaths were broken. In addition to a role for elders and *uluma*, respondents, particularly those from women's groups, youth groups and peace committees, advocated for the inclusion of other community groups in any reintegration process for ex-combatants, citing the tendency of traditional institutions and *Xeer* to exclude and treat differently members of vulnerable groups such as women, youth, minority clans, and foreigners. Wide participation obviously brings additional security challenges.¹⁰¹

Community-based reintegration in Somalia

This study aims to critically examine the prospects for engaging South-Central Somalia's customary justice mechanisms in the reintegration of low-risk disengaged AS combatants and of a supporting role for the international donor community and the government. Linking the popular perceptions in Somalia with the insights gained from the literature on other countries where the customary justice system has played a role in the reintegration of disengaged combatants leads to several understandings.

First, the importance of clan allegiance in Somalia may impact the responsibility for crimes and perpetuate the inequality among clans. Despite people's rhetoric of forgiveness, it is not entirely clear whether victims and their families will in all cases be willing to forego compensation. A context of large-scale armed conflict may nullify the collective responsibility of families and clans for their member's wrongdoing. The situation in Somalia is ambiguous though. AS, despite its Islamic rhetoric, is not free from clan dynamics. According to Solomon, much of AS's actions, including decisions where to lay a new offensive, can 'be better explained through the dynamics of Somali clan politics as opposed to Islamist ideology.'¹⁰² In addition, many of the AS combatants, while their choices were severely restricted by ongoing famines and lack of alternative livelihoods and they often did not join out of Islamic fundamentalism, were not forcibly conscripted.¹⁰³ The interlinking of AS and clan interests led certain people in Baydhaba to confront clansmen of *active* (not disengaged) AS combatants who were causing mayhem in the area and demand compensation from them. In Hamar Jajab, on the other hand, respondents claimed that clans could not be held responsible for actions of clan members operating under the aegis of AS. It is an open question whether in some areas or cases collective guilt for the actions of a *disengaged* combatants may similarly be apportioned to the (sub-)clan and the payment of compensation via clan structures seen as appropriate. One particular concern in this regard is that if reintegration procedures are imbued with clan interests, it is likely that the inequality of clans will be reinforced in the process, with majority clans imposing forgiveness on minority clans regarding disengaged combatants from the majority clans, while refusing to grant the same and enforcing *Xeer* compensation rules or exacting revenge regarding ex-combatants from minority clans.

¹⁰¹ The Peace Committee of Hamar Jajab preferred not to have a reintegration process, because of the security risks (interview, Peace Committee, Hamar Jajab, Somalia, 11 August 2014).

¹⁰² In the early stages, AS relied heavily on clan leaders and their militias and incorporated them into the organization where possible. Tensions between the various clans led to serious divisions within AS. Later the leadership tried to weed out commanders who favored their clans over the Islamist identity of the organization as a whole, while still attempting to incorporate local clan leaders from the areas AS controlled (Solomon, *supra* n 66, at 12,14).

¹⁰³ In a 2014 study among 95 ex-combatants, 13% reported they were forced to join AS (Anneli Botha and Mahdi Abdile, *Radicalisation and al-Shabaab Recruitment in Somalia*, Institute for security Studies, ISS Paper 266, 2014).

Second, Somalia has experienced challenges to customary and religious authority and witnesses increased pressure to enhance the inclusiveness of local reintegration processes. The authority of elders suffered from the conflict. During the civil war, the role of elders extended significantly to fill the vacuum of authority created by the collapse of the state, but their authority was paradoxically also weakened, due to disrespect from clan leaders and AS, the elders' inability to address the violence and insecurity in their communities, and even involvement of some elders in clan fighting. The authority of *uluma* was similarly challenged, by AS and other Islamist groups that propagated their own strict version of Islam and denounced other Islamic leaders as un-Islamic. The loss of respect for clan elders and Islamic leaders complicates their role in the reintegration of ex-combatants. Their involvement could function as an opportunity for local authority figures to re-establish themselves and their peace-building capacity. This could have a positive impact on conflict resolution, but this is a delicate process. The customary justice system in Somalia suffers from a lack of participation of youth and women, and expanding its authority may suppress challenges to male elderly rule by such groups, which may lead to violence against or (violent) resistance from them.¹⁰⁴ While Somalia is a strongly patriarchal Islamic society, many of the respondents reportedly supported a more inclusive community-wide reintegration process. Inclusion of the youth could go some way towards undercutting youth discontent, one of the driving forces of recruitment to AS. One way reintegration processes could be more inclusive is through the participation of Peace Committees, viz. local committees involved in conflict resolution comprised of representatives of the various sections of the community including women and youth. Such committees exist in three of the districts studied and play an active role in their communities.

Third, the context of an ongoing civil war in Somalia leads to security concerns. The need for a reintegration ceremony largely stems from the insecurity caused by unregulated returns of ex-combatants. This insecurity is felt by the community—which does not know whether returnees have indeed disengaged or are instead returning on a murderous mission for AS—as well as by the returnees—who both fear AS's wrath for their defection as well as community revenge for crimes committed during their time with AS. Elders, particularly from minority groups, have also indicated a reluctance to be involved with returning combatants for fear of retaliation against them by either AS or the government security apparatus. While a reintegration process is intended to address these causes of insecurity, their sources differ and therefore their solutions may be contradictory. For instance, while a public ceremony involving the community as a whole could go a long way to address the insecurity of returnees vis-à-vis the community and possibly also vice versa, it may simultaneously heighten the visibility of returnees as well as of community leaders involved in the reintegration process and thereby increase the risk of attention from AS for the defection and for the community. It has been said that involvement of the government could make it safer for people to engage with local reintegration processes.¹⁰⁵ This makes sense in countries where the threat comes from the government, in the form of prosecution of disengaged combatants by the government. Here, however, the threat comes from both the government and AS. Furthermore, the position of the Federal Government of Somalia is so fraught that—while it is hoped that in the long run cooperation between the formal and the informal justice system will enhance the standing of both and reduce mistrust – in the short run governmental endorsement may rather delegitimize local processes than reinforce them.

¹⁰⁴ Respondents also pointed to several customary practices they found problematic, such as widow inheritance and the custom to marry a rape victim to her rapist in order to save her honor and that of her family and to make sure she is taken care of, as the rape has ruined her chances of marrying another man. Such practices are contested and slowly changing.

¹⁰⁵ Hoffman, supra n 37.

Another factor complicating Somalia's security issues is the screening needed to sift high-risk ex-combatants from the low-risk ones. To ensure that no perpetrators of major crimes slip through the cracks and are reintegrated into their communities, the screening of all disengaged combatants by NISA is declared as a non-negotiable step in the return process. The government's stance in this regard is informed by the international community, which is adamantly against the granting of a blanket amnesty to AS ex-combatants. They point to Somalia's obligations under international law to prosecute and punish war crimes and crimes against humanity.¹⁰⁶ While such a screening offers an opportunity to transfer the high-risk cases from the localities to the state, and may therefore be beneficial to local reintegration processes, the cooperation of community leaders in such a system obviously holds security risks, as these leaders are likely to be held accountable for the apprehension of high-risk ex-combatants by the government. In addition, the further return of disengaged combatants will be hampered if word spreads that ex-combatants who return to their communities and contact the elders may be diverted to the criminal justice system and end up in prison.

Conclusion

We do not romanticize traditional forms of justice, nor suggest that reintegration processes based on acknowledgement or wrongdoing and granting of forgiveness reflect the totality of people's understandings of justice. Nevertheless, from a pragmatic point of view, the only real hope for reintegrating low-risk ex-combatants in Somalia lies at the level of the communities.

Asserting that there is a role for the local in the reintegration of ex-combatants leaves unanswered the question of donor and government support for such local processes. This may be a somewhat theoretical question for now, as the Somali government is extremely weak and the donor community severely constricted in its movements by the precarious security situation in the country. Nevertheless, international donors and the government see the reintegration of ex-combatants as an important security issue. Moreover, the establishment and activities of the TDRU shows their interest in supporting community-based reintegration processes.¹⁰⁷ Somali communities are generally very poor and could make good use of financial support for local activities, particularly when geared towards job creation and economic projects. In addition, the role the state and particularly international actors play in capturing and screening of ex-combatants calls for some kind of communication and cooperation between these actors and the locality.

Having said that, we advocate for a cautious hands-off approach by external actors, in order to avoid the pitfalls of ethno-justice. Sharp points out that '[t]he rise of the discourse of the local could also be thought of as a practice of resistance to the perceived hegemony of international peace building.'¹⁰⁸ In Somalia, the role of external actors is even more fraught than in most other countries. The role of the state is extremely contested and the government is largely seen as a predator. Moreover, the role of the international community in peace building is heavily criticized.¹⁰⁹ Menkhaus advances the thesis that policies of western and UN actors

¹⁰⁶ Stuart Casey-Maslen, "Disengaged combatants" in *Somalia: A review of the normative framework*, September 2013. It is not clear what criteria are currently employed by NISA to determine whether someone is considered 'high-risk'.

¹⁰⁷ Government of Somalia, *supra* n 90. In 2015, the TDRU piloted a project on community reconciliation in Baydhaba.

¹⁰⁸ Sharp, *supra* n 10, at 168.

¹⁰⁹ Harper, *supra* n 63.

meant to aid peace building in fact helped to inflame conflict and insecurity.¹¹⁰ External actors' lack of legitimacy sends a clear signal warning against their interference in local affairs concerning justice and reintegration. This is particularly true when such involvement would be aiming to strengthen the authority of clan elders, without awareness of sub-altern voices, such as from women and youth. The role some clan elders in South-Central Somalia played in the civil war should make us wary of creating or recreating structures of exploitation.

A clear lesson from this article is that it matters to what extent customary structures—elites, practices, norms—were implicated in the conflict, or a cause of dissatisfaction leading to the struggle. If they were heavily involved, a return to the pre-war status quo will not so much bring peace as recreate the situation that led to war. An engagement with customary justice in such a case should go beyond a re-creation of male elderly power, and scrutinize whether the current point in time provides an opening for broader community participation. What is the perception of the population in this regard, and do community structures exist that could serve as a model or entry point? Will traditional leaders, anxious to remain relevant in the new constellation, be open to negotiate certain changes to their style of administration? To prevent an imposition of an imagined customary system, participation and decision-making power of the local population in all stages of the process, from conception and design to implementation, is indispensable. Only by taking a supporting, back-bench position and allowing for locally differentiated programming, can external actors assure that reintegration processes—even when they are new imaginations of older themes in order to deal with the new situation of large-scale violence—are based on local notions of justice.

The first activities of Somalia's TDRU—data collection on local people's perceptions, and discussion in the same communities of skeletal guidelines for a policy paper based on these perceptions—give hope. The considerable investment of time and resources, and willingness to persevere despite the precarious security situation, shows genuine commitment. There are, however, some formidable challenges ahead, including: the context of a highly fragile, and for many Somalis illegitimate, government; pervasive inter and intra-clan distrust; the continuing power of AS to derail any peace process; and the discredited role of the international community in peace-building in Somalia.

¹¹⁰ Ken Menkhaus, 'Somalia: "They created a desert and called it peace(building)"', *Review of African Political Economy* 120 (2009): 223-233.