

CONSTITUTION-MAKING IN SOMALIA: A CRITICAL ANALYSIS, 1960 –

2013

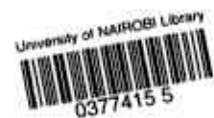
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DECLARATION

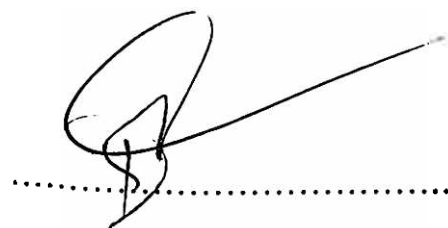
This research project is my original work and has not been presented for the award of a degree in any other University.



.....
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5th November 2014
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This research project has been submitted for examination with my approval as the University Supervisor.



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Date

DEDICATION

To my parents Hirsi Ahmed and Hooyo Fatuma and my wife Habiba Kutubey and children Khalid, Imran, Maida, Farhan, Salwa and Rage for their support, patience, understanding and encouragement. To my friend Abdinasir Mohamud Sheikh for all the unwavering support he extended to me throughout the course.

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LIST OF ABBREVIATIONS

- AMISOM - African Union Mission in Somalia
- ANC - African National Congress
- ARS - Alliance for the Re-liberation of Somalia
- AU – African Union
- CDC - Consultation Draft Constitution
- COE – Committee of Experts
- DDR - Disarmament, Demobilization and Reintegration
- FCC - Federal Constitution Commission
- ICCPR - International Covenant on Civil and Political Rights
- ICESCR - International Covenant on Economic, Social and Cultural Rights
- ICU - Islamic Courts Union
- IFCC - Independent Federal Constitution Commission
- IGAD - Intergovernmental Authority on Development
- KDF – Kenya Defense Forces
- NCA – National Constituent Assembly
- NDIIA - National Democratic Institute for International Affairs
- RECs – Regional Economic Cooperation’s
- SRC - Supreme Revolutionary Council
- SRSR - Special Representative of the Secretary-General
- TFC - Transitional Federal Charter
- TFG - Transitional Federal Government
- TFP - Transitional Federal Parliament

UDHR - Universal Declaration of Human Rights

UN – United Nations

UNHCR - United Nations High Commissioner for Refugees

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CHAPTER ONE

INTRODUCTION TO THE STUDY

1.0 Introduction

As Okoth-Ogendo pointed out a constitution is: A power map upon which the framers may delineate a whole set of concerns ranging all the way from an application of the Hobbesian concept of 'the covenant,' to an authoritative affirmation of the basis of social, moral, political or cultural existence including the ideals towards which the policy is expected to strive.¹ Hence constitutional-making, is a process which involves, inter alia, making choices as to which one of those concerns should appear on that map.

Thus, how these choices made, would necessarily affect some positively and others negatively depending on how they involved on the making of the choice. Hart asserts that, unlike the traditional constitutional making which considers the constitution as an act of "completion," modern constitutional making focus on participatory and conversational "new constitutionalism."² Today there is a virtual consensus that a constitution should be made democratically. The understanding now prevails that constitutional process is democratic; only if it is participatory and all-inclusive in each stage preceding the final document.

Medhanie argues that constitution-making as it involves "essentially the distribution of power," the way constitutions made, as well as its substance, is of crucial importance in

¹ Okoth-Ogendo Hart, *constitution without constitutionalism: political economy reflection on an African political paradox in State and constitutionalism an African debate on democracy*, (Published by South Africa 1st edition, 1991), 13.

² Vivien Hart, *Democratic Constitution-Making*, (Cambridge: Cambridge University Press, 2003), Report No. 107.

the political and governance transitions of every polity. Particularly in polities in short of national consensus, the participation of all the political, ethnic and socio-economic groups in this power distribution agenda fosters and strengthens in all of them the awareness that they are part of the same polity. It endorses and sustains the people's "sense of commonality" i.e. "the sociological claim of 'We' that defines a people."³ This legitimacy, the sense of "We" minimizes the threat to the political stability.

Accordingly constitution-making, if it is properly organized, given adequate attention and resources, can transform societies from the worst to the better and if not, to a continued unrest. These are among the lessons that emerged from an ongoing study that has been conducted over the past several years by the United States Institute of Peace on constitution making, peacebuilding, and national reconciliation. Through an examination of 17 case studies of constitution making processes around the world, which have occurred over the course of the last 25 years, focusing primarily on post-conflict transitions, the study attempts to assess the constitution making process for its potential for conflict resolution and prevention as well as for the maintenance of stable peace.⁴ To date, this review by a wide range of experts strongly suggests a basic message perhaps more so than at any previous time in history, the processes by which constitutions are made matters.

Regassa notes that, constitutional making is a process which never ends. Legitimacy, hence, is also which nations gradually build in the course of implementing the

³ Medhanie Tesfatsion *Constitution-making, Legitimacy and Regional Integration: (America: Affairs Council of Northern California, 2010), 45.*

⁴ Ibid, p1.

constitution itself by employing different positive measures.⁵ While this has been the case, some bodies, who consider the existing Ethiopian constitution as if it came through a faulty process rather opted a zero-sum stance against the constitution. Others, on the other hand, engaged on the political competition with less commitment and feeling of disadvantages. The view on the making of the constitution yet remained a point of difference among actors in the political process.

1.1 Background

Somalia has lacked an effective national government since 1991 when the government collapsed following the ousting of President Mohamed Siyad Barre. Over the past twenty years, various armed groups have vied for political dominance in South Central Somalia, the most recent of which is *Al-Shabaab*, an Al-Qaeda linked armed group which has opposed the Transitional Federal Government (TFG) and its efforts to put in place a new Provisional Constitution for Somalia. But the situation in Somalia has been improving from both a political and security perspective. The relatively peaceful political transition has taken place alongside the adoption on August 1, 2012 of the Provisional Constitution of Somalia, the first official new national constitution in 52 years, currently awaiting popular referendum. Furthermore, Mogadishu is also now under the direct control of the Somali government, with assistance from African Union troops. Major cities in the south of Somalia, including Kismayu have been recovered from *Al-Shabab*.

However, real challenges face the new Somalia, which President Hassan Sheikh Mohamud calls “the third republic”. These challenges will need to be addressed before

⁵ Tsegaye Regassa, *Issues of federalism in Ethiopia: towards an inventory, in Ethiopian constitutional law series*, (Addis Ababa: AAU printing press, 2009), 23.

the government is able to provide the people of Somalia with functioning and effective services and protection. Two of the most challenging issues which must be addressed as implementation of the Constitution goes forward are reconciliation and political reconstruction, and institution-building. Though it is true to a lesser extent in Somaliland and Puntland, at this point there are no functioning government institutions that can deliver constitutionally-mandated services to the people of Somalia, of which services upholding the rule of law are a cornerstone. Thus, the road to lasting peace in Somalia requires the re-establishment of the rule of law in Somalia through effective government. The adoption of the Provisional Constitution by the National Constitution Assembly on the August 1, 2012 has marked a notable milestone. The Constitution is a progressive document based on Islamic principles that contains key elements of the rule of law and lays out a vision of democratic governance. It also establishes Federalism with a parliamentary system of government. In order to safeguard the constitution and the vision it puts forth for Somalia, effective federal institutions must be in place. Chief among them are an effective justice system and an accountable security apparatus.

The constitution attempts to respond to historic injustices and appreciates that where security and justice are not available to all equally, grievances may develop that can cause or inflame conflict. Justice and security are also necessary for Somalia's economic and social development, and vital for the protection of human rights. The current institutions and organizations that make up the security and justice sectors (such as the police, armed forces and judiciary) are often unable to provide people with adequate services. In the past two decades, donor investment in the area of justice has been minimal and this has contributed to a paucity of qualified justice professionals in the

three zones of Somalia: Somaliland, Puntland and South Central Somalia; the latter receiving less investment than the other two areas which are enjoying relative peace.

The election of the new president and the recent security progress against *Al-Shabab* insurgents has made both the Somali people and the International Community hopeful for a recovery in Somalia. In order to translate that goodwill and abundant optimism, the government should put in place policies that will augment the security gains and advance rule of law in Somalia. Tellingly, the President has made Justice and Security a top priority for his new government. After two decades of civil war, those involved in the rebuilding efforts have a unique opportunity to 'get it right.' Specifically, now is the time for those investing in the future of Somalia to support the development of structures and systems that are in line with democratic principles of accountability and transparency, and to make sure these systems respond to citizen needs while also matching the economic realities and the long-term sustainability of Somalia.

1.2 Statement of the Research Problem

A constitution enjoys a special place in the life of any nation. It is the supreme and fundamental law that set out the state's basic structure, including the exercise of political power and the relationship between political entities and between the state and the people. As the former Chief Justice of South Africa, Justice Ismail Mohamed, once observed, 'a constitution is not simply a statute which mechanically defines the structures of the government and the relations between the government and the governed, but it is:⁶

⁶ John Hatchard, Muna Ndulo and Peter Slinn, *Comparative constitutionalism and good governance in the commonwealth an eastern and southern African perspective*; (New York: Cambridge university, 2004), 23.

⁶ Ugandan Constitution

a Mirror reflects the national soul, the identification of the ideals and aspiration of a nation; the articulation of the values binding its people and disciplining its governments.’ This notion has been reflected by many constitutions adopted in Africa in late in 1990s. The constitution of Uganda is an example, which provides that the constitution is to build a better future by establishing a socioeconomic and political order through a popular and durable constitution.⁷ Principally the constitution is the supreme document of the land, which enhances and protects the democratic values and principles. As a result, it has been renowned that viable and durable constitutions play a vital role in the effectiveness of democratic institutions.

Somalia is a history beset by conflict, with short periods of peace interrupted by ferocious periods of oppression, civil war, militia activity, and foreign interventions⁸ until the State finally collapsed in 1992. Yet it would be inaccurate to assert that all Somali institutions failed. As will be shown briefly, with respect to the justice sector, some traditional Somali institutions survived, in particular the customary cashier system of law and a system of the Shari’ah, the Islamic law.⁹ Beyond custom and the Shari’ah, however, and with the support of the international community, a Somali statutory legal culture has survived. It is a tattered system and much work must be done by both international and domestic actors to restore it, but distinct Somali statutory legal traditions at least survive in the four Somali constitutional texts considered in this study. There is thus a foundation upon which, in time, legal institutions worthy of the name can be built.

⁷ Ugandan Constitution

⁸ Othman Mahmood, *The Root Causes of the United Nations Failure in Somalia: The Role of Neighbouring Countries in the Somali Crisis* (Somalia, 2006), 3-14.

⁹ Xeer is a customary and informal legal system, whereby tribal elders resolve disputes between members of clans and between clans. Elmi, *supra* note 1, 31-32.

However, the Provisional Constitution passed by the Constituent Assembly in Mogadishu on 1 August 2012 envisions more than a system of customary law and a legal culture. It creates a federal and state judiciary, headed by a Constitutional Court and Judicial Service Commission; it promises a wide array of fundamental rights to Somali citizens which are to be protected by the judiciary and its calls for a series of laws to be promulgated to implement its provisions. However, the current reality in Somalia is an enormous need for institutions and human capacity in order to ensure that the Provisional Constitution does not become a mere piece of 'parchment' irrelevant to the lives of Somalis.¹⁰ This study, therefore, sought to examine constitution making in Somalia: a critical analysis, 1960-2013.

1.3 Objective of the Study

The overall objective of the study was to critically examine the constitution making process in Somalia. More specifically, the study aimed to:

- i. Provide an overview of constitution-making processes in Somalia;
- ii. Examine the institutional capacity of the Constitutional Court in Somalia;
- iii. Analyze the role of local and international actors in the constitution-making process in Somalia.

1.4 Literature Review

In the state of nature as John Locke observes in his book, 'Two Treatise of Government' there was a system of governance in Africa before the colonization. Somali as a British protectorate had a traditional system of governance, which encompass the powers, and

¹⁰ Terrence Lyons and Ahmed Samatar, *Somalia: State Collapse, Multilateral Intervention, and Strategies for Political Reconstruction* (Somalia, 1995) 23-24.

functions of the modern democratic governance. Unlike the current contemporary political structure, Somali had no a written constitution which guarantees the fundamental rights and freedoms of its inhabitants. Moreover, there was no unified and centralized political authority. On the contrary, the political structure was divided into clans and sub-clans. It is, therefore, impracticable to have a constitution in this traditional political structure. It is highly reasonable to argue that, it is the current democratic system, which requires a written constitution and its monitoring institution.¹¹

Othman¹² observes that during the colonial epoch, the Somali was governed directly by the queen's representative, the governor, who exercised all legislative and executive powers. In 1946 an advisory council was established which consisted of 48 selected by the governor from different sectors of the community. This council had no legislative and executive power. In 1955 the legislative council was set up under the 'Somali Order in Council 1955'. The council composed of 15 members and presided by the governor. In addition, there was another two orders, which came into force in 1959 and 1960 respectively. None of these two orders established a separate body, such as constitutional court or other relevant institution, which protects the rights and freedoms of the citizens. The only reasons that can be justified why these orders or constitutions did not institutionalize a constitutional court are the two political systems are different. Before the restoration of the independence of Somali in 1991, Somali had practiced a parliamentary system, which did not separate the powers of the state. Conceptually the doctrine of separation of powers obliges the division of power into three different

¹¹ John Hatchard, Muna Ndulo and Peter Slinn, *Comparative constitutionalism and good governance in the commonwealth an eastern and southern African perspective* (New York: Cambridge university, 2004), 23.

¹² Ibid, p 6.

branches (legislative, executive and judiciary). The judiciary is one of the key institutions of this presidential system by which Somali adopted in Borame in 1993. It is the constitutional court, which protects, develops, enhances and promotes the constitution and constitutional justice. After the unilateral secession from the rest of Somalia, Somali developed its first post-Barre constitution in 1997. A committee nominated by the former House of Representative drafted a draft constitution. In it a constitutional court was constitutionalized which serves as a watchdog of the constitution.

1.4.1 Ethos of Constitution-Making

Gobeze asserts that constitutional history dictates, the origin of written constitution dates back to the late 18century in America, and then in French, following the revolution.¹³ Since the period was the time when peoples were struggling for liberation against autocratic governance, constitution was limited only to limit the government and stipulate people's right. Later, after it began to be adopted by different polities; it started to take different meanings depending on the ideology and tradition of the polity where it was developed and grown. Hence, though the American model, due to its prominence in originating the concept of modern constitutionalism and its cross boundary¹⁴, is often taken to be the only way of understanding, constitution, it is yet proper to understand a constitution as it is perceived in different cultural and ideological contexts. Such changes in meaning, purpose and forms of constitution should also be viewed as part of constitutional development.

¹³ Gobeze Negede, *Constitution, election and democracy in Ethiopia* (Amharic). (ASEOP: publisher, America, 2004), 59-60.

¹⁴ Mattie Ekra, *The New Ethiopian Constitution: First Thoughts on Ethnical Federalism and the Reception of Western Institutions*,(Addis Ababa University: Harvard University Press, 2010),14

Accordingly, Daniel¹⁵ states that different ways of understanding a constitution emerged, such as, constitution as a frame of government and protection of right, as modern adaptation of ancient traditional practices, constitution as revolutionary manifesto, as a code and political idea. Constitution as a frame of government and protection of rights is the original US model. The model took the pioneer in the level of its transplantation in different parts of the world. Almost all modern polities' constitution, including Somali, took the form of the US model. Mattei,¹⁶ a constitutional comparativist, describes the constitution of Somali as it followed the rhetoric part of the structure, and many of the categories of the American model. This model maintains the idea that a constitution is or should be meant to lay the framework of the government: the basic institution, structure and mechanisms through which the polity can function properly and democratically. Also, as a protector of citizens, it's audacious certain rights to be superficial and attach mechanisms for their enforcement. Constitutions in this module are designed in a way to answer the changing demands of the generation; hence there is no need to abrogate the whole constitution in the aftermath of each generation. Yet this does not mean amendment is not justified.

The constitution as revolutionary manifesto, which is often named interchangeably with the socialist model, is both developed and grown within socialist/communist ideology. It is known that the communist ideology is centered on the struggle for the liberation of the working class from the rich oppressors. Constitution in socialist ideology, therefore, is a

¹⁵Daniel Espen, *Constitution-making: The Pre-eminently political act* (New York University: Public Law and Legal Theory Working Papers, 2010), 23.

¹⁶ Clarke Walter and Robert Gosende, "Somalia: Can a Collapsed State Reconstitute Itself?" *In State Failure and State Weakness in a Time of Terror*, (Washington: Brookings Institute Press, 2003), 129-158.

plan of action or instrument towards liberating the specific group i.e. the working class. It is a document which describes the rights, responsibilities and powers of those to whom the constitution is targeted and those who take the lead in realizing these ideals of the constitution. In relation to its being a program, such constitution will only have the age of the polity which developed the program.

Elter observes that Constitution as a modern adaptation of an ancient tradition represent those countries which only have unwritten constitutional convention like Britain, Israel and New Zealand.¹⁷ In these nations constitution is a collection of fundamental rules developed through time marking the adaptation of the great tradition to changed circumstances. These polities have a deep-rooted commitment to the ancient and continuing constitutional tradition developed in their history, religion or both. Constitution as a code and political idea is also another way of understanding constitutional adaptation in a different polity. However, in spite of their differences in forms, purpose and meanings, constitutions share similar features, in that they are power maps, reflect the realities of power distribution, are fundamental laws which set fundamental issues of the polity and, are, which have stringent amendment procedure as opposed to regular laws.

¹⁷ Elster, John. Forces and mechanisms in the constitution making process, Duke Law Journal, Vol. 45, 1995 at 366, available at <http://links.jstor.org/sici?sici=0012-7086%28199511%293%3A45%3A2%3C364%3AFAMITC%3E2.0.CO%3B2-A>, consulted on August 03, 2010, He described, however, in some countries like in France and Hungary fundamental laws like electoral rules are not set in the constitution, while in some others it is stated only in a general terms.

1.4.3 'Democracy,' Constitution and Constitution-Making

Piotrowski contends that unless we need a majority tyrant, we may describe democracy as majoritarian rule.¹⁸ He further states that if we demand a more stable and all-inclusive polity, democracy should mean more than the simple terms of a majoritarian rule. Scholars often, therefore, have stated limitation on simple terms of democracy. Peczenik, for instance, provided a broader meaning of democracy: political representation of the interest of citizens, majority rule, participation of citizens in politics, freedom of opinion, the protection of human and political rights, legal certainty, and division of power and responsibility of those who are in power.¹⁹

Dahlv pointed out certain criteria: voting equality at decisive stage, effective participation, enlightened understanding, final control of the agenda and inclusiveness for a democracy not to create majority tyrant.²⁰ In spite of the difference in length of lists of criteria presented by different scholars, there is a common understanding that in democracy rights to be protected, the majority to act only within the prescribed rules, legal certainty and an all-inclusive political environment. Thus, democracy should be understood as regime capable of building political community in harmony.

Constitution and democracy are often inseparable ideals, as the latter is unthinkable without the presence of the former. One may dare to disprove this truth mentioning the strength of democracy in those nations which only have constitutional convention. Primarily, it is unfair to assert that countries in short of written and packed constitution

¹⁸ Piotrowski Wright *Commentary introduction: Democracy and constitution: one without the other, Connecticut law review*, (New York: Cambridge university, 2010), 852.

¹⁹ Aleksander Peczenik, *Why constitution? What constitution? Constraint in majority rule in why the constitution matter*, (oxford university: Oxford university press2002), 18-19.

²⁰ Lundstrom Mats. *The moral standing of democracy, in why constitution matter* (oxford university: Oxford university press, 2002), 72.

are without constitution. As it is attempted to describe earlier, constitutions may take different forms depending on the Juristic-political realities of nations where it is developed. Yet, all nations possess a document which they refer to as a higher law, which set fundamental matters and can only be changed with relatively stringent amendment rules. In Israel, for instance, after decision not to have constitution in a coded way is made, fundamental laws constitutionalizing its legislative, executive and judicial organs, the presidency, the state lands, civil-military relations, and the status of Jerusalem have been enacted since the early 1950s.²¹

Elster observes that Israel's Declaration of Independence (a covenantal document) has also been given quasi-constitutional status by the courts in lieu of a formal bill of rights, since it specifies the basic principles of the regime, though yet there exist unsettled issues such as the status and powers of local government or controversial ones such as a bill of rights.²² These laws a part from regulating more fundamental norms; most of them contain a provision that they cannot be modified during a state of emergency. Thus, it is unrealistic to reach to a conclusion that these countries have ensured democracy without rules, as a constitution is nothing else but a collection of fundamental rules.

Whether constitution has often ensured democracy in history is another valid and practical question. Although country specific arguments for the failure of each constitution might be raised, democracy also requires a commitment to be faithful to the constitution. Since it is the constitution which establishes and protects democratic principles, it is important to respect and endure the constitution so that democracy also does. One way or another constitution plays a democratic function in many ways. As a

²¹ Ibid, p11

²² Ibid

fundamental law of the country it provides the framework so as to ensure smooth operation of political system by channeling the expression of politics through a prescribed rules and institution, it establish peaceful means for change of government, it solidify the political community by affirming common values, and also by declaring equality of all groups to participate and take advantage in all forms Constitution making on the other turn is a crucial moment where we choose a constitution to be either instrument of democracy or discrimination, inequality, social unrest, a legalized dictatorship or others which define undemocratic polity.

To use Sajo's interesting typology in describing how important the process which created the constitution is or as it may leave whatever mark on the polity to come, he stated: "if one is born with the aid of forceps, the surgical marks remain."²³ Owing to the mothers alcoholism or syphilis, the infant may need to undergo a long period treatment, generally lasting impact." In constitution making also both the process that we prefer to use and the substance we choose the constitution to hold is very important in the fate of the future polity. A constitution, which is made by participation of all groups or made possessing the finger print of all, is likely to create a more stable and democratic polity.

The 1990's Nepal and the South African constitution are right instances where constitutions resulted on social unrests and social cohesions respectively. On the other hand, as Gahi²⁴ rightly pointed out, many internal conflicts usually revolve on the structure and identity of the state and also on the distribution of power, which at one point, at least are constitutional disputes. Accordingly, the resolution of this dispute often

²³ Sajo Andrew. *Limiting government: An introduction to constitutionalism*, (Budapest and New York: Central European University press, 1999), 18.

²⁴ Anikster Gahi, *The Role of Constituent Assemblies in Constitution Making*, Institute for Democracy and Electoral Assistance at (Nepal: Jhalak Subedi, 2010) 2.

starts from changing the constitution which delimited the structure or issue of power distribution which has been contested. Constitution making, therefore, marks the beginning of new relation on the basis of mutual understanding of what led to instability also guaranteeing the interest of those at stake. This mutual understanding, peaceful resolution of conflicts and recognition of all groups, on the other hand, develop mutual trust among political factions in any political negotiation and fosters democratic culture which is the beginning of constitutionalism.

Lane and Essron argue that Ensuring democracy also depend on the kind of democratic institution we opt our constitution to hold.²⁵ Constitution crafters must make difficult institutional choices that will have far-reaching consequences for governance. The form of government (whether parliamentary or presidential), unitary or federal structure, judicial review, choice of electoral system, and creation of horizontal accountability are all crucial in shaping the behaviors of political players. Institutions not only can affect the quality of democratic governance but also can lend themselves to certain policy outcomes. Skilful and conscious constitutional making adapts institutions to local circumstance, which is easier if the process is genuinely inclusive. This in turn asserts the fact that the process and the content choices go hand in hand.

A far- reaching change to fundamental political rule, citizen's interest for a more democratic and accountable governance and international pressures sought for more democratic new credentials in today's polity. Accordingly, Drassel²⁶ affirms that constitution making has long become a regular occurrence in all coroners of our modern

²⁵ Jan-Erik Lane and Svante Ersson, *The new institutional politics: performance and outcomes*, (London and new York: Routledge, 2000).48.

²⁶ Dressel Bjoern, *Strengthening Governance through Constitutional Reform*, (Thailand: The Pacific Review, 2010), p.13.

world. More than half of 200 national constitutions in existence today are less than 25 years old. In the last decade alone, roughly 70 emerging democracies have completely rewritten or substantially altered their constitution. 1990 to 2000 only 17 African countries, 14 Latin American countries, and nearly all post-communist Eastern Europe and former Soviet Union has altered their constitution. There are also many which currently changed their constitution such as Kenya, Nepal, Sri Lanka, Iraq, Bosnia Herzegovina, and Bolivia. Turkish and Madagascar are also among nation which very recently changed their constitution. This drastic and emerging activity not only reveals the increasing importance and purpose of constitutions but also born a new epoch to the conception and practice of constitution making.

In previous times constitution making was considered as an act of completion or a document written to the public. In spite of the famous word “we the people” the process that created the United States constitution was clearly a very elite-driven enterprise.²⁷ The Constitution was not approved by a unanimous vote or even by a majority of all persons in the country at the time. It was approved by a majority delegates to the conventions in each state. These delegates were elected by a majority of those who voted for delegates in the convention. Though voting requirements varied with local jurisdictions, in no place were women, blacks and poor white men. The American constitution, which is the originator of the traditional constitution making and which endured for more than 200 years was, therefore, made only by a wealthy and property holding white males.

²⁷ Rubin, Barnett. *“Constructing Sovereignty for Security.” Cooperating for Peace and Security: Evolving Institutions and Arrangements in a Context of Changing U.S. Security Policy* (Cambridge University Press, New York, 2012), p.56.

Besides, Sajo states that the delegates in Philadelphia convention were sent only to correct the defects of the articles of the confederation.²⁸ The delegates then contrary to their primary mission reached to a decision to formulate a new constitution without consulting their respective state congress. Moreover Madison²⁹, who chaired the convention and had his own note, had strong assent for the process to be made officially. Publicity, he argued, would have afterwards require delegates to maintain their ground, whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth and was open to the force of argument. He said secrecy enabled members to change their mind when they are persuaded by truth. Thus, secrecy was the principle in Philadelphia. The process that created the United States rather gives emphasis for stability and rationality of the document than for democratic principles like participation. This was also what characterizes the traditional constitution making in other parts of the world: French, Russia Germany, Japan and others. Apart from this, the Japanese and German constitution making was dominated by the external occupants' i.e. allied powers.

Japanese constitution which is still in work was written by two dozens of Americans during Japan's post war occupation, virtually with no public consultation. By February 1946, the occupation's government section had prepared a rough draft, the so-called MacArthur Draft, which reflected General Douglas MacArthur's personal philosophies. The Germany's constitution making had also similar story.³⁰

²⁸ Ibid, p 14.

²⁹ Ibid, p 9.

³⁰ Alicia Bannon, *Designing a constitution—Drafting process lesson from Kenya*, (Oxford: oxford university press, 2010), 26.

The modern day polity, however, has declared a new and unprecedented era to constitution making. Designing a constitution behind a closed door like what has been before 200 years, whatever purpose argued to had, is not only an outdated tradition but also is undemocratic. In today's polity a democratic constitution is no longer the one which only aspire to create democracy but also which is created democratically. There is an emerging notion that constitution themselves to be designed based on the norms/principles of democracy. The new constitutionalism, therefore, borrows from the ideals of democracy, to ensure that the populace is involved in the process to create the document. It is now connected with the concept of popular sovereignty which is the founding pillar of democracy. As long as sovereignty is to reside on the people, the people must also be able to fix the powers and responsibilities of their representative in a democracy.

1.4.4 Legitimate Constitutions: What Counts for a legitimate Process

According to Regassa constitutional legitimacy is the legal, moral and social tolerability of the document by all who are ruled by it.³¹ A constitution enjoys legitimacy when the public regards it as justified, appropriate, or otherwise deserving the support for reasons beyond fear of sanctions or more hope for personal rewards.

Bilgin, also argues legitimacy of a constitution requires a genuine social acceptance, where the relevant public reverses and honors both the political intention, expression behind the constitution and legal forms and foundational institutions instituted by the

³¹ Ibid, p 2.

constitution.³² It is which create a sense of ownership or which create a feeling up on the people that the document should be obeyed or it is respect-worthiness.

Legitimacy in general requires the acceptability of the process-content analysis. Not only the process needs to be participatory, the values, principles, rules and institutions adopted must be the one which command respect and loyalty of the public. Yet, it is also valid to argue that the acceptability of the process is capable of justifying the substance. Because, If the text is the product of the genuine deliberation of all groups; there couldn't be any legitimate reason to question the validity of the content.

Unlike the traditional approaches which used to view constitutions as an act of completion, the new constitutionalism focuses on participatory constitution-making or conversational constitutionalism. The new approach is characterized by transparency and broad-based public participation. As a result, the legitimacy of the constitutional process and the constitution itself is measured by the degree to which the process is participatory, open, democratic, socially inclusive, transparent, peaceful, faithful, and where those who adopt the constitution are democratically elected. Developing a legitimate constitution, thus, requires different but equally important courses of actions.³³ Establishing all inclusive Interim arrangements, democratic representation in both bodies which draft and adopts the text, a genuine deliberation of the process embracing all factions, and empowering a neutral and proper body to oversight the process are all at the heart of a legitimate process.

³²Jack Bilgin, *Respect worthy: Frank Michelman and the legitimate constitution*, (Harvard University: Oxford University Press, 2004), 39.

³³ Neil Kritz, *Constitution-Making Process: Lessons for Iraq, Congressional Testimony presented to the senate committees June, 2003*, (New York: Cambridge University Press, 2003).

1.4.5 Interim Arrangements

Erato contends that what gradually emerged from Spain between 1975 and 1977 in South Africa between 1991 and 1996 and now in Nepal, constitutional change has often involved interim constitutions.³⁴ Interim arrangements also known as transitional governance occurs at hinges between the past supposed to be repressive regime and future stable and all inclusive state. Interim arrangements are institutional bridges to peace, stability and for a permanent democratic institution, although this couldn't work for Somalia, which seems stuck with a series of virtually permanent "transitional government." Interim arrangement includes interim constitution or equivalent and a government formed under it.

As the main purpose of having such an arrangement is to have some authority in place while decisions are being made about the character of a more permanent and participatory government, interim arrangements are often a result of inter elite negotiations than direct popular participation.³⁵ Allowing elite's participation in the formation of the arrangement is essential as it provides actors with information that is likely to give them a competitive advantage under the permanent regime. Those who involved in the interim arrangement have the potential to tilt the rules of the game. Thus, interim arrangements should demand a broader representation and effective participation of all groups which allege to have a normative claim. In spite of whom takes the

³⁴ Andrew Arato, *Post-Sovereign Constitution-Making and Its Pathology in Iraq*, (New York: New York Law school Law Review, 2007), 539.

³⁵ Guttieri, Karen, and Jessica Piombo, *Interim governments: institutional bridges to peace and democracy*, (Washington Dc: United State Institute of Peace press, 2007), 3.

initiative, all actors should have given equal bargaining power in the determination of both the procedure and substance of the permanent regime to come.

In South Africa, the ANC, which took the lead in combating apartheid, had an interest for an independent elected assembly to draft the constitution. However, the NP and other smaller parties representing minority constituencies feared that an elected assembly would negate the purpose of negotiations and result in majority rule without constitutional safeguards to protect effective minority participation in political decision-making. This dispute was eventually addressed through the formula of first holding a multi-party constitutional conference where all parties, irrespective of the size of their constituency could participate as equals to decide core constitutional principles and the structure of a transitional government. Then the public would elect the parties to form a power-sharing transitional government and the delegates to an assembly that would draft the final Constitution.³⁶

Interim arrangements as noted by Neil³⁷ are usually meant to: (1) to clearly demarcate a break from the past and to immediately remove those elements that are clearly objectionable or repressive.; (2) Clarify the basic legal rules and governmental structures during the interim period, allowing society to move forward with a minimum of disorder.; (3) And most importantly to set down constitutional principles and guidelines for a legitimate constitutional process. The establishment of a transitional arrangement, primarily, is to reveal that the former despotic state, which calls for a new constitutional order, does not have any more a legal and moral reason to stay. This in turn has the

³⁶ Ibid, p 19.

³⁷ Ibid, p 19.

advantage of establishing a level playing field as the country embarks on a deliberate process of restructuring the state and determining the rules for access to it; building trust among former foes, and ensuring that there is no regression to conflict or oppression. It thus helps all groups to have equal bargaining power in mapping the new state. This is true of almost all constitutions- making, as it often involves a situation of rebuilding the state in a new way or otherwise in deciding issues because the previous regime is either not all inclusive, democratic, or needed a new social order.

Since constitutions are almost often made in times of crises (a time when the existing arrangement have been shown to be illegitimate), ³⁸some degree of peace and stability have been tried to be established in all interim arrangements. Peace and stability are the cornerstone of a legitimate process. Without this, other efforts for inclusion of all segment groups or effective public participation, enforcement of the agreed principles and generally the smooth operation of the process will not escape to remain rhetoric. Making sure that the country is not in a state of siege and the situation is where individuals can exercise their freedoms, therefore, has to be the primary task of interim arrangements. Yet, a mere stipulation of desires to create peace doesn't suffice, particularly, in a transition period. There should also be an effective consensually created enforcing mechanism and a commitment to realize on the part of all those concerned. For instance, there has to be a court, though not strong, at least neutral and a legally constituted national army or police force. In Somalia, for instance a turbulent security situation hampered the process. Because, there were no a legally established national army and police force.

³⁸ Donald Horowitz, *Constitution- making: a process filled with constraint, constitutional studies* (London: Yale University Press, 2006) 45.

1.4.6 Public Participation

As Madison considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a league or treaty and a constitution.”³⁹ Though there are many differences in terms of law and constitution making, one of the important elements is people’s involvement. While a treaty lacks a direct peoples’ involvement constitution making depends on public involvement.

Elai notes that Public involvement in constitution making has long begun to be given different explanation.⁴⁰ Popular sovereignty is the deriving notion behind nations struggle for democracy. In fact, it is the most common provision, therefore, which has been construed as the universal value of world constitutions and of modern democracy. Most constitutions of the world also declared the primacy of popular sovereignty and that ultimate power resides with "the people". Modern constitutions, more importantly, regarded the people not only upon whom sovereignty resides, but also the source of the constitution itself. Hence, if sovereignty is indeed vested in and flows from the people they should also be able to determine how it should be delegated and exercised.

Gahi adds that the emphasis on popular sovereignty is pragmatic reasons for popular participation.⁴¹ Until people are not given the power to choose the nature of government and the society they prefer to live in, it is meaningless to talk about sovereignty of people. The concept of sovereignty and participatory democracy, thus, are so much linked with one another. In fact, participatory democracy has now been accepted as the quintessential for genuine democracy. Besides of this, participation has now begun to be considered as a

³⁹ Drinker Bowen, *Miracle at Philadelphia, The story of the Constitutional Convention May to September* (Atlantic: Atlantic Monthly Press Book, 1996), 229.

⁴⁰ Neil Kritz, (1996). *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, (Atlantic: Atlantic Monthly Press Book, 1996), 29.

⁴¹ Ibid, p14.

right under international law. This has been explained on Canadian Case, *Marshall v Canada*, where the leaders of the Mikmaq tribal society brought a complaint against the Canadian government alleging that the government, by excluding them from directly participating in a series of constitutional conferences, had infringed their right to take part in the conduct of public affairs of their country, contrary to article 25 (a) of the ICCPR, to which Canada is a state party. The UNCHR in 1991 after five years of its submission ruled that participation in constitutional conferences constituted a conduct of public affairs. In reinforcing this decision, the UNCHR in one of its general comments issued on July 12, 1996, has stated right to participate on public affair under art 25 also includes the citizen's right to directly participate to choose or change their constitution. Thus, the General Comment in so doing explicitly expand the scope of democratic participation beyond the act of voting.

He goes on to state that more than anything else, public participation in modern constitutional-making is so important because it enhances the legitimacy of the constitution. The question of legitimacy of the constitution is concerned with how making a constitution's command the loyalty and confidence of the people. A constitution should be generally understood by the people and acceptable to them. A constitution cannot hope to command the loyalty, respect, and confidence of the people otherwise. To achieve popular involvement in the Constitution-making certain requirements have to be satisfied. Primarily, particularly in countries where democracy is a novel concept, educating the populace must often precede other tasks. The education campaign may generally have two elements. First, the population must be educated about the role that they will play in the formulation of the new constitution. Then, the populace must also be

informed about how democracy and constitutional supremacy works in general, and more specifically, about the possible considerations available to them in forming the constitution. This task is not necessarily easy, but as many African experience revealed, it is possible, even in societies where the literacy rate is quite low. This public education process permits the public to be consulted on what shape the constitution should take. Their views on such things as the form of government (i.e., a monarchy, parliament, or presidency), the vertical sharing of power (i.e., a unitary state or a federal state), minority issues (i.e., indigenous languages or minority inclusion in politics), and other general concerns should be taken into account.

This task is often coordinated by the constitutional commission, either appointed or elected, to draft the constitution and submit it together with the public opinion to constituent assembly or to the body which ratifies the final draft. It is a mistake to attempt to short-circuit this process. For example, in some cases, commissions have tried to conduct civic education and popular consultation all in one phase. It is strongly urged that these generally be treated as two distinct phases of the process. The public education phase provides an important vehicle to broadly disseminate information regarding the constitution and the constitutional process, and Ghai and information on the basic themes that should inform the new constitutional framework. However, the synthesis of the results of the popular consultation and incorporation into the constitutional draft has been a challenge in certain cases, and requires proper planning. In East Timor, for example, the constituent assembly focused on a draft prepared by the dominant political party that ignored the results of the popular consultation.⁴²

⁴² Ibid, p 14.

Secondly, the public consultation, on the other hand, need to be all inclusive and extensive. Consultation must not be limited to the elite or principal power dealers, but all classes of society must be afforded the opportunity to participate. Ordinary people must be empowered to make effective contributions to the debate and they must be provided with the necessary and extensive channels to participate. The South African experience, for instance, took three forms: the community liaison, the media liaison and advertising. The community liaison involves face to face with members of the constituent assembly. This direct argumentation has augmented people's sense of ownership of the process. In the media campaign, on the other hand, the assembly has used both print and electronic Media. Using all these channels, the assembly has managed extensive civic education and expressed the importance of the process. Advertising liaison on its turn increased the people's awareness using different media including billboards.

The advertisement was also exceptional experience in using ear and eye catching phraseology like the famous one "you've made your mark now have your say." Besides, the assembly also used information technology to disseminate the ongoing process through home pages. More importantly, both the awareness raising and consultation campaigns shouldn't fall in short, of physical and language proximity. There has to be as much effort as possible to avoid language barriers to reach all segment groups on the language they understand the discussion. Generally, the process needs to be accessible (both physically and technically), open and transparent to the public.⁴³

⁴³ Ibid, p 12.

1.5 Literature Gap

The fact that there are a handful, if any, after all, researches on the subject has made many, particularly, law students foreign to the history of the making of their constitution. The study, therefore, on this regard would serve as a prominent reference for readers interested in the subject. Constitution making is all about redefinition of state by creating a new identity for the nations. Given the poor documentation culture in the country, this study would also play a role in recording this prominent nation's history. Moreover, as the issue is yet unexplored, the study would have also an inspiring role for others to engage in an in-depth study on the subject.

1.6 Theoretical Framework

A theory of constitution-making: New Constitutionalism is a theory of constitution-making that is gaining increasing acceptance; especially since the United States drafted its constitution in 1789 largely in response to the failures of the Articles of Confederation. The constitution that emerged, as well as the ensuing amendments, has created a very stable democracy and constitutional system, and as such, this undertaking was unquestionably a success. However, the process that created the United States Constitution was clearly a very elite-driven enterprise, focusing far more on stability than on such things as human rights, or even participatory democracy. This can be rationalized by looking to the era of history in which it was created, but in more modern times, it is debatable whether the United States process would be considered a good approach, regardless of the outcome.⁴⁴

⁴⁴ Ibid, p 1.

The Somali experiences, and others, have taken a very different approach, one which takes a far more expansive perspective to democracy.⁴⁵ Referred to as “democratic constitution-making” or “new constitutionalism,” this approach has gained increasing acceptance as an adept technique to use in post-conflict situations (which is often the situation involving new constitutions in our modern era). Though they are not directly connected, the concepts of new constitutionalism and constitutional principles have developed somewhat in tandem.

New constitutionalism is based on the premise that for a constitution to be legitimate, it must have the support of the people. Without this legitimacy, there is less assurance that either the constitution or rule of law generally, will be willingly accepted and internalized. In order to achieve such legitimacy, new constitutionalism borrows from the ideas of democracy, to ensure that the populace is involved with the process of drafting the constitution. Such involvement usually commences with public education, which is often a necessity in countries where democracy is a novel concept. This education campaign will generally have two elements. First, the population must be educated about the role that they will play in the formulation of the new constitution. Then, the populace must also be informed about how democracy and constitutional supremacy works in general, and more specifically, about the possible considerations available to them in forming the constitution. This task is not necessarily easy, but as the Eritrean experience revealed, it is possible, even in societies where the literacy rate is quite low.

This public education process permits the public to be consulted on what shape the constitution should take. Their views on such things as the form of government (i.e., a

⁴⁵ Ibid, p 8.

monarchy, parliament, or presidency), the vertical sharing of power (i.e., a centrist unitary state or a federal state), minority issues (i.e., indigenous languages or minority inclusion in politics), and other general concerns should be taken into account. These public consultations often target certain demographics of the population, to assure that the final result is as inclusive as possible. This education and consultation role is often done by some form of a constitutional commission, which can also call for proposed constitutional drafts to be submitted to them. All the material collected will then be combined, perhaps in the form of a “working document,” and presented to another body charged with creating the constitution, such as a constitutional assembly.

While the commission may be appointed, it is very important that the assembly should be elected by the general population, ensuring that those elected to represent the people. This constituent body will then be charged with drafting the final constitution, but only after full consideration of the issues raised through this public consultation. Finally, when a document is drafted, it is then to be ratified by the people, giving the people the final say. Variations on this approach exist, and very few constitution-making processes have effectively completed all of these steps. However, any form of new constitutionalism will require three basic factors to exist before the process can succeed.⁴⁶

First, as described above, there must be social inclusion in the process. Second, freedom of speech and expression must be assured, for otherwise, these efforts for public consultation will be in vain. Third, there must be general security, for without this, the other efforts for inclusion and for freedom of expression could face insurmountable obstacles. Perhaps what is most intriguing about this process of constitution-making is

⁴⁶ Ibid, p16.

that it not only adds legitimacy to the final constitution, but it can also provide the groundwork for a stronger democracy to take shape when the new constitution comes into force. If done properly, the process can instill within the population a desire for—and respect of—rule of law, enhancing security. Thus, the purpose of constitution-making can be seen as being less about creating actual justice (in the form of substantive rights), and more about creating the desire within the population to seek access to justice.⁴⁷

The promise of new constitutionalism can be clearly seen in post-conflict situations. By allowing opposing sides to come together and work together in creating their shared new constitution, and by assuring that all sides have ownership in the process, it enhances the new constitution's, and the new government's legitimacy. Of course, there is no guarantee that new constitutionalism will thus assure peace. But, it is one more tool that can help to contribute to a peaceful reconciliation in post-conflict situations, which is why this approach has become so popular.

1.7 Hypotheses

The study tested the following hypotheses:

- i. The making of the Somali constitution was not as 'democratic' as its drafters and supporters argue;
- ii. Institutional capacity is a prerequisite for the effective functioning of the constitutional court;
- iii. Coordination and collaboration between and among stakeholders can lead to effective constitution-making processes.

⁴⁷ Ibid, p.1.

1.8 Research Methodology

This study was based on both theoretical and practical analysis. For the theoretical insights a literature survey of secondary materials, including books, journals, articles and others was used. With that, what measures the legitimacy of a certain constitution-making and also how the Somali constitution was made is dealt with.

This research was based on secondary data. Secondary data were gathered by means of reviewing published books, journal articles and public documents on the subject for the relevant concepts and current opinions. The qualitative data were coded thematically and then analyzed statistically. The data collected which was qualitative in nature, was analyzed using conceptual content analysis, which is the best suited method of analysis. According to Mugenda and Mugenda⁴⁸ the main purpose of content analysis is to study the existing information in order to determine factors that explain a specific phenomenon.

1.9 Chapter Outline

The study is structured around the following five chapters;

Chapter One: Introduction to the Study

Chapter Two: The Making of the Somalia Constitution: An Overview

Chapter Three: Constitution-Making in Somalia: An Analysis, 1960 – 2013

Chapter Four: Constitution-Making in Somalia: A Critical Analysis

Chapter Five: Conclusion

⁴⁸ Olive Mugenda and Abel Mugenda, *Research Methods: Quantitative and Qualitative Approaches*.(Nairobi: Acts Press, 2003).

CHAPTER TWO

THE MAKING OF THE SOMALIA CONSTITUTION: AN OVERVIEW

2.0 Introduction

An unprecedented constitution building bloom followed the end of the Cold War in 1989. In South America, Brazil's constitution building process in 1988 was quickly followed by Colombia (1991), Argentina (1994), Peru (1993), Chile (1989 followed by amendments throughout the 1990s), Ecuador (2008) and Bolivia (2009). In Africa, 23 of 52 states had experienced internal conflicts by 1994. In all regions, constitution building often followed peace building. In Eastern Europe, new states emerged and existing ones were altered considerably, and new constitutions were promulgated in all cases. In Asia, Indonesia (1999–2002), Pakistan (2010), Nepal (2006 to date), Afghanistan (2004), Mongolia (1992), Thailand (1991, 1997, 2006, and 2007) and Myanmar (2008) undertook constitution building, as did Fiji (1997) and the Solomon Islands (2009). These constitution building processes are located within broader transitions, sometimes democratic and quite often in post-conflict settings.

Somalia could be considered to be a part of the 'bloom', but its constitution building process is still ongoing. Here the process of constitution building is being tested as a means for arriving at a shared vision of statehood. Thus far, the differences among the many domestic forces have proved too wide to bridge by a constitution building process. One lesson from Somalia is that consent is the lynchpin of any constitution building process, especially if there are insufficient domestic or international pressures to keep all the players at the negotiating table and then implement the results.

2.2 Contemporary Constitution-Making: An Overview

Constitutions and corresponding concepts of constitutionalism are classified in various ways depending on the purpose for which the categorization is sought. According to the realist approach, a constitution is an expression of “the balance of power”⁴⁹ obtaining at the time of its making. Hence, a constitution represents that which is sanctioned or permitted by the existing state of affairs as regards power; it “merely divides the spoils between political elites”. It is not an agent playing a mediating role in a process of “change or transition”. Samuels⁵⁰ further observe that the idealist perspective on the other hand views a constitution as having a “foundational” function. It represents the end of the old order and the establishment of a new one. In other words, according to the idealist perspective, a constitution is the “foundation of a new political order.”

The “transitional” or “new” perspective differs from both the “realist” and the “idealist” approaches, even though not to the same degree. It is close to the “idealist” approach; but it envisages a deeper and broader appreciation of a constitution’s role in the establishment and development of a new order. It focuses on the significance and role of a constitution in times of political transformation, as distinguished from a period of stability. It relates to “constitutional developments” taking place immediately following a “political change” of great magnitude. It is a type of constitutionalism in which law –i.e. The constitution in this case- has “an extraordinary constituting role’ in the stabilization of democratic governance.”⁶

⁴⁹ Samuels, København “*Balance of power*” is a concept applied in international relations.” (Oxford: Oxford University Press, 2000), 78.

⁵⁰ Ibid, p 32.

Widner posits that while this perspective “recognizes” the complex and many-sided function of constitutions, it views constitutionalism as an ongoing process, “inextricably enmeshed in transformative politics”.⁵¹ In other words, according to this perspective, constitutionalism reckons with and “codifies” the predominant “consensus” but “transforms it” as well. This means that it continues to strengthen the process that upgrades the environment and stabilizes and develops the new order or governance. And hence, according to this perspective, constitution-making is “a forum for negotiation amid conflict and division”, a forum in which - inter alia - the foundation for the process of “democratic education” and empowerment of the people is laid.

William notes that, notwithstanding the plausibility of the above classification of the perspectives on constitutionalism and constitution-making, many scholars opt for a simpler categorization.⁵² To them, there are two basic approaches namely, the traditional and the new. According to the traditional approach, a constitution is “an ‘act of completion’”. It is perceived as “a contract, negotiated by appropriate representatives, concluded, signed, and observed.”⁵³ The issues are deemed settled with presumed finality and conclusiveness.

In the words of Aucoin the new constitutionalism, on the other hand, is an approach centering “on ‘participatory constitution-making’ or ‘conversational constitutionalism’”.⁵⁴ It is perceived as “a continuing conversation between the elites of a given society and the

⁵¹ Johnston Widner, *“Constitution Writing and Conflict Resolution in Africa”*, (University of Michigan: United State Institute of Peace press, 2004).

⁵² William Paul, *“The Constitution Making Process” –Workshop*, (Austin: University of Texas Press, 2006).

⁵³ Robert Scruton, *a Dictionary of Political Thought*, (London: Macmillan Press, 1982), 34.

⁵⁴ Aucoin Louis *“Building the Rule of Law and Establishing Accountability for Atrocities in the Aftermath of Conflict”*, (University of Michigan: United State Institute of Peace press, 2007).

population". It is carried on by all the stakeholders and is "open to new entrants and issues"; and its aim is to fashion and provide "a workable formula that will be sustainable rather than assuring stable". The issues are not deemed disposed of for good and all, although a consensus is reached on how they should be resolved presently.

This approach, i.e. new constitutionalism is more sensible, especially considering the essential nature or function of a constitution. A constitution can be neither value-neutral nor agenda-free. It is necessarily informed by some desiderata that may be expressly declared - usually recited in its preamble - or tacitly stated. What this means is that a constitution is designed bearing in mind the apprehensions or anxieties of the polity concerned as well as the ends or goals aspired to. Okoth-Ogendo in effect points to this idea when he characterizes the constitution "as a 'power map' upon which the framers may delineate a whole set of concerns which may range all the way from an application of the Hobbesian concept of 'the covenant', ...to an authoritative affirmation of the basis of social, moral, political or cultural existence including the ideals towards which the policy is expected to strive."⁵⁵

It follows from this that the framers of a constitution, determine which concerns should be highlighted as the desiderata informing the content and spirit of the document. In other words, constitution-making, as Okoth-Ogendo put it, is a process which "involves, inter alia, making choices as to which one of those concerns should appear on that map".⁵⁶ The choices made do not necessarily remain sound for all time. With changes taking place in the society, new concerns may emerge or some of the concerns not highlighted

⁵⁵ Ibid, p.1.

⁵⁶ Ibid.

heretofore may be found to have become more important. This means there is a need for dialogue - a conversation - and change so as to respond to the new claims, so to speak, or adjust to the new reality.

Quite significantly, for situations in the countries of the Global South, constitution-making of the new type is understood as “a creative and developmental part of the transformation of inter- or intra- state conflict.” Specifically, it is “a tool for the transformation of conflict”. As such, constitution-making affords, as the late Pierre Trudeau put it, “a site for ‘civil dialogues’, a ‘meeting ground’ where adversaries build trust and test mutual good faith”⁵⁷. In plain words, it is a form of conflict resolution.

Such constitution-making is not only about the rights and principles of governance; it is also, “essentially about the distribution of power.” The various elites and other stakeholders -- especially the former adversaries -- converse, debate, compromise and agree on how or in what form power would be shared. One of the cardinal rules of the new constitution-making thus stresses the need to “limit the appearance of incumbent/occupier dominance.” Going beyond appearance, Shoemaker⁵⁸ says that “no party or interest should have a dominant voice”. The reason for this is that “incumbent control of the drafting process can delegitimize the constitution and sow distrust. Also, the appearance of control by an international force, such as the Coalition in Iraq, can delegitimize the constitution.”

⁵⁷ Cunliffe Centre, “*Constitution-Making, Conflict, and Transition in Divided Societies*”, (Jo Work-man on behalf of The Cunliffe Centre, 1999).14

⁵⁸ Shoemaker Jolynn, “*Constitutional Rights and Legislation*”, in *Inclusive Security, Sustainable Peace: A Toolkit for Advocacy and Action (2004)*, Hunt Alternatives Fund. (Annapolis: Maryland, United States, 1953), 3.

Samuels assert that in post-conflict situations, the way a constitution is made, as well as its substance, is of crucial importance.⁵⁹ It plays “an important role in the political and governance transitions.” In such situations the process of making a constitution “is an opportunity to create a common vision of the future of a state and a road map of how to get there. The constitution can be partly a peace agreement and partly a framework setting up the rules by which the new democracy will operate”. The process of such constitution-making is inclusive or expansive also in the temporal sense. It has several phases. Normally, there are four phases in a constitution-making process. They are the phases of preparation, drafting, public consultation and final review and adoption. However, in many cases, especially in post-conflict situations, the process in effect begins before the preparations for the actual making of the constitution. The “anticipation” to negotiate a constitution in a participatory process influences or determines the spirit, style, and direction of the “pre-constitutional phases of debate and conflict transformation”.

Today there is a virtual consensus that a constitution should be democratic, i.e. it should be made democratically. And the understanding now prevails that a constitution-making process can be democratic only if it is participatory. This understanding is gaining ascendancy. Due to this, a tenet of new constitutionalism is that how a constitution is made is as important as, if not more important than, the substance. In the words of Aucoin⁶⁰, “new constitutionalism is characterized by the view that the process is as important, if not more important, than the ultimate content of the final charter. The theory underlying this view is that an open and inclusive process will contribute to healing and

⁵⁹ Ibid, p 32.

⁶⁰ Ibid, p 33.

reconciliation”. This is true especially in a post-conflict setting. The situation of a society in post-conflict is still vulnerable, which means that considerable care is required to maintain the consensus reached. Hence, the need for a constitution that is legitimate and sustainable. And the chances for a constitution to become so “will largely depend on its acceptance by the people”.

2.3 The Importance of the Process

According to The Cunliffe Centre the strength of participatory constitution-making process is that it secures the consent of all the elites and stakeholders.⁶¹ All have to be included because “in divided societies, inclusion is a prerequisite of genuine consent”. More broadly, it is “a process of constructing a political consensus around constitutionalism” in the society as a whole. This means that not only the elites, but also the people at large consent to it. As a result of this process, the people will have “a sense of ownership” of the constitution. They identify with, uphold and safeguard it.

The consent is actually the source of the constitution’s legitimacy, which is different from legality or legal validity. Legality or legal validity only indicates propriety or appropriateness of a measure within the framework of the existing law or the legal system. Legitimacy is however a different matter. In the words of Lorz, “Legitimacy asks for the fundamental justification at the basis of the whole state order”. Paraphrasing Habermas, Lorz adds that legitimacy “encompasses all publicly announced reasons and constructions which have been designed to secure the acceptability of a constitution. In other words, there is always a certain idea of legitimacy within a given society, and the legitimacy of the constitution depends on the degree of its conformity with this idea”.

⁶¹ Ibid, p 35.

Even more fundamentally, in a number of cases a democratic constitution-making process has a “constitutive” function as regards the establishment of a modern state. Some writers use the term “foundational” to express the same concept. For example, the making of constitutions in Europe in the 1990s or since the end of the Cold War is said to be “foundational”, an expression used in two senses. The first sense, already mentioned, is “regulative” and conveys the idea that a constitution establishes the new political order –i.e. The system of liberal democracy comprising of separation of powers, constitutional procedure and principles of human rights. The second sense, also referred to as “geographical legitimacy”, relates to the establishment of the very “identity” of the geographical entity as a political state. Explaining this in the context of the European Union’s “constitution-making efforts”, Priban⁶² says: “the second function pursued the goal of constituting the identity of a sovereign people and political legitimacy and thus reflected the symbolic rationality of law and its expressive power to speak for a political community”.

Akpinarli explains that democratic constitution-making process has such a function not only in the framework of developmental polities such as those in the European Union, but also as regards the establishment of states, mostly multiethnic, in the Global South. It confirms the country concerned as a politico-geographical entity.⁶³ The participation of all the political, ethnic and socio-economic groups in this “democratic” process fosters or strengthens in all of them the awareness that they are part of the same polity. It endorses

⁶² Priban Jiri “*The European Constitution-Making, Political Identity and its Central European Reflections*”, *European Law Journal*, (New York: Cambridge university, 2005).

⁶³ Akpinarli Naftery, (2008). *The Fragility of the 'Failed State' Paradigm: A Different Public International Law Perception of the Absence of Effective Government*, (Bremen: University of Bremen, Faculty of Law, 2008).

and sustains the people's "sense of commonality" i.e. "the sociological claim of a 'We' that defines a people". This legitimacy, this sense of the "We" minimizes the threat to the continued territorial integrity of the state. Established in accordance with a constitution fostered by this process, the political regime, as well as its governing institutions and authorities, acquire legitimacy. This legitimacy also lends the state the quality needed for its genuine acceptance and internal and international recognition.

Such a constitution fundamentally contributes to peace making and peace maintenance. A constitution that is the product of such a process will enhance the chances of the state for "long term peace" and boost "the quality of the democracy created".⁶⁴ In the process of constitution-making, the various groups and stakeholder dialogue and reach an understanding or consensus. A state established on the basis of such a constitution has more capacity to observe the rule of Law internally and to maintain normal relations with neighboring and other states. Going beyond normal relations, it can enter into relations of cooperation and even political association such as a confederation.

On the other hand, processes that are not really representative and inclusive, but "dominated by one interest or faction tended to result in constitutions favoring that interest or entrenching power in the hands of certain groups". A state controlled by such a group is less inclined to observe the rule of law and less capable of cordial relations internationally. Participatory constitution-making is a necessity. It provides peace and stability that are important components of the context for development. Unfortunately, it cannot be undertaken in any situation. It can be launched and realized only un-there

⁶⁴ Ibid, p.36.

certain conditions. As Ihonvbere put it, “for constitutions to have value and legitimacy, the enabling environment for constitutionalism must first be established”.⁶⁵

Detailing the enabling environment, Brooke⁶⁶ wrote that, in addition to “social inclusion in the process” and freedom of expression, “there must be general security, for without this, the other efforts for inclusion and for freedom of expression could face insurmountable obstacles”. In other words, the prevailing environment should be such as to guarantee or provide security, and enable enjoyment of civil liberties and dialogue. It is also important to note that the international situation matters. One even dare say that the possibility of such a constitution-making process is affected by the international environment. This is quite true especially considering that “the process is characterized by (among others) increasing international involvement - what is being called a ‘shared international effort’”. This involvement is appropriate particularly in light of the argument that there is a basis in international law for the right to participate in constitution-making.

2.4 Participative Constitution-Making: International Legal Basis

The claim that there is a right to participate in constitution-making rests on two grounds. These are (i) the internal right to self-determination which is enunciated in UN resolutions and treaties; and (ii) the “international constraints on constitution-making” based on the Universal Declaration of Human Rights (UDHR) and other international instruments of human rights. By internal right to self-determination is meant that people

⁶⁵ Julius Ihonvbere, *“Towards A New Constitutionalism in Africa”*, CDD Occasional Paper Series 0.4 (London: Centre for Democracy & Development, April 2000).

⁶⁶ Brooke Simon, *Constitution-Making and Immutable Principles*, (M.A. Thesis), (Boston: The Fletcher School, 2005), p.67.

have the right to determine the political and socio-economic order for themselves. This contemplates that the people are independent in making the determination. It follows that the states must guarantee “the constitutional and political processes which in practice allow the exercise of this right”.⁶⁷ What this means is simply that public international law demands that “it is indeed the people which make the choice on the future political and constitutional system of their state.” In other words, internal self-determination demands that the people participate in the constitution-making process. It is such participation that provides them with the opportunity to debate, compromise and reach consensus on, among others, the ideals the fundamental desiderata that should inspire the content and spirit of the constitution as well as the pertinent objectives and frameworks of operation.

By international constraints on constitution-making is meant that there are certain principles that should be observed when constitutions are made. The constraints are substantive and procedural. They are basically applications of human rights principles stipulated in various international instruments. The substantive constraints concern the contents of the constitution. The earliest source of such constraints is the 1948 Universal Declaration of Human Rights. A non-binding proclamation at the outset, the UDHR has become authoritative over time. Its provisions are now “considered to be part of international customary law”. Moreover, much of the UDHR has been concretized in the provisions of the International Covenant on Civil and Political rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which are multilateral treaties and thus binding. All these instruments provide for the rights to which citizens are entitled. This means that constitutions should provide for the

⁶⁷ Ibid, p 37.

protection of the rights stipulated in these instruments. In other words the international human rights instruments constitute “internationally mandated constraints” on constitution-making. For example, a state would have serious problems enjoying effective international recognition if its constitutional order is openly violative of fundamental freedoms.⁶⁸

Procedural: The procedural aspect of the international constraint on constitution-making is closely tied in with the right of internal self-determination, the essential meaning of which is that “it is indeed the people which make the choice on the future political and constitutional systems of their state”. Choosing a political and constitutional system necessarily entails participation in the making of the constitution.

More concretely, many legal scholars agree that “international human rights instruments” such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political rights (ICCPR) provide for the right of such participation.⁶⁹ For example, Art. 25 of the ICCPR provides that “*every citizen shall have the right and the opportunity*”, among others, “*to take part in the conduct of public affairs, directly or through freely chosen representatives*”. Participation in the making of the constitution is a form or an instance of taking part in the conduct of public affairs and is thus upheld in international law. Besides, it is known that the UN Commission on Human Rights has “articulated the specific right to participate in constitution-making”.⁷⁰

⁶⁸ Gai, Yash. (2004) *The Constitution Reform Process: Comparative Perspectives*, [paper presented at a conference “Toward Inclusive and Participatory Constitution-Making, (Center on International Cooperation: New York University, 2004), 3

⁶⁹ Ibid, p 37.

⁷⁰ Ibid p33

2.5 Historic Specificity of Actual Constitution-Making Processes

2.6 The Making of the Somalia Constitution

On July 1, 1960, Somalia achieved independence and became the Republic of Somalia after the union of two territories, the British Somaliland Protectorate and the Italian-administered Trusteeship Territory of Somalia. At independence, the Republic of Somalia was a democracy with a constitution. Ratified by referendum, the constitution sets out a civilian, parliamentary system of governance and enshrined human rights, and, under it, two successive and democratically-elected governments ruled Somalia from 1960 to 1969. A bloodless military coup d'état followed in 1969. Led by Major General Mohamed Siyad Barre and, it resulted in the suspension of the constitution and in the country being renamed the Somali Democratic Republic.⁷¹

Dave-Odigie notes that Clan-based forces overthrew the military dictatorship of Siyad Barre in 1991, resulting in the collapse of central state authority and the emergence of clan-based structures that alternately disputed and controlled limited Somali territories.⁷² The northwest former British protectorate declared its independence as Somaliland in May 1991. It has yet to be recognized by any foreign government. In 1998, the leaders of Puntland, a region of northeastern Somalia, declared itself an autonomous state.

2.6.1 The Arta Peace Process

Since 1991, numerous attempts to restore stability and central authority in Somalia have failed. In 2000, the Djibouti government hosted the Somali National Peace Conference in

⁷¹ Abokor Abdi, Bradbury, Mohammed and Yusuf Abdul *Review of African Political Economy Somaliland*: (Asmara: The Red Sea Press, 2003)50.

⁷² Dave-Odigie, *Somalia Conflict: An African Indigenous Approach towards A Peaceful Resolution*. (Washington: Brookings Institute Press, 2011). 63-70.

the town of Arta. This process resulted in the creation of a Transitional National Government (TNG) in August 2000, which commanded some national and international support. The 4.5 power sharing system of fixed, proportional clan representation originated at Arta. Through it an equal number of seats in parliament and positions at other institutions of the transitional government were allotted to each of the four major Somali clans, with a “half” place reserved for minority clans.⁷³

2.6.2 The Transitional Federal Charter and Institutions (TFC/Is)

Between 2002 and 2004, the Intergovernmental Authority on Development (IGAD), a regional organization, sponsored peace talks in Kenya with significant political actors who controlled territory and militias in Somalia or had the support of their respective clans. In 2004, conference participants agreed on a framework document, the Transitional Federal Charter (TFC or “Charter”). The TFC provided the legal basis for the formation of a Transitional Federal Parliament (TFP) and a Transitional Federal Government (TFG). The TFP, composed of 275 representatives, was selected in accordance with the 4.5 formula. The Charter established a five-year term of the Transitional Federal Parliament, which has since been extended twice.⁷⁴

2.6.3 The Independent Federal Constitution Commission (IFCC)

The Charter also calls for the formation of an independent Federal Constitution Commission (FCC). Article 71 (9) of the Charter requires that a draft federal constitution, based on the Charter, be completed within two and half years and adopted by popular

⁷³ Eubank Nicholas, “*Taxation, Political Accountability and Foreign Aid: Lessons from Somaliland*,” (Pretoria: Africa Institute of South Africa, 2012), 48.

⁷⁴ Haggmann, T. & Hoehne, M. V. (2009). Failures of the state failure debate: Evidence from the Somali territories. *Journal Of International Development*, 21, 42-57.

referendum during the final year of the transitional period. Somalia's constitution-making process began in challenging circumstances. At the time, the country had been without an effective government for fifteen years. Conflict in Somalia was intense and the newly-constituted Transitional Federal Government had no control over large areas of Somali territory.

In June 2006, the fifteen-member FCC, appointed according to the 4.5 formula, was established in by the Somalia Constitutional Commission Act, with a mandate to draft a constitution for Somalia. The Act defined guiding principles for the Commission, including that it was to consider the Charter, the principles of Islam, democracy and social justice. It also recommended a process that "promotes public participation, transparency and accountability to the people, accommodates the diversity of Somalis and their opinions and promotes stability, peace and reconstruction." The FCC met for the first time in August 2006. It decided to add "Independent" to its name to become the "Independent Federal Constitution Commission" (IFCC). Members also agreed on an extensive civic education program to explain the constitution-making process for the Somali people and on a consultation process to initiate a national dialogue. The IFCC then planned to produce a draft constitution that would be the basis of continued civic education. As the IFCC embarked on its activities, however, instability in Mogadishu grew. Soon after the initial IFCC workshop, the Minister of Constitutional Affairs was killed in Mogadishu and the constitutional process came to an abrupt halt.⁷⁵

⁷⁵ Ibid, p 44.

2.6.4 The 2009 Djibouti Peace Process

In 2008, the TFG president resigned and the United Nations sponsored talks between the Transitional Federal Government and the Alliance for the Re-liberation of Somalia (ARS), culminating in a reconciliation conference in Djibouti in 2009. A power-sharing agreement was reached between the TFG and ARS, calling for the number of Transitional Federal Parliament seats to double to 550 and the former chair of the Islamic Courts Union (ICU) to assume the presidency of the Transitional Federal Government. The Djibouti peace agreement was denounced as a betrayal by *Al-Shabaab*, extremists formerly part of the ICU, who went on to declare their support for Al Qaeda and now exercise control over most of south central Somalia. The IFCC was doubled to thirty members as a result of the Djibouti peace agreement.

2.6.5 The Work of Expanded IFCC

The IFCC began work again in March 2010. A final draft was to be completed and ratified by August 2011, when the term of the TFP was to end. Due to the prohibitive security situation on the ground in south central Somalia, under the control of *Al-Shabaab*, the IFCC worked from its provisional base in Djibouti. Security also precluded the IFCC from embarking on its planned program of public consultation. Instead, members set to work to produce a preliminary draft for purposes of public consultation from relative isolation in Djibouti. The IFCC refrained from releasing news or updates regarding the drafting process, making it questionable if the larger Somali community

was aware that a constitution was being drafted on their behalf, let alone being engaged in the process and the issues.⁷⁶

Instead of a final draft for a referendum, in August 2010 the IFCC released a preliminary and incomplete draft known as the Consultation Draft Constitution, or CDC, outlining ideas and options to stimulate public debate and comment. The Consultation Draft Constitution presents options concerning, among other things, a presidential or parliamentary system and the status of Mogadishu as a capital. It also outlines certain principles of federalism, but does not set out a federal system in detail.

2.6.6 Public Consultations and Civic Education

The IFCC recognized the need to focus on public consultations and civic education to make people aware of the Consultation Draft Constitution and the value of constitutionalism in general. This was challenging given that Al Shabaab made it dangerous even to discuss the draft. The CDC was posted nonetheless on the IFCC website at <www.dastuur.org>. This website also allows for the submission of comments on the draft. In addition, radio and television produced serial programming on constitutionalism and a text messaging servicing was developed to distribute information about the draft constitution. The National Democratic Institute for International Affairs (NDIIA) hosted focus group meetings in both Puntland and south central Somalia, including in Shabaab-controlled areas. NDI's research revealed a general lack of

⁷⁶ ICG, *Somaliland Democracy and its Discontents. Africa Report* (New York: International Crisis Group, 2003), 66.

awareness on the part of Somalis around the constitution-making processes as well as a lack of knowledge of what a constitution is and the role it can play in governance.⁷⁷

Between late 2010 and early 2011, the IFCC held consultation meetings throughout Somalia on the Consultation Draft Constitution. IFCC members met with the leadership of Somalia's Transitional Institutions in Mogadishu. The IFCC also consulted with Somali traditional leaders and civil society organizations, including women's groups, youth groups and organizations of people with disabilities; members and committees of the Transitional Federal Parliament; Somali security forces officers; and representatives of universities in Mogadishu. IFCC members also held workshops at the CDC with leaders and civil society organizations in Puntland, Galmadug and Somaliland.

2.6.7 The Kampala Accord

These processes of public consultation and civic education in the draft constitution have been delayed to some extent by the decision of the Transitional Federal Parliament on February 3, 2011, to extend its own term for an additional three years. One effect on the TFP's self-extension was to create uncertainty around the timeline for the draft constitution. An agreement was signed between the President and TFP Speaker on June 9, 2011, known as the Kampala Accord, which, among other matters, marks a commitment to adopt a constitution by August 2012. The agreement itself is controversial and so it remains to be seen how the constitution-making process will ultimately unfold.⁷⁸

⁷⁷ Ibid, p 46.

⁷⁸ Ibid, p 46.

2.6.8 Challenges

The constitution-making process in Somalia presents particular challenges. Somalia has had no effective government for more than two decades. A generation of Somalis has never lived under the formal governance and so may have a distorted concept of what this means. The draft constitution is also being developed during a time of conflict when few people can move freely in Somalia and participation in constitution processes is dangerous. Members of civil society assume real risks in reaching out to their communities with public consultation and civic education activities. Furthermore, civil society is fragmented along clan lines and weakened by the security situation.⁷⁹

The Transitional Federal Charter requires a new constitution to be ratified by referendum; however the security situation makes that impossible in the foreseeable future. Alternative means of provisionally adopting the constitution, such as ratification through a constituent assembly, are being canvassed. Ultimately, the goal is to generate confidence in the larger Somali population that this constitutional process may present an agreed-upon and long awaited framework for a process of nation and state building in Somalia.

⁷⁹ Republic of Somaliland. *Constitution of Somaliland*. (The Republic of Somaliland, 2001).

CHAPTER THREE

CONSTITUTION-MAKING PROCESSES IN SOMALIA: AN ASSESSMENT, 1960

- 2013

3.1 Introduction

At its simplest, a constitution is nothing more than a document that sets out the basic principles or established precedents according to which a state (or other organization) is to be governed. It usually entrenches and institutionalizes political agreements, define the state and its population and frame the rules for the lawful exercise of authority.

3.2 Constitution-Making in Somalia: An Assessment

The Republic of Somalia was formed on July 1, 1960, composed of former Italian and British Somaliland. Shifting allegiances and divisions between Somalia's clan and sub-clan structures have shaped a complex environment. Dictator Mohammad Siyad Barre took control of the country in a coup d'état in 1969. He believed the only way to govern Somalia was to break the back of clan influence and attempted to enforce the state's authority through imposing a highly centralized government and a form of socialism⁸⁰. In the context of severe drought and a disastrous conflict with Ethiopia, organized clan resistance to Siyad Barre grew. Civil war erupted in 1988, and in 1991, Siyad Barre fled Mogadishu⁸¹.

On July 20, 1961 and through a popular referendum, the people of Somalia ratified a new Constitution, which was first drafted in 1960.⁸² The Constitution of 1961 had provided

⁸⁰ Harper, M. *Getting Somalia Wrong: Faith, War and Hope in a Shattered State* (Zed Books, London, 2012).

⁸¹ Ibid.

⁸² See the Constitution of the Somali Republic, 1960; available at <http://www.somalilaw.org/Documents/>

for a parliamentary democracy, with the Prime Minister and Council of Ministers (cabinet) being drawn from the membership of the legislature. The legislature also elected the head of state, or president of the republic.

In 1969, following the assassination of Somalia's second president, Abdirashid Ali Shermarke, the military staged a coup on October 21 (the day after Shermarke's funeral), and took over the office. The Supreme Revolutionary Council (SRC) that assumed power was led by Major General Siyad Barre. Barre shortly afterwards became the head of the SRC. The SRC subsequently renamed the country the Somali Democratic Republic, arrested members of the former government, banned political parties, dissolved the parliament and the Supreme Court, and suspended the Constitution.

A constitutional referendum was held in Somalia on 25 August 1979. The new constitution replaced the one approved in 1961, and introduced a one-party state with a presidential system of government. It was approved by 99.78% of voters⁸³. A new Constitution was promulgated in 1979 under which elections for a People's Assembly were held. However, Barre's Somali Revolutionary Socialist Party Politburo continued to rule. The Constitution of 1979 provided for a presidential system under which the president served as both head of state and head of government. As head of government, the president selected the members of the Council of Ministers, which he chaired. The Constitution of 1979 initially called for the president to be elected to a six-year, renewable term of office by a two-thirds majority vote of the legislature. After Barre's

Constitution1960.pdf.

⁸³ See "Somalia", *The African Contemporary Record*, Vol. XVIII, No. 25, November 5-18, 1979, p. 5211.

overthrow, a provisional government called for a new Constitution to replace the 1979 document that had been the law of the land at the time of his ouster.

The provisional government called for a new constitution to replace the 1979 document that had been the law of the land at the time of Siyad Barre's overthrow. The provisional government created a Ministry of Constitutional Affairs, which was charged with planning for a constitutional convention and revising an October 1990 draft constitution that Siyad Barre had proposed in an unsuccessful effort to stem opposition to his rule. As of May 1992, however, the lack of consensus among the USC-dominated government and the various guerrilla groups that controlled more than half of the nation had prevented the completion of a final version of the new constitution. Consequently, those provisions of the constitution of 1979 that had not been specifically voided by the interim government remained in force.

Like its 1984 amendments, the constitution of 1979 had been approved in a popular referendum. Somalia had universal suffrage for persons over eighteen years of age, but women did not play a significant role in politics. The constitution of 1979 resembled the constitution of 1961, also approved in a nationwide referendum after the former Italian and British colonies had been unified as independent Somalia. The main difference between the two documents concerned executive power. The constitution of 1961 had provided for a parliamentary democracy, with the prime minister and Council of Ministers (cabinet) being drawn from the membership of the legislature. The legislature also elected the head of state, or president of the republic. The constitution of 1979 provided for a presidential system under which the president served as both head of state and head of government. As head of government, the president selected the members of

the Council of Ministers, which he chaired. The constitution of 1979 initially called for the president to be elected to a six-year, renewable term of office by a two-thirds majority vote of the legislature. Constitutional amendments enacted in 1984 provided for direct popular election of the president for a seven-year term. The first presidential election was held in 1986. Siyad Barre, the sole candidate, received 99.9 percent of the votes.

Both the 1961 and 1979 constitutions granted broad powers to the president. The constitution of 1979 authorized the president to conduct foreign affairs, declare war, invoke emergency powers, serve as commander in chief of the armed forces, and appoint one or more vice presidents, the president of the Supreme Court, up to six members of the national legislature, and the members of the Council of Ministers. Both constitutions also provided for a unicameral legislature subject to stand for election at least once every five years; the president could dissolve the legislature earlier.

In ideal terms constitutions describe a social contract between rulers and ruled, explicitly formulating the obligations, rights and duties of the two sides. Considering the fundamental importance of 'contract' (xeer) in Somali social order and the multiplicity of contracts that actually regulate social relationships among Somali clans and lineage groups, it might be supposed that constitution making in the Somali context would be a reasonably straightforward undertaking. As the three case studies presented here by different Somali constitution-making

During the 1990s, a rise in intrastate conflicts generated increased international focus on peacebuilding. A sequential approach to the transition from war to peace that had characterized interstate conflicts did not hold in the complex civil conflicts after the Cold

War⁸⁴. Such conflicts did not end in decisive military victories and reconstruction phases, but rather countries were trapped in cycles of conflict, with complex cases that risked flaring into violence as states formed. As international understanding of state formation and conflict grew, the UN and others started to develop peacebuilding as a field in its own right.

The concept was first introduced in Boutros Boutros-Ghali's Agenda for Peace in 1992⁸⁵, which defined peacebuilding as "action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict." The UN developed the peacebuilding concept further in the 2000 "Brahimi Report"⁸⁶ and the 2004 report of the High level Panel on Threats, Challenges, and Change⁸⁷, to encapsulate a cyclical view of the causes of conflict and relapse and responses to addressing them.

Concepts of "peacebuilding" and "state building" relate to the historical processes by which a state's institutions, legitimacy and state-society relations are built. These are often described as the processes by which a state generates legitimacy and consent, through elite deals on the distribution of power, through some degree of political inclusion, and through delivering core state functions targeted to meet citizens' basic expectations. Peacebuilding has been more widely defined to also encompass processes through which historical grievances and the causes of conflict are addressed and

⁸⁴ McAskie, Cain. *2020 Vision: Visioning the Future of the United Nations Peacebuilding Architecture*. (London: Norwegian Institute of International Affairs NUPI, 2010).

⁸⁵ Wyeth, Vanessa *Peacebuilding at the UN over the last 10 years*. (Colorado: International Peace Institute, 2011).

⁸⁶ Brahimi Louis, *Report of the Panel on the United Nations Peace Operations*. (United Nations: New York, 2000), 32.

⁸⁷ General Assembly, *Report of the High-level Panel on Threats, Challenges and Change*. (Nairobi, 2004), 42.

reconciliation is pursued. Peacebuilding and state building processes should contribute to the consolidation of a “political settlement” that forges a common understanding on the distribution of power and rights, and that can prevent violent conflict and enable the pursuit of long-term development⁸⁸.

There are two schools of thought about what constitutes a political settlement. The first describes long-running formal and informal relations and institutions involving political actors, especially elites. The second describes the construction of more formal political agreements and power-sharing arrangements between elites (constitutions, peace agreements and so forth). In fragile states, there is a need to understand the development of political settlements through both lenses, as the formation of relations between elites, punctuated by major political agreements⁸⁹. These processes should not be understood in isolation from the development of wider state-society relations. Recent research on peacebuilding and state building has pointed to inclusion as a major contributing factor in building greater state legitimacy and stability⁹⁰. Exclusionary behavior (particularly of former rebels and militias) has also been identified as a “consistently important” factor in relapses into violent conflict⁹¹.

In recent years, international policy exercises have been undertaken to identify what has gone right and wrong when external actors support peacebuilding and state-building,

⁸⁸ Elgin Cossart, Jones Bhadra and Esberg Johnes, *Pathways to Change: Baseline Study to Identify Theories of Change in Political Settlements and Confidence Building* (Center on International Cooperation, New York University, 2012), 89.

⁸⁹ Elgin Cossart, Jones Bhadra and Esberg Johnes, *Pathways to Change: Baseline Study to Identify Theories of Change in Political Settlements and Confidence Building* (Center on International Cooperation, New York University, 2012), 89.

⁹⁰ Call Cousens, *Why Peace Fails: the Causes and Prevention of Civil War Recurrence* (Georgetown University Press, 2012), 34.

⁹¹ Call Cousens, *Why Peace Fails: the Causes and Prevention of Civil War Recurrence* (Georgetown University Press, 2012), 34.

ranging from the foundations for the Republic of Korea's post-conflict success, to recovery from the genocide in Rwanda and resource conflict in Sierra Leone, to more recent experiences in "failed states" policy in Iraq and Afghanistan. These exercises have included the 2011 World Bank *World Development Report on Conflict, Security and Development* (WDR 2011), the UN's 2011 *Report of the Secretary-General on Civilian Capacities in the Immediate Aftermath of Conflict and the International Dialogue's New Deal for Engagement in Fragile States*⁹².

3.2.4 Post-Barre Somalia

The Siyad Barre's regime was able to lead Somalia for more than 30 years by employing a clan identity based approach that thrived on a divide-and-rule strategy. The former regime is blamed for the rise of clannism after its fall. Armed conflict raged across southern Somalia throughout 1991-1992 as clan-based militias fought each other for control of resources in various towns and ports. The post-Barre war, which may have begun as a struggle for control of the government, quickly turned into predatory looting and banditry by various militias. Towards 1992 Somalia was affected by a massive famine, and the casualties of the fighting and famine combined are estimated at 250 000 Somali deaths⁹³. The international food aid sent to alleviate the famine quickly became part of the war economy (a commodity worth fighting over).

In response to the widely media covered and significantly devastating famine of 1992, and the inability of the food aid to reach its intended recipients safely, the UN and US intervened in Somalia with a view to protecting the food aid and helping the famine

⁹² World Bank, *World Development Report on Conflict, Security and Development* (Washington DC, 2011)

⁹³ Menkhaus, Ken. *Governance without Government in Somalia: Spoilers, State Building, and the Politics of Coping*. (America: Affairs Council of Northern California, 2006), 74-106.

ravaged south Somalia. There is no need here for a detailed outline of this intervention as the history of this period is amply documented. Suffice it to say that the UN and US were not successful in building any sort of consensus between the warring militias, or forming a peace deal. After the infamous and highly publicized 1993 “Black Hawk Down” incident in which Somali militias shot down two US helicopters and killed 18 soldiers, the US had had enough of Somalia. US troops withdrew from the country in March 1994 and soon after the UN followed suit, leaving the country at the mercy of its own warring parties and clan supported militias⁹⁴.

Since 1995, armed conflict has continued to plague south and central Somalia, but the nature of the conflict has changed. From 1995 to 2006 the majority of armed conflicts in the country occurred locally, pitting sub-clans against one another, and the duration and intensity of these conflicts was diverse⁹⁵. In the northeast of the country, regional authorities formed the state of Puntland, which considers itself part of a Federal Somalia (Puntland State of Somalia Constitution). Puntland has developed a semi-autonomous state like structure which allows it to foster a more secure and peaceful environment than that in central and southern Somalia. Unfortunately, since 2008 Puntland has come under significant international attention due to the problems of piracy off the coast of Somalia, which presents a considerable nuisance and a threat to international shipping companies, and individual sailing in those areas.

⁹⁴ Clarke Walter and Robert Gosende, “*Somalia: Can a Collapsed State Reconstitute Itself?*” In *State Failure and State Weakness in a Time of Terror*, (Washington: Brookings Institute Press, 2003), 129-158.

⁹⁵ Menkhaus, Ken. “*Governance without Government in Somalia: Spoilers, State Building, and the Politics of Coping*.” (America: Affairs Council of Northern California, 2006), 74-106.

One of Barre's longest lasting legacies has been the reduction of national politics to narrow tribal and clan based interests which still dominate the political landscape of south and central Somalia. Siyad Barre distributed money and arms to his friends and cronies and encouraged them to fight his enemies, who were in turn accused of tribalism and clan politics⁹⁶. On the other hand, by "destroying his country's economy through corruption and inefficiency, Siyad also promoted those conditions of scarce resources and insecurity on which clan loyalty thrives, since clan solidarity then offers the only hope of survival⁹⁷. This legacy is one of the main reasons why south and central Somalia remain without any kind of trans-local political authority, and where such authority did emerge, international forces conspired to neutralize it out of their own interests.

In 1991, Somaliland declared its independence (not secession) from Somalia as a revocation of the 1960 voluntary union. Its priority is to achieve recognition of independent statehood. When analysts studied the causal factors in Somaliland's success in state formation, they found that an absence of foreign aid and intervention was significant (along with secondary education and a widespread desire for safety). The lack of foreign aid meant that actors in Somaliland determined their own political and institutional arrangements and forced Somaliland authorities to raise revenue⁹⁸. These factors built confidence, institutional capacity and accountability between state and people⁹⁹.

⁹⁶ Lewis loan, *Understanding Somalia and Somaliland*, (London: Hurst Publishers, 2008), 34.

⁹⁷ Lewis loan, *Understanding Somalia and Somaliland*, (London: Hurst Publishers, 2008), 34.

⁹⁸ Phillips Sarah "Political Settlements and State Formation: The Case of Somaliland," *Research Paper 23, Developmental Leadership Program*, (Austin: University of Texas Press, 2013).46

⁹⁹Eubank Nicholas, "Taxation, Political Accountability and Foreign Aid: Lessons from Somaliland," (Pretoria: Africa Institute of South Africa, 2012), 48.

Somalia, although it has only one ethnic group and the same religion, failed to build a viable nation-state. Not only was the government policy of greater Somalia (borrowed from Britain colonial rulers), to bring all Somali-speaking people under one Somalia state a failure, but also attempt to integrate the people within the republic. Rather, the Somalia people divided themselves into different tribes and fought against each other, which resulted in a complete collapse of the state.¹⁰⁰

The Somali Republic has been without an effective government and engulfed in dysfunctional violence and fratricidal civil war for more than two decades. The ouster of the late dictator Siyad Barre rather than bringing relief and better life to this country opened another Pandora's box of political power struggles, clan animosities, competition and violence which resulted in deaths, destruction, human rights abuses and massive population displacement internally and externally. Consequently Somalia has acquired the status of a failed state.¹⁰¹

Conflict in Somalia has its roots in the historical and political legacies of the country. These include both the omissions and commissions of all previous governments, including the colonial powers. The issues of clannism and factional competition for resources and political power remain at the heart of the conflict. In 1991, the Somali state collapsed as civil war engulfed the capital Mogadishu and the military regime of Mohamed Siyad Barre was forced out of power, after more than a century in the making and 30 years of independence, Somalia has ceased to function as a unitary state¹⁰²

¹⁰⁰ Wondem Asres. *The State, The Crisis of State Institutions, and Refugee Migration In The Horn Of Africa. The Case of Sudan, Ethiopia, and Somalia*, 2007.

¹⁰¹ Somalia National Reconciliation Conference; *Conflict Resolution and Reconciliation Report*, 2003.

¹⁰² Bradbury Mark, *Becoming Somaliland*. (London: Progression, 2008), 45.

In 1992, a US diplomat described the situation in Somalia as the worst humanitarian crisis faced by any people in the world¹⁰³. The nature of the Somali conflict is rooted deeply in a clan-based political system, as Somalia's political history is itself determined by its clan structures. This was coupled with the militarization of Somalia and the internationalization of the Somali conflict.¹⁰⁴ After the Barre's fall, the international community came to assist Somalia to get out of the mess of the civil war. This was done through the provision of emergency relief and the organization of peace and reconciliation efforts and conferences.

The conflict between clan and sub-clan factions was destructive in terms of its material cost and the loss of life. Not only had the state collapsed, but all logistics were interdicted and roads blocked, the feeble economy ruined and anarchy imposed.¹⁰⁵ The result was a famine that puts 4.5 million people at risk, including half a million dead, two million displaced and made one million refugees. This chaos and loss of life received regional and international attention. Consequently, several peace and reconciliation efforts were held by IGAD, the United Nations, and regional governments such as Kenya, Ethiopia and Djibouti, to reconstruct and reunite the Somali state.

Despite the fact that some of the Somali peace and reconciliation efforts have had positive outcomes, they have frequently failed to take root in the long term. So far none of the effort could fully reconcile the warring factions, and thus could not end the anarchy in the country. The outcome of every peace effort has generated new and worse conflicts.

¹⁰³ Joe Prendergast. *Crisis Response: Humanitarian Band-Aids in Sudan and Somalia* (London: Pluto press with centre of concern 1997) p115

¹⁰⁴ Bradbury Mark, *Becoming Somaliland. op. cit.*

¹⁰⁵ Azar Edward, *The Management of Protracted Social Conflict: Theory and Cases*, Aldershot: Dartmouth, 1990, p.56.

In all the peace efforts held, Somalis were hoping to hear good news of peace and unity, unfortunately, most of the previous peace efforts could not restore a lasting peace that Somalis have dreamt for decades.¹⁰⁶ Somalia's crisis has reminded the world that chronic violence, famine, and stagnation remain unfortunate features of much of black Africa. But Somalia's plight also holds lessons for the future of the region. Both African leaders and Western powers must avoid committing the same errors and abuses that helped create the region's ongoing problems.

3.2.1 The Arta Peace Process: 2000

Since 1991, thirteen reconciliation conferences to restore peace and national authority have been held. Warlords and factional leaders dominated eleven of these gatherings, all of which failed to produce Consensus. Each self-appointed warlord was adamant in claiming the presidency of the country. As a result, most Somalis submitted to the prospect of not seeing a national state in their lifetime. The bleakness of the predicament proved so paralyzing that it would fall to the small, partially Somali-populated Republic of Djibouti and its leader to recharge hopes of saving Somalia from itself. Ismail Omar Gueh, with the zest that accompanies a new presidency, coupled with his own primordial affinity with the Somali people, made a personal assignment of the pressing necessities of reducing regional instability and Djibouti's immediate vulnerabilities.¹⁰⁷

With his surprise announcement at the UN General Assembly in 1999 to convene a different gathering to rebuild Somalia, President Gueh put the full energy of his administration behind the endeavor. So it was that this meeting of Somalis took place in

¹⁰⁶ Azar Edward, *The Management of Protracted Social Conflict: Theory and Cases*, Aldershot: Dartmouth, 1990, pp 45.

¹⁰⁷ Ahmed I. Samatar and Abdi Ismail Samatar: Somali Reconciliation. Editorial note.

Djibouti in March 2000. A series of workshops were conducted for a month. Traditional leaders, businessmen, women, intellectuals, and others were invited. Most significantly, warlords were also extended a welcome, but *not* as veto holders. All in all, nearly 5,000 delegates came from every region to deliberate the future of their country.¹⁰⁸

While the Government of Djibouti provided modest facilities and acted as a fair broker, the key actors were Somali “traditional” leaders and former politicians. One moment in the proceedings is etched in the memory of those who were present: negotiations came to a halt when sharp conflicting interests clashed. Fearful that the whole conference was in danger of collapse, Geeleh intervened by appealing to the delegates to consider their collective interest. In an emotionally charged tone, he pleaded, “*Somaliyee II hiiliya aan idiin hiiliye*” (O Somalis, help me so that I can help you). The appeal moved the delegates and broke the logjam. Afterwards, the key obstacle proved to be the selection of the official delegates to the conference who ultimately were to choose a new parliament of 245 deputies. The formula for working out the distribution of the seats was set at dividing the nation into 4.5 communities. In the meantime, a national transitional charter was drafted which the delegates approved and the provisional parliament later adopted. Perhaps the most daunting task was how to equitably parcel out the parliamentary seats *within* each community. This milestone was reached after some acute wrangling and, subsequently, Somalia’s first “democratically” *selected* chamber of deputies was put into place. Moreover, the chamber proceeded to elect an interim president from several competing candidates.¹⁰⁹

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

Arta peace talks in Djibuti 2000 created a Transitional National Government (TNG) led by President Abdiqassim Salad Hassan. Originally this new government was permitted to serve for a three-year interim period as the recognized national authority. The Arta peace agreement in Djibuti declared that after this period a national government should be selected through a national election. In the beginning the new administration seemed to be eager to face the hard challenge: restoring good relations with the neighboring Ethiopia, and controlling the Southern Somalia territory by promoting a new order. Initially, the Transitional National Government started to work with the high support of the powerful Mogadishu businessmen; TNG fell short of domestic and international expectations. TNG quickly failed to gain any political result: it never administrated more than a portion of the Somali capital Mogadishu, it has never had good relations with the neighboring Ethiopia, as a consequence, it didn't attract the foreign assistance that it needed to make its administration efficient and the small foreign aid arrived from the Arab countries it has been used as a private resource. The missed opportunity to rebuild constructive relations between the TNG and Ethiopia made potential rival factions serious enemies.¹¹⁰

The Transitional National Government (TNG) announced in August 2000 as an attempt to rebuild a political authority in Somalia. This cross-clan and supposedly national government was headed by Abdiqasim Salad Hassan as President. All TNG political leaders, however, are linked to a cartel of key Mogadishu businessmen, which again shows that business is the authority rather than politics. Furthermore, the TNG is accused of having linkages to Islamic fundamentalist organizations. In effect, it has not gained sufficient authority to create some sort of public order; indeed, it "failed to become

¹¹⁰ Umberto Tavalato, Djibouti to Mbagathi, making or breaking peace, Nairobi, January 12th, 2004.

minimally operational, was plagued by internal schisms, did not gain widespread bilateral recognition, and in 2002 appeared increasingly irrelevant. It formally expired in August 2003, the point at which its three-year mandate ended, though TNG President Abdiqassim Salad Hassan declared an extension to the TNG's mandate" (Menkhaus, 2003, pp. 11-12).

Hence the TNG has become another faction in the struggle for power and profit with its business cartel having more authority than its (former) legitimate political position ever held. Somaliland, Puntland and the Bakool and Bay regions in south-west Somalia have never participated in the TNG. The TNG controls not more than one district in Mogadishu and has some influence in Marka and Kismayo. Hence, apart from the sharia-courts which could be evaluated as functional authority, but provide a questionable sort of security, the aforementioned potential authorities do not, or even cannot, provide security to the people. Hence, one could argue that there is not a lack of authority in Somalia, but that the potential authorities are all limited by a social fragmentation of the Somali society.¹¹¹

The Arta Peace Process was located within the conceptual framework of the peaceful resolution of the Somali conflict resolution approach with a third party as a facilitator. Moore¹¹² argues that to deal effectively with conflicts, the intervener needs a conceptual road map or "conflict map" that details why a conflict is occurring, identifies barriers to the settlement, and indicates procedures to manage or resolve the conflict. The mediator works with the disputants to test hypotheses about the sources of the conflict. The crux of

¹¹¹ Sabrina Grosse-Kettler, *External actors in stateless Somalia. A war economy and its promoters*. Published by BICC, Bonn 2004.

¹¹² Moore Christopher, *The Mediation Process. Third edition*. (San Francisco: Jossey-Bass, 2003)

the Somali conflict was all about political power and addressing the political power relations and required a systematic approach in order to ensure the positive outcomes of the process. To a certain extent, the Arta Peace Process was influenced by the Addis Ababa objectives, namely the quest to establish some form of a government system.

Establishment of a government without first resolving the Somali conflict or addressing the sources of the conflict would not provide guarantees that such a government would survive the test of time. It is important to note that the Arta peace process was an initiative of the President of Djibouti, Ismail Omar Guelle. The Intergovernmental Authority on Development (IGAD) that included Somalia, Djibouti, Eritrea, Kenya, Sudan, Ethiopia and Uganda was the main underwriter of the process, though Ethiopia worked actively to undermine the outcome of the process due to the perception that Islamists dominated the outcomes. The argument by Tadesse that al-Ittihad succeeded in handpicking representatives for the Arta Peace Conference lacks credibility as it is based on the fact that Abdulqasim Salat Hassan had a relationship with the al- Ittihad group.

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The EU, the UN and US as well as Egypt, Italy and Libya, later endorsed the Arta Peace Process. Support of the peace conference was based on the expectations of the international sponsors that out of the process, a form of government structure would emerge. In this regard, the government formation was seen as a viable approach to drive the conflict resolution process. The assumption that government formation is equal to conflict resolution in Somalia was without any basis whatsoever and this assumption

¹¹³ Tadesse, Medhane *Al- Ittihad, Political Islam and Black Economy in Somalia*, (Addis Ababa: Meag Printing Enterprises 2002), 78

drove the conflict resolution processes in Somalia, with the emphasis shifting from conflict resolution to state-building. There are some merits to Moller's argument on state-building approach in this regard.¹¹⁴ The state- building approach to the Somali conflict resolution introduced challenges with regard to the nature and form of such an eventual government and state.

The top-down process of state-building adopted by the Arta process was flawed given that Somali society historically enjoyed a decentralized form of government- based power sharing by clans. To some extent, the clan system was an example of an autonomous and cohesive system of government worth revisiting when dealing with government-building process. A positive aspect of the Arta process was the attendance by over 2000 delegates representing a wide spectrum of interests, varying from warlords, to clan and religious leaders. According to Adar, the delegates were motivated to create the building blocks of a system of government.¹¹⁵ Consequently, 44 seats were set up and allocated to the main clans each (the Hawiye, Darod, Digil, Mirifle and Dir Clans). Neither the Hawiye military faction nor the Islamic leaders were in favour of the equal balance of clan representation in the created Transitional National Assembly, mainly because they had superior military capability compared to other clans. The establishment of the Transitional National Government (TNG) with Abdulqasim Salat Hassan (Hawiye) as president was perhaps another compromise to manage and appease the Hawiye opposition to the process outcomes.

¹¹⁴ Moller Bjorn, *The Somali Conflict: The role of external actors, DIIS Report* (Copenhagen: Danish Institute for International Studies, 2009).

¹¹⁵ Adar, Kennedy, *Somalia: Reconstruction of a collapsed state: Conflict Trends*, (Asmara: The Red Sea Press 2001). 21.

The compromise involved with the election of Abdulqasim Salat Hassan as president of the TNG meant that the transitional government was in a crisis management mode before dealing with the challenges of creating a functioning system of governance and the pacification of one of the militarized countries in the African continent. Creating a government adhering to some semblance of democratic values in terms of the Arta process, was another challenge as the delegates were not representatives of a democratically constituted body of the Somali Society. Lewis argues that, in practice, many people who claimed to be legitimately appointed representatives were simply self-appointed,¹¹⁶ and he views this as the most obvious flaw in the process, which nevertheless sought to appeal to every section of the nation in the widest sense. The delegates did have a role to play in the resolution of the conflict. However, it did not necessarily follow that such a role could be transformed into the formation of a representative government. People who had the means and capability to engage in violent conflict would not necessarily represent any specific constituency in Somalia. The Arta Peace Process elevated groups, which had no strategic vision for resolving the conflict ravaging the country. Abdulqasim Salat Hassan is a former enthusiastic exponent of Siad Barre's Scientific Socialism and a prominent Minister of Interior, consequently, Somalis associated the process with the vestiges of the Siad Barre regime.

The Arta Peace Process sponsors assumed that appointing a Habr Gidir as president of the transitional government, was expeditious as he was someone who could lead and control his fractious clansmen in Mogadishu. This assumption did not take the political background of Abdulqasim Salat Hassan into account; in addition, 60% of the 245

¹¹⁶ Lewis loan, *Understanding Somalia and Somaliland*, (London: Hurst Publishers, 2008), 34.

members came from Siad Barre's carefully selected parliament¹¹⁷. Consequently, the TNG and TNA did not enjoy the support of the Mogadishu citizens, let alone that of the warlords. In reality, the TNG only had control of a few streets in Mogadishu, while the greater parts of the country was divided among the dominant warlords, such as Mohammed Qanyere Afrah, Musa Sudi, Ali Osman Atto, Hussein Aidid and Mohammed Dhere.

During the TNG's preoccupation with international legitimacy, the Islamic courts flourished in Mogadishu, Benadir and the adjacent Hiran region, Tadesse argues that the cumulative effect was the gradual al-Ittihadisation of Mogadishu and its environs.¹¹⁸ Abdulqasim Salat Hassan played a pivotal role in the pacification of areas under the control of the TNG. He did this by forging a working relationship with prominent Islamic leaders such as, Shaik Dahir Aweys. The inclusion of Islamic leaders in the TNG strategy had unintended consequences for the country's body politics. Somali neighbors became suspicious of the TNG long-term vision for the country and decided not to support the transitional government actively. The Sharia courts as they are commonly known proved to be a formidable force in developing some system of governance in areas of Mogadishu under their control.

The monumental failure of the Arta peace process lay in the lack of focus on conflict resolution and failure to create a mechanism to ensure that the underlying causes of the conflict were addressed in a systematic and coherent manner. The focus of the conference

¹¹⁷ Lewis loan, *Understanding Somalia and Somaliland*, (London: Hurst Publishers, 2008), 34.

¹¹⁸ Tadesse, Medhane *Al- Ittihad, Political Islam and Black Economy in Somalia*, (Addis Ababa: Meag Printing Enterprises 2002), 78.

on the creation of a government before the resolution phase was short-sighted to say the least. The conceptual framework for creating a government before making peace has since become a defining feature of international diplomacy in the resolution of the Somali conflict despite its shortcomings.

The other lesson of the Arta Peace Process is that the top-down approach of government formation has not resonated well with the Somalis since the Addis Ababa process. The international diplomatic focus on the top-down approach was also not generally accepted by all the international role-players, thus when Mohamed Sahnoun criticised the UN for only focusing on the top-down approach, he was then forced to step down as the UN special representative for Somalia. Adam points out that Mohamed Sahnoun had begun to win Somali cooperation by advocating a gradual approach, in harmony with traditional conflict resolution mechanisms.¹¹⁹

3.2.2 The Eldoret/Mbagathi Peace Process: 2002 – 2004

The peace process, sponsored by IGAD (Intergovernmental Authority on Development), began in Eldoret (Kenya) in October 2002 with the “Declaration on Cessation of Hostilities and the Structures and Principles of the Somalia National Reconciliation Process”. The Declaration of Hostilities was accompanied with the arms embargo “which established an embargo on all deliveries of weapons and military equipment to Somalia”. Despite the promising start the Resolution adopted by the Security Council of United Nations at its 4737th meeting on 8 April 2003 claimed: “Noting with regret that the arms has been continuously violated since 1992, including since the signing of the Declaration

¹¹⁹ Adam Smith, *Private Sector Investment and Barriers to Growth Analysis in South-Central Somalia and Puntland* International Report for DFID, (New York: Harcourt Brace Jovanovich 2013), 45.

on Cessation of Hostilities and the Structure and Principles of the Somalia National Reconciliation Process (Eldoret Declaration) in October 2002, and expressing concern over the illegal activities linked to the financing of arms purchases and military activities by the violators of the arms embargo in Somalia”¹²⁰. However the growing irrelevance of the Peace Process on the grounds of Somalia is a fact and public confidence in the country is close to zero.

Several members have violated, as the Security Council claimed, both the embargo and the ceasefire, the peace process works have been characterized by posturing and recrimination rather than a “genuine search for consensus”, the TNG in the capital has collapsed in all and Mogadishu faction leaders usually control no more than a few kilometers area, and Ethiopian sponsorship of the Somalia Reconciliation and Reconstruction Council (SRRC) is matched by Djibutian and Arab patronage of the TNG, and both violate the arms embargo. According to International Crisis Group “what should have been an important step toward restoration of peace and government in Somalia has evolved toward an unimaginative cake-cutting exercise in power-sharing by un-elected and only partially representative political elite that threatens to repeat the history of earlier failed initiatives.”¹²¹ In mid-February 2003, as a cost saving measure, the peace process was relocated in Mbagathi, on the outskirts of Nairobi. By drafting papers on various aspects of reconciliation and state building, in order to present them to a final plenary session, the Mbagathi process completed the second phase of the peace process. The second phase has produced a Declaration of Agreement on the 5 July 2003 in which leaders agreed to a transitional parliament comprising 351 members apportioned

¹²⁰ Security Council Resolution at its 4737th meeting, 8 April 2003.

¹²¹ International Crisis Group Report: Negotiating a blueprint for peace in Somalia. (6 March 2003).

by clan, as recommended during the Arta peace process (Djibouti 2000) formula. At the time Somali delegations agreed on the “4.5 formula” in which the four major clan families (Dir, Darood, Hawiye, Digil-Rahanweyn) are represented in equal numbers, while minority hold half seats. This guarantees that clan elders will have a role and it is presumed that any aspiring leader must pose as a representative of his clan. The current coalitions as TNG, SRRC, and G-8 are multi-clan and the real political fights are within and not between clans “What will emerge from political maneuvering and the talks in the Mbagathi process is not an attempt to create a government of national unity, but rather an effort to poach and co-opt disgruntled members of other clans into one’s coalition at the expense of one’s rivals. This is an old game which Somali political figures are very adept. Clan is, from this perspective, as much a tool to be used by political elites as it is an autonomous political force”¹²².

Phase II of the Somalia National Reconciliation Conference, which started at the end of February 2003, provided the framework for the finalization of all the tasks related to the drafting of the Transitional Federal Charter for Somalia and the preparatory work for the launching of Phase III. The formal adoption of the draft Federal Charter was scheduled by the IGAD Technical Committee, in consultation with the Somali leaders, to take place in mid-September 2003. While it had been assumed by the Committee and the international observers that there was consensus among the Somalis for the adoption of the Charter, disagreements emerged among the Transitional National Government (TNG) and several Somali leaders and factions, as well as between the Technical Committee and some of those Somali leaders. Those differences related to the following issues in the

¹²² Menkhaus Ken, *Warlord and Landlords: Non-state actors and humanitarian norms in Somalia*, Draft paper presented at the Curbing Human Rights Violations by Armed Groups Conference, (Liu Institute for Global Issues: University of British Columbia, Canada, 2003), pp.14-15.

Transitional Charter: reference to federalism, autonomy of regions, such as Puntland and the self-declared Republic of Somaliland; the status of the three languages spoken in Somalia, namely, Somali, Arabic and English; the role of clan and sub-clan leaders in the election of the Transitional Parliament; the size of the Parliament; the duration of the transitional period; and the designation of the new Transitional Government.¹²³

The TNG and some of the Somali leaders opposed any reference to federalism in the Charter. They insisted that the issue be left to the future, when peace would have returned to Somalia. Yet other Somali leaders argued that the Reconciliation Conference had the mandate to address the issue of Somalia's future political system. As the Somali leaders and the Technical Committee could not resolve these issues at the time, the TNG and its allied factions decided to withdraw from the Conference. As a result, the reconciliation process remained in a stalemate from September to December 2003. In view of the stalemate, the Technical Committee undertook several consultations and initiatives, with a view to putting the reconciliation process back on track. Those efforts were supported by the 10th IGAD Summit of Heads of State and Government that took place in Kampala on 24 and 25 October 2003. The Summit addressed the concerns raised by the Somali leaders, especially regarding the ownership and management of the Conference. Most Somali leaders had complained that it was the Technical Committee, not themselves, that was dictating the terms and pace of the Reconciliation Conference. They also complained that there were conflicting interests and approaches among the three Frontline States of

¹²³ Peace and Security Council 6th Session, Report of the Chairperson of the Commission on the situation in Somalia, Addis Ababa, Ethiopia. 29 April 2004.

Djibouti, Ethiopia and Kenya, which constituted the Technical Committee, thereby creating misunderstandings among the Somali delegates.¹²⁴

The Somali leaders were able to reach a consensus on all the issues referred to above. On 29 January 2004, they signed the Declaration on the Harmonization of Various Issues Proposed by the Somali Delegates at the Somali Consultative Meetings from 9 – 29 January 2004, in Nairobi. President Mwai Kibaki witnessed the signing of the Declaration. The Somali leaders agreed that: the name of the Charter shall be “The Transitional Federal Charter of the Somali Republic”; the Constitution shall be approved by an internationally supervised referendum; the name of the Government shall be “Transitional Federal Government of the Somali Republic”; the size of the Transitional Parliament shall be 275 members, of which at least 12 % shall be women; the Parliament shall be selected by the sub-sub-clan political leaders of the parties/factions that signed the Declaration on 29 January, namely the TNG, the SNSC, the Regional Administrations, the SRRC, the Group of Eight and the Civil Society, with the endorsement of traditional leaders; - the transitional period shall be for a duration of five years; - there shall be a census to determine the size of the population, prior to national elections during the transition.¹²⁵

The signing of that Declaration was supposed to be the entry point into Phase III of the Conference that would deal with the issues of power sharing, the election of the Transitional Parliament, the election of the Transitional President and the formation of the Transitional Government; as well as the elaboration of the programmes for DDR and post-conflict reconstruction, rehabilitation and resettlement (PCRRR). However, fresh

¹²⁴ Ibid.

¹²⁵ Ibid.

misunderstandings surfaced as a result of attempts by some Somali leaders to visit, again, certain sections in the draft Charter. Col. Abdullahi Yusuf, leader of the Puntland delegation, later joined by some faction leaders from the SRRC, called for the revision of article 30 of the draft Federal Charter for the purpose of giving it more clarity with respect to who exactly would be qualified to participate in the selection of the members of Parliament. According to that article, only those leaders who participated in the Retreat are entitled to designate the Somali delegates, who would then participate in the selection process of the members of the Transitional Parliament. But the other delegations, including the TNG and the SNSC, opposed the revision of that article. Due to those differences, the Conference could not graduate into Phase III, in early February, as had been anticipated. Some of the leaders of delegations left the Conference and returned to Somalia for consultations. As for the SRRC delegation, despite repeated threats to withdraw from the Conference, it has remained at Mbagathi. Based on the original timelines set by IGAD in April 2002, the Somalia National Reconciliation Conference was supposed to run for 6-8 months, in three consecutive Phases, starting from October 2002. However, six months from the opening, on 15 October 2002, the Conference had only achieved the signing of the Eldoret Declaration. Phase II, which started at the end of February 2003, continued to the end of the year and beyond, lasting until April 2004. At the time of finalizing this report, the Reconciliation Conference was focused on the preparation for Phase III. Among the steps already undertaken is the elaboration of Draft Rules of Procedure that will govern and guide this Phase.¹²⁶

¹²⁶ Ibid.

The 2004 IGAD sponsored Mbagathi Peace Process was also founded on the basis that creating state institutions will transform the Somali conflict. Lewis alleges that the process that led to the formation of the TFG, had repeated all the major mistakes made during the circular and unproductive Somalia Peace Process.¹²⁷ The most critical mistake was the failure to insist on the parties making peace before trying to form a government. The Mbagathi process took place in a period of challenging international security threats, characterized by the post 11 September 2001 attacks in the US. The fact that Somalia is a Muslim state meant that America government would have a strong interest in the direction the peace process was taking, mainly due to the Bush Administration's global strategy and war on terrorism. Like Afghanistan, the protracted failed state of Somali was viewed by the Bush Administration as a safe haven for *Al-Qaeda* inspired groups. The US policy exerted considerable pressure on the state-building approach to the Somali conflict resolution efforts. Menkhaus contends that for external actors, conventional wisdom holds that a responsive and effective state is an essential prerequisite for development, a perfectly reasonable proposition enshrined in virtually every World Bank and UN strategy on development.¹²⁸ For Somalis, the state is an instrument of accumulation and domination, enrichment and empowering those who control it; while exploiting and harassing the rest of the population.

External mediation tends to focus on state-building and not on peace-building, despite the fact that the average Somali needed and would have benefitted more immediately from a

¹²⁷ Lewis Ian, *Understanding Somalia and Somaliland*, (London: Hurst Publishers, 2008), 34.

¹²⁸ Menkhaus Ken, *Warlord and Landlords: Non-state actors and humanitarian norms in Somalia*, Draft paper presented at the Curbing Human Rights Violations by Armed Groups Conference, (Liu Institute for Global Issues: University of British Columbia, Canada, 2003), pp.14-15.

state of peace than a revived central government¹²⁹. The Mbagathi process was initiated in 2002 when it was apparent that the TNG had failed, and the Mogadishu warlords were becoming a dominant force threatening the national security of Kenya and Ethiopia. The European Union (EU) and the UN were once again the financial sponsors of the peace process, which first took place in the Kenyan town of Eldoret. Kenya and Ethiopia are key actors in all the peace processes in connection with the Somali conflict resolution. The involvement of the two countries has to do with their national interests. These interests covered a wide spectrum of issues that were not just limited to security, commercial and political issues; therefore, at times their parochial definition of national interests had become a hurdle to the resolution of the Somali conflict.

The Mbagathi Conference did not achieve much and failed to address the underlying causes of the conflict, such as food security, unrestrained and irresponsible attacks on the general population by warlords and their armed militias, demobilization, disarmament and the reintegration of displaced persons back into their communities.

The focus on state-building during the Mbagathi process was a strategic error in terms of mediation as the Somali conflict was not mainly about government formation as this mediation approach appeared to imply. The focus of the conference was determined and driven by external stakeholders who were often too removed from the conflict to understand its dynamics. Therefore, no progress was made with regard to the renewed fighting inside Somalia that was exacerbated in fact, by the posturing during the

¹²⁹ Menkhaus Ken, *Warlord and Landlords: Non-state actors and humanitarian norms in Somalia, Draft paper presented at the Curbing Human Rights Violations by Armed Groups Conference*, (Liu Institute for Global Issues: University of British Columbia, Canada, 2003), 14-15.

Mbagathi peace process. Subsequently, the disputants tried to settle the differences that came to the fore during the conference by means of military force on the battlefields. Menkhaus comments that this state of affairs has persisted for over a decade, from the 1991 Djibouti Peace Accord (which is held responsible for sparking the highly destructive war in Mogadishu in the latter part of 1991 between the militias of General Aidid and Ali Mahdi) to the 2002 Kenya mediated Peace Process sponsored by the IGAD.¹³⁰ Mohammed Qanyere Afrah and his group were known as the Group of Eight and their positions and actions at the peace talks soon revealed a predisposition to the use of threats to walk away from the talks as a weapon to obtain better positions in the proposed transitional government¹³¹.

The selected delegates at the Mbagathi Peace Process created the Transitional Federal Institutions (TFI), the TFC, a legislative branch TFP and an executive branch, the TFG. The Ethiopians lobbied hard for Abdulahi Yussuf Ahmed to become president of the TFG. They made it clear that Ethiopia would not accept the candidature of Mohammed Qanyere Afrah for the presidency of the transitional government.

The Ethiopian support of the process was critical in ensuring the success of the Mbagathi process as indicated by the IGAD desire to address Ethiopia's interests without due regard to the interests of the disputants. When Abdillahi Yussuf Ahmed was elected President of the TFG, his first act was to appoint a pro-Ethiopia Prime Minister, namely

¹³⁰ Menkhaus Ken, *Warlord and Landlords: Non-state actors and humanitarian norms in Somalia*, Draft paper presented at the Curbing Human Rights Violations by Armed Groups Conference, (Liu Institute for Global Issues: University of British Columbia, Canada,2003), 14-15

¹³¹ Menkhaus Ken, *Warlord and Landlords: Non-state actors and humanitarian norms in Somalia*, Draft paper presented at the Curbing Human Rights Violations by Armed Groups Conference, (Liu Institute for Global Issues: University of British Columbia, Canada,2003), 14-15.

Mohammed Ali Ghedi (Abgal). Adam¹³² asserts that Ghedi would be linked with the then Prime Minister of Ethiopia, Meles Zenawi.

The Mbagathi constituted TFG was similar to the previous peace processes in that it focused on a government-building approach to the Somali conflict resolution processes. Because of this approach, the creation of the cabinet was not aligned to the challenge of creating a climate conducive to free and fair political activities when the mandate of the transitional government ends. The government-building approach could perhaps have focused on creating a cabinet that concentrated on conflict resolution. Importantly, the conflict focused approach could perhaps have laid the foundation for conflict resolution strategies. The reality was that the Mbagathi process was a gathering of disputants who were still at war with each other for all practical purposes. However, the Mbagathi process failed to acknowledge that the conflict resolution process was not yet ripe to allow a fundamental shift to initiate a successful government-building process. Disputants and mediators would have taken advantage of the moment when the warlords and other role-players in the Somali conflict gathered to define a conflict resolution process. The fact that all the stakeholders in the conflict gathered in Mbagathi to negotiate the successful resolution of the conflict, is an affirmation that the conflict was indeed ripe for a negotiated settlement.

It was premature for the TFG to establish a truth and reconciliation mechanism before confronting the immediate need for resolving the conflict¹³³. National reconciliation is a model derived from the fact that society is conflict-torn and factions are worlds apart in

¹³² Adam, H. (2008). *From Tyranny to Anarchy*. Asmara: The Red Sea Press.

¹³³ Menkhaus Ken. *Somalia: State collapse and the threat of terrorism*. (London: Routledge, 2004).

terms of their views and visions¹³⁴. The truth part of national reconciliation is a matter that requires an institutional capacity to deal with it and that has the zeal to act, no matter the extent and impact of the truth on role-players in the process. Of utmost importance is the fact that the persons presiding over the truth part of the reconciliation need to be of good standing in the society. The appointment of Mohammed Ali Mahdi as the chairperson of the process was an indication of the extent to which most Somali's credibility was tainted by the conflict.

3.2.3 Post-Mbagathi Somalia

Following the inability of the TNG to establish adequate security and functioning state institutions in the midst of rigid opposition from the Somali Reconciliation and Restoration Council (SRRC), a follow-up peace and reconciliation conference under the auspices of the Government of Kenya and the IGAD was organized in 2002 and continued up to 2004. Its main aim was to reconcile the remaining factions. Known as the Eldoret/Mbagathi peace process, the key highlights of the process were the creation of the Transitional Federal Institutions (TFIs) and the election of Abdullahi Yusuf Ahmed as transitional president, which ushered in the second phase of the transitional arrangements in 2004. The TFIs were made up of a Transitional Federal Government (TFG), a Transitional Federal Charter, and a 275-member Transitional Federal Parliament (TFP). The TFP was later expanded in 2008 through the 11-point Djibouti Framework agreement to a membership of 550 to include groups opposed to the TFIs. Such groups included the Alliance for the Re-liberation of Somalia (ARS), some civil society organizations and some women's groups.

¹³⁴ Ngwane Gauson, *Settling Disputes in Africa*, (Yaounde: Buma Kor, 1996).

The TNC was replaced by the Transitional Federal Charter (TFC), which provided in its Article 11 for the federal character of the Somali Republic and also outlined the components of the federation.¹³⁵ It also provided in Article 71 for crucial tasks, including disarmament, the drafting of a new constitution and elimination of tribalism. While the four-year mandate of the TFG was principally to oversee these key milestones and organize national elections for the onset of government, progress on these important issues was limited. Instead, the security situation in the country worsened as a result of the activities of *Al-Shabaab* – the youth wing of the Union of Islamic Courts (UIC) – which had emerged following the ousting of the UIC in 2006 to contest the presence of Ethiopian forces in the country. The TFG governed by proxy from Kenya and could only reclaim Mogadishu in January 2007. In 2009, however, as a result of a lack of progress in implementing the agreements of the Djibouti peace process, Sheikh Sharif Sheikh Ahmed took over from President Abdullahi Yusuf Ahmed. The TFG was extended in the same year for two additional years with the mandate to draft the new constitution and organize elections to pave the way for a permanent political arrangement in the country. However, by 2011, it was apparent that the TFG was not in a position to realize the mandate. Consequently, the President had come under intense international pressure over allegations of shielding suspected pirates, corruption and mismanagement of funds.¹³⁶ Worst of all, the TFIs were simmering with tension and embroiled in bitter infighting. The relationship between President Sheikh Ahmed and the Speaker of Parliament, Sheikh Hassan Sheikh Ahmed, had deteriorated.

¹³⁵ Transitional Federal Charter for Somali Republic (Somalia), February 2004, (Accessed 7 may 2013).

¹³⁶ United Nations, Report of the Monitoring group on Somalia and Eritrea Pursuant to Security Council Resolution 2002, New York, UN, 2011.

A number of factors underpinned the crisis that confronted Sheikh Ahmed's government. First, he did not trust his cabinet. Consequently, the President and his prime ministers did not get along, which led to several changes in members of the cabinet. Prime Ministers Sharmarke and Mohamed Abdullahi Mohamed were forced to resign because of their inability to work with the president or some related infighting.¹³⁷

The second problem was that, despite Sheikh Ahmed's experience in security management under the UIC, his approach largely involved deal making. He was, therefore, known to spend a substantial amount of his time negotiating for peace as a strategy for dealing with the numerous issues that came into his office. The third issue was that he had no standing army and as a result was not able to function as he would with a functioning national army behind him. He also failed to reach out to the regional states, particularly Puntland, that had a well-structured army and could have lent support to the central government in the fight against *Al-Shabaab*, as they did during President Yusuf's regime.

3.2.4 The Kampala Accord and the End of the Transition

In the midst of these issues, there was little hope that the August 2011 deadline for ending the transition was going to make any meaningful progress in the realization of the mandate of the TFG. Additionally, there were real concerns on the part of the troop-contributing countries to the African Union Mission in Somalia (AMISOM) about the need to sustain military successes that had been realized. A meeting between President Sheikh Sharif Sheikh Ahmed and Speaker of Parliament Sheikh Sherif Sheikh Hassan was organized on 9 June 2011 under the auspices of President Yoweri Museveni in

¹³⁷ See BBC 210, Somalia's Prime minister resigns, 21 September 2010, <http://www.bbc.co.uk/news/world-africa-11380701> (Accessed 3 August 2014).

Kampala, Uganda. The meeting was facilitated by the Special Representative of the Secretary-General (SRSG), Ambassador Augustine Mahiga, and, among other important issues, it was agreed to extend the term of the TFG for another year until August 2012 and reshuffle the cabinet.¹³⁸

Known as the Kampala Accord, the agreement ended five months of political deadlock, but its extension of the TFG's term received mixed reviews from both Somalis and the international community. Notwithstanding, the agreement provided the immediate framework for exerting international pressure, identifying important benchmarks for the end of the transition, establishing compliance mechanisms for the realization of priority tasks, and clarifying the requirements for a roadmap.

Following the Kampala agreement, a consultative meeting was held in Mogadishu on 6 September 2011 to draft the roadmap to end the transition. The meeting refined the milestones of the transition by zeroing in on (a) security stabilization, (b) drafting and adoption of a constitution, (c) reconciliation and (d) good governance, as the four most important tasks for ending the transition. The four priority tasks were anchored on the principles of (i) Somali ownership, (ii) inclusivity and participation, (iii) resource support by the international community and (iv) monitoring and compliance. The next meeting was held in Garowe on 24 December 2011 to create an outline for permanent government and representation of women. A second meeting at the same venue took place on 18 February 2012 and primarily established the framework for the federal structure, electoral and parliamentary systems that made up the new government. A month later, agreements

¹³⁸ See Article 4 of the Agreement between the president of the TFG of Somalia and the speaker of the TFP of Somalia made in Kampala on 9th June 2011.

reached in the last two meetings were expanded through the Galkayo agreement, which also touched on ways of unifying emerging regional governments. Intense efforts by stakeholders to meet the various provisions of the roadmap led to progress in a number of areas. First was progress with the liberation of Mogadishu, characterized by the securing of *Villa Somalia* and its environs through the deployments and operations of AMISOM. Securing the presidential palace made it possible for the TFG to find its feet as a key actor in Somalia. It also provided the basis for liberating other strategic towns, in this way reducing the hold and influence of *Al-Shabaab*. This feat ultimately saw the liberation of Kismayo after the transition through the efforts of the Kenya Defense Forces (KDFs) and Ras Kamboni local militia in October 2012. In the midst of these efforts, Somalia received a great deal of international attention, capped by two important high-profile meetings. The first was the London Conference, which took place in Lancaster House on 23 February 2012. The meeting succeeded in gathering international momentum on the Somali issue and pledged support for a coherent and cooperative international approach. This was followed by the second Istanbul Conference on Somalia, which was organized in June 2012 and emphasized the need for reconstruction as a prerequisite for sustainable completing other important tasks. It also stressed the need for predictable financial and for establishing mutually accountable regimes for the transitional administration. Apart from providing the avenue for international stakeholder interaction and commitment to the Somali crisis, the two meetings overwhelmingly brought attention to the Somali issue and created the momentum required for meeting the outstanding milestones. However, the most important progress made before the end of the transition was in the successful nomination of 135 traditional leaders. These leaders in

turn nominated 825 members of the National Constituent Assembly who were responsible for the nominations of the 275 members of parliament and the provisional adoption of the constitution. The nominated members of parliament then elected a speaker of parliament with two deputies as well as a president to mark the end of the transition. The president later appointed a prime minister, who formed a cabinet to make up the new government.

The end of the transition in Somalia does not imply the return of peace. However, it represents an important step in the quest for political stabilization and peace for the country. Following the failure of previous attempts, the success of the just-ended process provides lessons for peace initiatives in the country and Africa at large.¹³⁹

3.2.5 The 2006 Constitution-Making Process

By the time the Somalia Transitional Federal Parliament convened for the first time in the town of Baidoa on 26 February 2006, the constitutional process was high on the list of urgent business. In 2004 parliament had been sworn in, and according to the transition timetable a draft constitution had to be ready by October 2007.

Reliance on a constitutional process as part of a transition from a peace agreement with a legitimate elected government is an increasingly common methodology. It acknowledges that those at the table during peace negotiations may not represent all the interests in a country, that in many cases the range of issues that need to be debated in a constitution are too vast for a peace, negotiation, and that many of these issues are best debated at a slower pace, in a more inclusive fashion. This was certainly the case in Somalia. The

¹³⁹ Andrews Atta-Asamoah. Long Walk To Restoration. Lessons from Somalia's Transition Process. Institute for Security Studies, Situation Report. July 2013.

peace agreement took the form of a transitional constitution – the Transitional Federal Charter of the Somali Republic – and set out many provisions that could be part of a constitution, including a federal governance structure and Islamic Shari'a as the basic source for legislation.

However the Charter had been adopted by unelected participants in a peace negotiation. It did not have the approval and involvement of the Somali people and lacked the legitimacy required to establish a workable peace and a viable state. Hence Article 71(2) of the Charter provided that a federal Constitution based on the Charter was to be drafted (within 2.5 years) and adopted by referendum during the final year of the transitional period. The TFG had a three-year window and a consortium of donors, NGOs and international agencies was formed to support this process.

The Charter provided for the creation of a Federal Constitutional Committee (FCC), the members of which were to be proposed by the Council of Ministers and approved by the parliament. The first step, therefore, was to create this commission. Undoubtedly some difficult negotiations took place among the ministers and parliamentarians in putting together a list of 15 members, who were ultimately chosen on a clan basis using the '4.5 formula', like the parliament. An early list did not have any women on it, but in response to advice about the importance of having a representative commission; two women were included in the list sent for parliamentary approval.

3.2.6 The Role of the Actors in the Processes

When the Siyad Barre regime was ousted in January 1991, fighting between various factions intensified, especially in Mogadishu, where General Aideed and Ali Madhi

fought for dominance of the capital. On April 24th, 1992, the United Nations Security Council gave the approval for resolution 751, thereby legitimizing the United Nations Operation in Somalia (UNOSOM). For the first time in history the International Community considered an intrastate conflict to be of concern to international security and decided to intervene despite the people's right to self-determination.

Djibouti (2000) and the Mbagathi Turks (2003) failed to provide the right remedies for establishing a durable peace and ending Somalia's thirteen-year civil war. Many external actors are working at the sub-national level toward a variety of stability and peacebuilding objectives, ultimately with a goal of building peace and the legitimacy of a Somali political settlement alongside the FGS¹⁴⁰. Efforts delivered at the sub-national level include: AMISOM was working at the regional level to pursue consolidation of security and the extension of the federal government's territorial control¹⁴¹. Their objective is security, with a view to creating space to extend the writ of the Somali government. They have worked alongside Somali clan-based militias and Somali Security Forces, and encourage reconciliation between clan militias. They are mandated to assist on the ground in the implementation of Somalia's National Security Stabilization Program (NSSP).

The Intergovernmental Authority on Development (IGAD) was involved in brokering regional political dialogue¹⁴². Most prominently, this includes the 2013 agreement to create the Interim Jubba Administration in South-Central Somalia. IGAD is likely play to

¹⁴⁰ Iyob, Ruth: "Regional Hegemony: Domination and Resistance in the Horn of Africa," *Journal of Modern African Studies*, (London: Centre for Democracy & Development, 1993), 257-276.

¹⁴¹ Lyons, Terrence B.: "The Horn of Africa Regional Politics: A Hobbesian World", in Howard Wriggins (ed.): *Dynamics of Regional Politics. Four Systems on the Indian Ocean Rim* (New York: Columbia University Press, 1992), pp. 153-209

¹⁴² Eshete, Andreas: "The Protagonists in Constitution-Making in Ethiopia," in Goran Hyden & Denis Venter (eds.): *Constitution-Making and Democratisation in Africa* (Pretoria: Africa Institute of South Africa, 2001), pp. 69-90.

a role in brokering the emergence of a “South-West State”. Moreover, IGAD played a key role in both the Arta and Mbagathi peace talks.

The UK Stability Fund, the US Government, and the UN are providing civilian support in key areas recovered from *al-Shabaab* and other accessible areas, although according to differing uses of the terms “recovery” (a UN approach to providing “needs-based assistance); and peacebuilding and stabilization (ranging from definitions around politically-driven “effects-based” assistance for government in recovered areas, community-level service delivery and recovery, to approaches to reconciliation and grievance resolution, and efforts to link to national peacebuilding efforts). Bilateral and multilateral actors are involved in mediating regional state formation and peacebuilding processes inside regional entities and between regional entities and Mogadishu, with support of the FGS.

Civil society organizations are supporting “bottom-up” community reconciliation processes to address the causes of conflict and to build local institutions and capacity for peace¹⁴³. Building on these community efforts, organizations are encouraging collaboration between communities to enable them to advocate for their interests at the regional and federal level.

Out of AMISOM’s military operations against *al-Shabaab*, the outlines of Somali future federal states may have emerged as Somali and external actors sought to fill the void left by the removal of *al-Shabaab* and to extend the writ of the Somali government. Leaders of coalitions in South-Central Somalia have tried to negotiate the formation of future federal states, with varying degrees of recognition. The processes to form r

¹⁴³ Menkhaus Ken. *Somalia: State collapse and the threat of terrorism*. (London: Routledge, 2004).

regional entities are contentious because they shape the balance of power between local regional and national elites¹⁴⁴.

In 2013, the tensions surrounding federalism and regional authority in Somalia were clearly illustrated when the communities of “Jubbaland” formed a Constitutional Congress to create a new federal state and to elect a president¹⁴⁵. The FGS insisted that only it could create new states. This resulted in a 6-month stand-off among the clan political and militia actors and the FGS, and between the FGS and IGAD, who support the formation of a new state. The FGS and the nascent “Jubbaland State” came to a compromise agreement in August 2013. The FGS accepted the fact of the Jubbaland initiative. The Jubbaland factions accepted an interim two-year administration structure. According to the agreement, a formal Federal Member State would be established according to a constitutional process. The port and airport were recognized as national assets. Within six months the FGS was to take over management of these assets, although revenues would continue to be exclusively invested in Jubba priorities. The Jubba militia would also be integrated into the Somali national forces. (However, eight months after signing, implementation is lagging.)

It is possible that the Jubbaland agreement will provide a model for the formation of other states.

Since the formation of the Interim Jubba Administration, the focus has shifted to the formation of a “South West State” around Baidoa. There is controversy over whether

¹⁴⁴ Bryden, Morgan. “*Somalia Redux: Assessing the New Somali Federal Government*,” *A Report for the CSIS Africa Program* (Washington DC, 2013), 89.

¹⁴⁵ Private Sector Investment and Barriers to Growth Analysis in South-Central Somalia and Puntland, Adam Smith International Report for DFID, (May 2013).

new state will supersede the Interim Jubba Administration territory or will simply exist alongside it. Other entities are seeking recognition. In the central regions, competing “states” claim the same or overlapping territories – Galmudug, Hibin and Heeb, Central Region State, and El Bur State.

These political processes are unfolding in the context of the ongoing presence and threat to peacebuilding of the *al-Shabaab* movement. Brahimi ¹⁴⁶ highlighted, “*Al-Shabaab's* residual influence can be explained by three main factors: the determination and discipline of its core leadership (irrespective of divisions between them); the absence of rival authorities across much of southern Somalia; and *Al-Shabaab's* skill in appropriating and exploiting legitimate local grievances for its own purposes. The jihadists’ territorial ‘footprint’ on the Somali map thus corresponds closely with areas inhabited by disgruntled and disaffected clans.” There is wide international agreement that investments in sub-national governance are necessary to the long-term stability of Somalia. However, there is disagreement over the importance of order, approach and proportionate investment.

Civil society advocates pointed to Somalia’s turbulent history with strong centralized governments and the deep suspicion this has bred amongst Somalis, as well as Somaliland and Puntland’s relative successes in pursuing peripheral state formation processes. Civil society actors argued that external focus and investment in the periphery and in reconciliation was too low. Many donor actors argued that timelines and imperatives in Somalia mitigated against adopting purely “bottom-up” approaches, although there was no strategic agreement among actors on the relative weight of efforts.

¹⁴⁶ Brahimi Louis, *Report of the Panel on the United Nations Peace Operations*. (United Nations: New York, 2000), 32.

The diversity of investments may reflect external actors hedging their bets across Somali institutions. Efforts to support local reconciliation and institutional development have led to improved local formal and informal governance capacity (institutions, authorities, resources, service delivery), and over time, whether this yields improved local perceptions of Somali state legitimacy. If we find causal linkages between these processes over time, this will suggest the potential to scale up “bottom-up” approaches, tailored to new areas.

However, for a long time after 1993, Somalia hardly featured on the agenda of the international community. In part, the lack of interest was blamable on the ‘Black Hawk Down’ incident in which the United States deployment to Somalia failed to achieve its intended goal. This resulted in the lack of serious engagement in finding a solution to the Somali crisis, however, three important dynamics changed regarding the UN’s engagement in Somalia. The first was the establishment of the UN Political Office for Somalia in 1995 as a Security Council-mandated field office. Second was the creation of the good offices of the SRSG to Somalia. Apart from signifying the concern of the international community about the deteriorating security situation in Somalia, these two initiatives were and persisted until also symbolic of the UN’s readiness to engage in finding a solution to the Somalia problem. The personification of the role of engaging on Somalia through the office of the SRSG, in particular, provided both a facilitator and driver for the process. The office of the SRSG, on the one hand, became a facilitator of the process by bringing together various stakeholders to engage on the Somali agenda. On another hand, the SRSG’s office drove the process through various initiatives organized by his office in attempts to advance the aims of the political process. The two

functions of the SRSB ultimately became evident through the Djibouti process, which was organized under the facilitation of the SRSB Ahmedou Ould-Abdallah. Through the use of his good offices, Ould-Abdallah, for instance, became an asset to the search for peace. He is believed to have understood the inherent sensitivities of the Somali situation and what needed to be done to make progress.¹⁴⁷ He succeeded in creating awareness within the international community that the engagement with Somalia needed to be based on the premise of a fragile state rather than a failed state. The shift was important because engaging with Somalia as a fragile state meant the basis was created for engaging with existing actors and processes working towards peace, rather than superimposing external ideas and processes as would be the case in a failed political entity. He also pushed for the inclusion of groups that were hitherto outside the political process, including opposition elements then based in Asmara, and succeeded in creating awareness about the role of the regional and continental players and the diaspora in the resolution of the conflict. However, he did not involve many players and was fairly secretive about his strategy. He also did not engage much with the region, primarily because of his choice of approach but also because of the lack of cohesion among the regional actors at the time. Despite the importance of the role of facilitator in keeping the international community engaged in situations such as Somalia's, any change of facilitator usually implies a change of approach. This was the case in Somalia with the replacement of Ould-Abdallah with Ambassador Augustine Mahiga. Under the auspices of the latter, the role of regional actors has increased. This is reflected in his engagement with countries and RECs in the region and the subsequent role they have played in the situation. He has also been keen

¹⁴⁷ Non-attributable interviews with various UN staff, UN Regional Office, Nairobi, Kenya, 28 November 2012.

sustaining the involvement of core Somali stakeholders as a prerequisite for preventing retrogression of the process in the run-up to the presidential elections in Somalia, he succeeded in getting the buy-in and commitment of six key stakeholders in Somalia. They became the six signatories for ending the transition. The six were Sheikh Sharif Sheikh Ahmed, President of the TFG; Sharif Hassan Sheikh Aden, Speaker of the FP; Dr Abdiweli Mohamed Ali, Prime Minister of the TFG; Abdirahman Mohamed Mohamud (Farole), President of Puntland State; Mohamed Ahmed Aalim, President of Jaldudug State; and Khaliif Abdulkadir Mallim Noor, Representative of Ahlu Sunnah Wal-Jama'a (ASWJ). The third and most crucial dynamic that brought international attention to Somalia was the internationalization of the crisis through the diaspora reach of *Al-Shabaab* and the rise of piracy in the Gulf of Aden. These two dimensions of the Somali crisis alerted the members of the international community to the fact that the worsening security situation in Somalia was a threat to the West, as well. This was the point where what mattered to Somalia began to matter to those members of the international community directly affected by terrorism and piracy.

The second lesson can be deduced from the collaboration between the AU and UN in the deployment of AMISOM. As a purely African-led and composed mission, the arrangement whereby the AU provided the human capacity and the UN provided the finance and logistical support for the operations of the mission is laudable. Entrenching such a partnership within the context of the subsidiarity of the relationship between the AU and UN will go a long way towards making it easier for African troops to respond swiftly to emerging complex security challenges on the continent.

Political leadership of the military operation is another important factor. While the AU provided the military component and intervention through the deployment of AMISOM, it has not provided sufficient political guidance for the operation or to allow it to synchronize their operations with those of other organizations such as the UN. As such, AMISOM does not appear to be the military component only, but also the political component of the AU's engagement. The challenge then is that the command and control structures of AMISOM have sometimes had to exert political pressures precisely because they have the troops. The various military components have sometimes had to take political directives from their respective capitals. What then happens on the ground sometimes has very little to do with the AU's vision and guidance but is rather about the interests of the respective troop-contributing countries. The political dynamics surrounding the sectors controlled by Kenyan troops and their handling of the Kismayo leadership case exemplify this. Rather than complementing the political processes of their offices, the AU and UN have shown little direct synchronization of goals and operations. As a result of this lack of synchronization, AMISOM requested the approval of the UN for a civilian component to implement certain political dimensions of the mission on the basis that the UN was not represented on the ground. Rather than deploy a civilian component, the UN office could have been mandated and expanded to play a political role and provide a civilian component to the AMISOM process. Apart from the fact that such an arrangement was not made, the irony was that the smooth functioning of the UN is dependent on the provision of security by AMISOM troops, who allegedly selectively determine when there is enough security. Even though the military apparatus sometimes claims that the UN is not physically represented on the ground, it appears that the ability

of the UN to maintain a presence in Somalia depends on improved security or the assurance of the provision of security by AMISOM forces.)

A meeting funded and facilitated by the UN Political Office for Somalia that operates from Nairobi, Kenya was held in Mogadishu, Somalia from 4 to 6 September 2011 dubbed as the ‘First Consultative Meeting on Ending the Transition’ in the midst of one of the worst famine crisis that Somalia faced in its history. As its title suggests, this meeting was to bring Somali political stakeholders together to chart out a roadmap to end the Somali transitional authority culminating in a nationwide constitutional referendum and free elections. . Delegates participating in this exercise were limited to four groups from the many Somali conflicting parties including the current Transitional Federal Government, Ahlu Sunna Wal-Jamai’, Galmudug State, Puntland State, and “approximately three dozen stakeholders from the international community” and other regional organizations according to the roadmap. After three days of deliberations the meeting proposed and adopted a roadmap that outlines four key tasks that includes “security, constitution, reconciliation and good governance” with benchmarks and timelines for implementation, all to be ambitiously accomplished within one year.¹⁴⁸ As Francis Fukuyama asserts (Fukuyama, 2005) external forces can’t provide “stateness” as this may lead to unresponsive local institutions. In this perspective, any institutional framework dictated from outside frequently faces lack of legitimacy and remains weak. The UN Political Office for Somalia serves as a catalyst for political transformation in Somalia and in addition, building partnership with other actors in its mandate to advance multilateral diplomacy. The UN Envoy for Somalia and the current TFG were at odds for

¹⁴⁸ Abdi Dirshe. The New Somalia Roadmap, Perpetual Conflict in the making, 2011.

some time regarding the participation process in the Consultation Meeting as the current TFG president was pressured to accept “regional states” as political equals in the process of establishing a legitimate government. But Somalia does not have developed regional states and inviting only two regions to the Consultation Meeting makes the entire process illegitimate in the eyes of the wider Somali public. Consequently, some argue, the new roadmap, colonially, seeks to impose a new political framework in Somalia through unelected local politicians without legitimacy in Somalia and who are in the payroll of the UN, the USA, the EU and in some cases in the payroll of neighboring countries. The organizational approach from the international community applied to Somalia in the current conflict management has been one of coercion in that cooperation is sought through micromanagement and threats of sanctions as evidenced by the current roadmap that is informed by the Kampala Accord. Legro (1996) suggests that state bureaucracies develop their own “culture” that influences national agenda. A case in point is Mr. Mahiga’s recent meeting with the Somali Diaspora in Toronto, he warned that if the current roadmap is not implemented the consequences will be dire and he declined to reveal what calamitous consequences the Somali people would face¹⁴⁹. This means that in the current framework, Somalis will be unable to develop their own institutional culture as they have to adopt those dictated from outside, the arbiters of nation building, democracy and good-governance. , the Kampala Accord clearly violates and/or supersedes the Transitional Federal Charter. The idea of constitutional law or constitutionalism refers to the rule of law and is defined as” the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power”. (Dicey 1959), in the case of Kampala Accord under the auspices of Ambassador Mahiga and the

¹⁴⁹ Ibid, p3.

president of Uganda made an arbitrary decision in the accord demanding inter alia the resignation of the popular prime minister. Moreover, the accord undermines the sovereignty of the state institutions of Somalia as the institutional oversight mechanisms are now in the hands of external actors, leaving the Somalis subservient to these entities. It makes the Somali leadership irrelevant and humiliates the Somali people. The accord entrusts IGAD heads of state to act as a political Bureau with oversight authority to oversee the performance of Somalia's Transitional Federal Institutions- the accord basically transfers authority of the TFI to neighboring countries with divergent and vested interest.

The role of the international community is seriously undermined by the shallow and sometimes misguided responsibility of the many interest groups involved in the Somalia file, which includes the TFG, the neighboring countries of Kenya and Ethiopia and particularly the United States of America for its lack of long-term vision for Somalia, its dual track policy and its main focus on the war of terror only. The new roadmap must have a comprehensive approach to Somalia as a state, seeking the support of the Somali people and rejecting the self-serving tribal-bigots who advocate for the balkanization of Somalia. Somalia is facing multiple threats to its existence. The current famine, poverty, piracy and institutional weakness in Somalia are all sources of growing threats to, primarily, the Somali people but also to the international community as the narrative of grievances by extremist groups will definitely continue to pose grave danger to the stability of the region and to international security.

A true Bottom-Up Approach which is a people centered approach that advocates peace from within the affected society and requires changing hearts and minds of the local

people to get them to work for peace and reconciliation holistically is absolutely imperative. Lederach argues in divided societies like Somalia, concentrating on indigenous actors within the country and not external actors is absolutely important. The establishment of the parliament and the subsequent election of the speaker and the president of Somalia inside Mogadishu is a move towards the right direction. This effort can be seen as bottom-up approach being employed. Though it requires establishing, basic institutions and administrative apparatuses as a corner stone for a broad based federal government, which is free from clannism and interference from warlords.

By and large, peace is a human concern, a multi-faceted and complex issue that calls for intergovernmental, governmental and non-governmental organizations and all element of civil society to work in harmony and coordinate their activities at all levels. However, as the biggest stakeholders, the Somali people must be seen to occupy the driver's seat in the process of peace.

As Salim Ahmed Salim rightly puts: "if Africans themselves do not take the issue of conflict as a number one issue to be dealt with and take the leadership role, no body outside Africa will bother" (Salim 2001, p.12). Given the hatred and suspicion among Somali clans caused by the spilling of blood, scholars suggest that, the only possible approach that could solve the Somali long standing problem is a adopting a true bottom-up approach.¹⁵⁰ People centered and people driven perspective. In a nutshell, let's wait and see how this current government of Sheikh Hassan established some years ago in Mogadishu handles itself and the affairs of Somalia at large.

¹⁵⁰ Fisher, R.. *Interactive Conflict Resolution*. Syracuse University Press, Syracuse New York, 1997.. p 23.

3 Current Debates

3.1 National Peacebuilding Frameworks

The Federal Government of Somalia (FGS) has been strongly focused on building sovereignty and ownership¹⁵¹. This should not be surprising given the history of transitional governments with weak popular legitimacy. This assertion of sovereignty has manifested in a clash with Somalia's neighbors (whom the FGS worries are meddling in Somalia's internal affairs) and a more assertive stance with development and humanitarian donors on Somali ownership and leadership of policy and programs.

The President Hassan Sheikh announced his Six-Pillar Policy upon being elected¹⁵². The policy committed the government to: (1) stability (security, rule of law and justice), (2) economic recovery, (3) peacebuilding (removing the main drivers of conflict), (4) government capacity for service delivery, (5) international relations (close ties with neighbors and allies), and (6) the unity and integrity of the country. Drafting a permanent constitution, the implementation of federalism, and preparations for elections by 2016 were absent. This omission corresponded with a Somali suspicion that the new administration was not committed to the establishment of a federal state.

The President's Six-Pillar Policy has been superseded by the Somalia Compact, which emerged from the New Deal for Somalia Donor Conference in Brussels in September 2013. Somalia became a signatory to the New Deal for Engagement in Fragile States in

¹⁵¹ Rubin, Barnett. "Constructing Sovereignty for Security," *Cooperating for Peace and Security: Evolving Institutions and Arrangements in a Context of Changing U.S. Security Policy* (Cambridge University Press, New York, 2012), 56.

¹⁵² Phillips Sarah "Political Settlements and State Formation: The Case of Somaliland," *Research Paper 23, Developmental Leadership Program*, (Austin: University of Texas Press, 2013).46.

2013. The Compact outlines aid priorities under the International Dialogue's five Peacebuilding and State building Goals (PSGs). The first PSG focuses on inclusive political processes, the finalization of the federal constitution by December 2015, and elections in 2016. The other PSGs prioritize security, justice, revenue and services, and economic development.

Adoption of the Somali New Deal Compact in Brussels in 2013 was viewed by many Western donors, as we encountered a significant step toward building Somali sovereignty and ownership of peacebuilding priorities. Bilateral donors, the World Bank, and the African Development Bank pledged an approximate €1.8 billion in support of the Compact. The FGS created an Aid Coordination Office in the office of the Prime Minister and a New Deal desk in the Ministry of Finance to manage the donor fund. A multi-donor Somalia Development and Reconstruction Facility (SDRF) was launched to align aid with nationally-agreed programs and Somali budget expenditure cycles. The aim is to build Somalia's capacity to directly manage the budget support it receives. The approach is to first build FGS capacity in priority-setting and oversight, and eventually, government capacity in public financial management and service delivery.

This assistance has been directed to support the FGS, with some support allocated to the governments in Puntland and Somaliland. At the same time, it is not clear how program funds would be disbursed at the point of service delivery, which mechanisms would be used, and how programs would be designed or monitored to build early confidence and legitimacy between Somalis and the FGS. The FGS' credibility with donors on public financial management took a serious blow in 2013 when the new Central Bank Governor resigned over allegations of fraud and threats to her safety.

Critique of the Constitution-Making Processes

In this alternative political trajectory, the roadmap calls for, among others, the completion of two contentious projects; a constitutional reform and the demarcation of Somali's territorial waters, specifically the Exclusive Economic Zone issue. Both these items are political fault lines in Somalia as both have clearly the potential to impact the Somalia's territorial integrity and it is widely opposed by the Somali public in every region.

Interestingly, Somalia has a constitution that has been affirmed in a national referendum in 1963 which guarantees the political unity of the country. There is no immediate need to change this constitution, particularly during a transitional period where no elected national government with legitimacy exists. The proposal to reform it at this time does not serve the interest of the country and creates unnecessary tension among the Somali people, notwithstanding the current Transitional Authority is woefully unprepared to manage competing internal and external interests. Similarly, the demarcation of the Somali waters is pushed at the behest of Kenya and Norway as they are allegedly the biggest proponents that will benefit from this and will likely create preventable tension between Kenya and Somalia. Allegedly, Kenya is desperately seeking to commercially explore parts of the Somali sea waters while Norwegian companies have concessions to carry out this commercial deal. Given that Kenya is already occupied Somali territory, it is pertinent that Kenya takes note of these concerns to prevent fresh conflict with Somalia.)

For the last three decades the Somali people experience multi-layered political, economic, and religious conflicts. A legitimate and Somali-owned constitution would

help address or contain many of these problems. However, controversy surrounds how the UN has approached and controlled the constitution-making process of the country. The process is fundamentally flawed because political expedience, secrecy, exclusion and hastiness mar the mandate and selection of the commission members, the drafting of the document and the adoption of the draft constitution. Therefore, like the previous charter, the current draft-constitution has legitimacy-deficit. It does not express the aspirations of the Somali people, regulate individual and group conflicts effectively and peacefully, or prescribe context-appropriate institutions that are necessary for building durable peace and a functioning state in Somalia. This leads me to conclude that the constitution-making process that was employed when Somalia was under the Italian trusteeship in the 1950s was more inclusive and transparent than the process used, now under the current de facto United Nations and Intergovernmental Authority on Development (IGAD) rule.

When it comes to constitution-making, the process is as important as substance because processes affect the legitimacy of the outcome. Jill Cottrell and Yash Ghai (the Kenyan legal expert who helped draft the constitutions of Afghanistan and the Fiji Islands) identify several factors that make the process inclusive and legitimate.¹⁵³ The most important and relevant features are the initial definition of the project, the nature of participation, and the rules for decision-making. In other words, the mandate given to the people writing the constitution, the selection and composition of the team, the openness in the drafting process, the inclusivity of the different groups and the way the final outcome is adopted all matter. In addition, as Noah Feldman observes, imposed

¹⁵³ Jill Cottrell and Yash Ghai, "Constitution Making and Democratization in Kenya (2000–2005)", *Democratization*, Vol. 14, No. 1, p. 19.

constitutions are limited in terms of their legitimacy and functionality on the ground.¹⁵⁴ The process of Somalia's constitution-making has passed through three phases: mandate and selection of the commission members, drafting of the constitution articles, and the adoption of the draft constitution. Political expedience, secrecy, exclusion and hastiness shrouded all three stages.

In August 2004, during the Ethiopian-controlled and Kenyan-hosted peace process, a committee was tasked to draft a new Transitional Federal Charter (TFC). As expected, constitution-drafting became so controversial that the committee broke into two groups. To reconcile the two groups, thirteen Somali experts, led by Professor Abdi Samatar, were tasked to harmonize the two documents that these two groups produced.¹⁵⁵ Unfortunately, political considerations carried the day, thus forcing the recommendation of the harmonization committee to be abandoned. As a result, the faction leaders and warlords that had the support of Ethiopia and the hosting state of Kenya imposed their will and their version of the Charter through an illegitimate process. The TFC became the law of the land in subsequent years.

¹⁵⁴ Noah Feldman, "Imposed Constitutionalism", *Connecticut Law Review*, Vol. 37, pp. 857-889; see also Simon Chesterman, "Imposed Constitutions, Imposed Constitutionalism, and Ownership", *Connecticut Law Review*, Vol. 37, pp. 947-954; and Zaid Al-Ali, "Constitutional Drafting and External Influence", in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Northampton: Edward Elgar, 2011).

¹⁵⁵ Abdi I. Samatar and Ahmed Ismaiel Samatar, "Somali Reconciliation: Editorial Note", *Bildhan: An International Journal of Somali Studies*, Vol. 3 (2003): 1-14.

The consequences of this controversial process were threefold. First, the Charter has reflected the interests of the neighboring countries.¹⁵⁶ Second, it could not manage the conflicts between Somali groups, institutions and individuals. For instance, because of political conflicts, there were two presidents, five prime ministers and months of political stagnation of the last seven years. Finally, and more importantly, Article 11 of the Charter has mandated a new 'federal' (three levels: national, regional and local) constitution that is based on the 2004 Charter to be written and ratified before the transitional government becomes a permanent government – even though Somalia had a democratic and legitimate constitution that had been ratified through referendum in 1961.

Interestingly, Article 11 of the Charter¹⁵⁷ sets out a clear roadmap in which a 'federal' constitution should be made for the country. It calls for the government to establish an Independent Federal Constitution Commission (IFCC) which has to be ratified by parliament. The Charter then requires the IFCC to draft a 'federal' constitution, conduct public consultation and present it directly to the public. The Charter never conceived that politicians would be involved in any way other than appointing members of the IFCC. The intention was to keep the constitution-making process as far away as possible from the politicians.

The mandate given to the IFCC was restricted to writing a 'federal constitution'. This restriction reflected the preferences of the neighboring countries and faction leaders that

¹⁵⁶ Afyare A. Elmi, *Understanding the Somalia Conflagration: Identity, Political Islam and Peacebuilding* (London: Pluto Press, 2010).

¹⁵⁷ See Article 11, Transitional Federal Charter of Somalia, 2004; available at <http://www.somalilaw.org/Documents/The%20Transitional%20Federal%20Charter%20of%20the%20Somali%20Republic.pdf>.

imposed their version of the Charter in 2004 during the peace conference in Kenya. Neighboring countries have been pushing their proxies to accept clan-federalism because this served the long-term interests of Ethiopia and Kenya. These two countries have had issues with what they call 'Somali irredentism' or united Somalia. For this reason, it is no secret that Kenya and Ethiopia wanted to install a weak and divided Somalia. As such, Ethiopia has been championing the 'building block approach'¹⁵⁸ while Kenya is determined to create a buffer zone in the Juba regions of Somalia. Both countries have troops in Somalia. The IFCC, therefore, did not have the opportunity to debate the type of system that would be suitable for the context or advance the interests and aspirations of the Somali people, at least in this case.

With regards to the selection of members for the IFCC, neither former President Abdullahi Yusuf nor the current President Sharif Sheikh Ahmed has taken seriously the competency of the members they were appointed. Although a few are competent, such as the chair, Dr Abdullahi Jama, most of the members could not comprehend the tasks required. One expert who was assisting them observed that many IFCC members did not have the capacity to understand and then apply the experts' advice. The selection was based on the simplistic 4.5-clan power-sharing system where the four 'major' clans get equal number of representations and the fifth clan would get one-half. Politicians, therefore, considered the membership of the IFCC as an employment opportunity for

¹⁵⁸ Matt Bryden, "New Hope for Somalia? The Building Block Approach", *Review of African Political Economy*, Vol. 26, No. 79 (1999), pp. 134–140.

some of their supporters. Somali politicians and the international community realized this later and perhaps this is why the Committee of Experts was established in 2011.

Restricted mandate and arbitrary selection of the IFCC members have had serious implications for the constitution-making process of Somalia. For more than six years, Somalis have been locked into an emotional debate on the suitability of a federal system. The irony here is that most Somalis have similar goals and interests when it comes to dealing with this issue as there is a universal demand from communities in every region for electing their representatives, accessing basic services close to home, and getting their fair share of development projects. A discussion based on interests and reason is yet to begin among Somalis. As of now, the issue remains highly controversial and will continue to be so for a long time to come. In fact, the Istanbul Gathering of the Civil Society in late May 2012 (which brought together traditional elders, academics, religious scholars and many of civic/political and women's groups) recognized the contested nature of the issue and recommended further discussions among Somalis until a consensus of some sort emerges.¹⁵⁹

Moreover, the selection of unqualified members for the IFCC has negatively impacted the quality of the constitution that the Commission produced in 2010. In other words, competent commission members, with an open mandate for producing context-appropriate institutions, would have helped to legitimize the process.

¹⁵⁹ See the communiqué from the Istanbul Gathering of the Civil Society at <http://www.insightonconflict.org/2012/07/istanbul-conference-somalia-civil-society/>

Drafting the Constitution

In July 2010, the IFCC presented the first draft of the Constitution to the Somali public.¹⁶⁰ Then, to improve the first draft, the Commission began to collect the views of the different sectors of society. The public reacted negatively to the draft, pointing to a number of issues including federalism, citizenship, the role of Islam, and the structure of the government. Many politicians were also opposed, though others welcomed it.

In order to manage this negative public reaction, the newly constituted Committee of Experts and the previous members of the IFCC came together and revised the 2010 Draft Constitution. This time the two committees did not share their revised draft with the public. Instead, in April 2012 they presented it to the seven signatories of the 2011 UNPOS-prepared Roadmap: Special Representative of the Secretary General (SRS) Ambassador Augustine Mahiga, and six Somali politicians. The six Somali politicians are the TFG President Sharif Sheikh Ahmed, the TFG Prime Minister Abdiweli M. Ali, former TFG speaker Sharif Hassan Sheikh Adan, Puntland President Abdirahman Mohamed Farole, Galmudug President Mohamed Ahmed Alim, and one of the leaders of the Ethiopian-supported Ahlu-Sunna Wal-Jama'a, Abdulkadir Moallim Nur.

Unexpectedly, the signatories' first move was to marginalize the IFCC and COE members that had prepared the second draft document after the committees submitted it

¹⁶⁰ For the 2010 Draft Constitution, see the IFCC copy available at

<http://www.dastuur.org/images/stories/docs/IFCC%20FINAL%20PROGRESS%20REPORT%2020th%20May%20English.pdf>.

in April 2012. For unexplained reasons, the seven signatories shifted a planned constitution-meeting in Mogadishu in Addis Ababa on May 2012. Puntland President Abdirahman Farole later told Somali media that he demanded the meeting be held in Addis Ababa because he wanted the international community to be present.

Although the Addis Ababa conference focused on the constitution, the IFCC and the COE members were not invited to the meeting. Instead, the seven signatories secretly formed a review committee from their delegations. The review committee revised the Draft Constitution that the IFCC and COE presented while in Addis Ababa. The signatories did not reveal the names of the committee members they put together or the reasons behind revising some of the articles of the proposed draft-constitution. Through a hasty and secret process, the signatories announced that they agreed on all of the contested issues without explaining what these issues were.¹⁶¹ Interviews with some of the members of the delegations in Addis Ababa revealed that the review committee was composed of three members from each of the seven delegations (signatories). While in Addis Ababa, the seven signatories officially disbanded the IFCC and the COE committees that had created the second draft. Then, the signatories kept the Addis Ababa draft to themselves.

Within a week, the secret review committee had convened another meeting, in Nairobi, to further edit and revise the Draft Constitution. The new committee worked for about two

¹⁶¹ Addis Ababa communiqué available at

<http://unpos.unmissions.org/LinkClick.aspx?fileticket=c5df15pV7q8%3d&tabid=9744&mid=12667&language=en-US>.

weeks on the document and completed its revisions in the middle of June 2012. Signatories were then called to sign the final draft of the constitution on June 22, 2012.

What is mind-boggling is that the signatories were not only playing games with the public; they were also playing games with each other. President Sharif Sheikh Ahmed came to the Nairobi meeting with the document that was revised in Addis Ababa arguing that it was the genuinely negotiated version. Yet Prime Minister Abdiweli Mohamed Ali and other signatories contradicted him, saying that the last version is the one that the committee completed in Nairobi. The President complained that his office was not informed about the Nairobi meeting. UNPOS and several Western diplomats intervened and pressured all of them to sign the document. On June 22, 2012, the seven signatories signed their own draft constitution and four protocols that deal with a number of issues, including the creation of a National Constituent Assembly (NCA) in Nairobi. UNPOS first shared the Somali-language version of the signatories' draft constitution and the protocols with the public on June 25, 2012.¹⁶²

Implications of the Hasty and Secretive Drafting Process

UNPOS and a narrow group of unrepresentative politicians have controlled the drafting process of the Somali constitution since April 2012. Given the time they had (from late April to June 22, 2012) they negotiated the articles in the constitution secretly and wrote the document hastily. Three implications result from the manipulation of the seven signatories. First, the hasty and secretive drafting process has permanently damaged the

¹⁶² See the latest Draft Constitution and four protocols at the UNPOS website, <http://unpos.unmissions.org/Default.aspx?tabid=9705&ctl=Details&mid=12667&ItemID=19206&language=en-US>.

legitimacy of the outcome (the draft constitution). Both committees of the IFCC and the COE have publicly distanced themselves from the signatories-driven process. The leaders of the IFCC and COE met with civil society members and religious groups in Mogadishu and explained to them the differences between the draft that the two committees had produced and the draft that the signatories had signed. The two committees produced a matrix that identified more than seventy articles that had either been deleted from the original document or differed. They highlighted several articles that relate to the role of Islam, the boundaries of the country, electoral systems, the design of the second chamber, and Mogadishu as a capital of Somalia. The signatories could not explain or defend their actions as well.

Second, civil society members, Islamists and other political forces were excluded even though they all wanted to participate in the constitution-making process. As a result, these political forces and many diaspora communities have refused to endorse the outcome. In addition, the fact that the signatories finalized the document in Addis Ababa and Nairobi further raised the suspicions of many Somalis. This invokes bitter memories as it was only a few years ago, in 2004, when Ethiopia and Kenya imposed a charter of their own on Somalis. Many people, therefore, considered the draft constitution as yet another document that subordinates Somali interests and aspirations to those of their hostile neighbors. Two factors further compounded these suspicions: (a) most of the signatories are proxies of these two countries – some are supported militarily while others are backed politically; (b) when the signatories signed the document they refused any changes to be made. Traditional elders meeting in Mogadishu demanded some changes. The signatories resisted, saying that the National Constituent Assembly or the next

parliament would have the powers to amend the constitution. Yet when the NCA met in Mogadishu in late July 2012 they were also denied the opportunity to make any changes to the document. Rhetoric aside, the protocol that established the NCA clearly says that the draft that the signatories negotiated will be Somalia's provisional constitution despite the results of the NCA or referendum.

Third, because of the hasty process, the quality of the Somali version of the draft constitution UNPOS released on June 25 was extremely poor. It was obvious that the Somali version had been hastily translated from an English source by unprofessional translators. UNPOS eventually published the English version, though too late. The Somali translation was evidently not proof-read as even the name of the country "Somalia" was misspelled many times in the Somali language. Referencing and counter-referencing were also inaccurate. For instance, Article 26 (1 and 2) deals with the right to own property and the right of the state to nationalize a given property for the national interest, respectively. However, Article 26(3) says that 26(1 and 2) will not apply to Article 49 which deals with the levels of 'federal' governance. There is no relationship between Article 26 and Article 49.¹⁶³ Interestingly, the English version has omitted Article 26 (3). Moreover, Article 72 (in the Somali version), which deals with the powers of the second chamber, is incomplete as it does not counter-reference at all. The poor quality of the draft constitution indicates that the signatories and their hand-picked individuals who prepared the final draft did not have the professional skills or sufficient time to think through the issues, or edit and proofread the document. As a result, Somali

¹⁶³ See article 26 and article 49 of the Draft Constitution in Somali language, available at http://unpos.unmissions.org/LinkClick.aspx?fileticket=1_2yjnyPFfk%3d&tabid=9705&language=en-US.

people are not well-served when it comes to understanding their own constitution in their language. In comparison, the English version has been improved. Obviously, a new Somali translation will be necessary.

More importantly, since the document is incomplete, it has serious limitations in terms of the content. Issues of federalism, the structure of the government, the role of Islam, electoral systems, amendment formula and territorial disputes are still contested. In particular, the design of the second chamber that transforms the eighteen administrative regions to political regions is alarming as it might create further unnecessary conflicts among Somali communities. Moreover, although the sections of the draft constitution that deal with rights seem to be stronger, many of the rights protected in the document cannot be guaranteed in any practical way by Somalia's failed state. As Feldman accurately argues, this may further contribute to the de-legitimization of the constitution.¹⁶⁴ Many rights are cut and pasted from other constitutions without due regard to context. The rights of internally displaced people are not enumerated well, for example, even though most Somalis are displaced within the country and sectarian authorities are known to abuse these IDPs.

¹⁶⁴ See Feldman, "Imposed Constitutionalism".

The Process of Adopting the Constitution

By 2009, it became clear to all that the security conditions on the ground would not allow the IFCC to present the constitution to the Somali people through a referendum as originally was conceived in 2004. UNPOS, which has led and funded the constitution-making process, realized that another way of adopting the constitution was needed. The SRSR at the time, Ahmedou Ould-Abdallah, proposed that Somalia's Parliament could provisionally adopt the constitution. He argued that the parliaments of 27 European countries adopted the EU constitution and therefore the Somali parliament could do the same, albeit it was not elected.¹⁶⁵ Before a decision was made on the issue, Ambassador Ould-Abdallah vacated his post and a new SRSR, Ambassador Augustine Mahiga was appointed to lead UNPOS, thus leading Somalia's constitution-making process.

Ambassador Mahiga dropped the idea of taking the Draft Constitution to the Somali parliament. Instead, he created what he called 'major stakeholders', consisting of the six Somali politicians already mentioned above: the TFG President Sharif Sheikh Ahmed, the TFG Prime Minister Abdiweli M. Ali, former TFG speaker Sharif Hassan Sheikh Adan, Puntland President Abdirahman Mohamed Farole, Galmudug President Mohamed Ahmed Alim, and one of the leaders of the Ethiopian-supported Ahlu-Sunna Wal-Jama'a, Abdulkadir Moallim Nur. The SRSR brought these six individuals together in Mogadishu and they (including Mahiga himself) signed an UNPOS-prepared Roadmap in 2011. The Roadmap had four components, of which security and constitution-making were the most important.

¹⁶⁵ Ambassador Ahmedou Ould-Abdallah presented a paper at the Lund Conference on Somalia on June 2, 2010.

The seven signatories became the entity that decided on all of the major issues of Somalia, thus replacing the parliament, the cabinet and all other political groups in the country. Known as the Roadmap signatories or the 'principals', the six Somali politicians and the SRSG signed subsequent and at times contradicting agreements in Mogadishu, Garowe, Galkayo, Addis Ababa and Nairobi. These agreements focused on the two most sensitive issues: the Draft Constitution, and selection of the members of the new parliament.

With respect to the provisional adoption of the constitution, the seven signatories decided to create a puppet assembly that would support their draft without making any changes. They signed a protocol, "Establishing the Somali National Constituent Assembly". In this protocol, the signatories created an 825-member 'National Constituent Assembly'. Somalia's traditional clan leaders select the members through the 4.5 tribal formula – such that the so-called four 'major' clans will get about 183 members of the NCA while the fifth clan would get 93 members. But, ironically, the signatories' Technical Facilitation Committee managed the adoption process and the minister of the constitution (a proponent seeking a Yes vote) was the chair of the NCA. Moreover, the NCA voted on the following loaded question: "Should this draft provisional constitution provisionally adopted to provide for a better Somalia, help reconstruct our country, and set us on the right path to justice and lasting peace, pending final adoption at the referendum"?¹⁶⁶

¹⁶⁶ See the NCA protocol, available at http://unpos.unmissions.org/LinkClick.aspx?fileticket=Crs_XvJpAd4%3d&tabid=9705&language=en-US

According to the Protocol, the NCA could approve or reject the whole document. But they could not amend articles as they wish. Instead, the NCA could give recommendations to the signatories' Technical Facilitation Committee which would pass the suggestions to the so-called 'principals'. In fact, this was consistent with the previous agreements in Garowe in which the signatories explicitly agreed that the NCA could vote either Yes or No for the draft constitution. In addition, according to the protocol establishing the NCA, a No vote would not have any impact on the document. The Protocol notes: "In the event of a No vote, this draft provisional constitution will nevertheless take effect until a new constitution is adopted." In fact, the signatories further agreed that even if this draft constitution is rejected in the referendum, it will still be the provisional constitution of the country, thus making this a *fait accompli*. In other words, regardless of the results of the NCA and the referendum, the signatories' draft constitution that was signed on June 22, 2012 becomes the law of the land.

Constituent Assemblies come in many shapes and forms. However, the basic function they often carry out is to write a constitution.¹⁶⁷ The UN, which has led Somalia's constitution-making process, missed a great opportunity here. The government of the United Kingdom, under its London initiative on February 2012, proposed a constituent assembly that would not only write the constitution but also become the legislature for the next few years. Had the signatories listened, this would have improved and simplified the process, thus producing a more legitimate and Somali-owned constitution.

¹⁶⁷ See Yash Ghai, "The Role of Constituent Assemblies in Constitution-Making", Institute for Democracy and Electoral Assistance, available at www.idea.int. See Jon Elster, "The Optimal Design of Constituent Assembly", Paper prepared for the colloquium on "Collective wisdom", Collège de France,

Instead of drawing from the best practices of establishing constituent assemblies, the UN and its signatories preferred the approach that dictatorships use – an approach that never legitimizes constitutions. They have created a rubber-stamp constituent assembly in which 96% of the delegates ‘approved’ the draft-constitution. On August 1, 2012, the day the assembly approved the text, the Voice of America Somali Section aired interviews with some of the delegates who were complaining about many irregularities.

In fact, the military government led by General Mohamed Siyad Barre used a similar mechanism in order to adopt the 1979 constitution. The military government brought together 832 delegates from all the districts and regions of the country to provisionally approve the constitution, albeit they could not make any changes. Even the 27-member technical committee led by Ahmed Ashkir Botan did not make significant changes before Congress approved it on January 25, 1979. This was followed by a referendum which took place on August 25, 1979. According to the government, 99.69% of the Somali people ratified the constitution and the Supreme Court endorsed it.¹⁶⁸

By way of comparison, during the Italian trusteeship era (1950-1960), Somalia’s first constitution was drafted by a technical committee comprising 23 members. The technical committee presented to the administration a constitution that consisted of 143 articles. Then, a fifty-member inclusive political committee debated the constitution article by article and created a new draft of 100 articles and made changes as needed. Moreover, a constituent assembly comprising the ninety-member parliament and twenty additional

¹⁶⁸ See “Somalia”, *The African Contemporary Record*, Vol. XVIII, No. 25, November 5-18, 1979, p. 5211.

individuals from different sectors again deliberated article by article, made some changes and provisionally adopted it.¹⁶⁹ Finally, in 1961, the Somali people ratified it through a referendum. Because the process was so open and transparent, the outcome became a legitimate and Somali-owned constitution that expressed the aspirations of the nation and regulated political conflicts well. With some amendments the 1960 constitution could still be used now, as it is more legitimate and functional than the current UN-led draft constitution.

From its inception, Somalia's constitution-making process was deeply flawed. The process was designed, funded and controlled by UNPOS, with help from the regional organization IGAD and the neighboring countries. Originally, the constitution-making process aimed at keeping the politicians at bay. Ironically, the process ended up in the hands of six unrepresentative Somali politicians and the SRSG of the UN. These seven individuals have dominated the constitution-making process of Somalia. They have excluded civic, political and Islamist forces; they have secretly and hastily negotiated on the articles of the constitution; and they have imposed a poor draft through a sham process by creating a puppet constituent assembly. As a result of this political expediency, secrecy and haste, both the IFCC and COE which were tasked to prepare the draft and many civic and political forces distanced themselves from the UN-controlled constitution-making process. In short, flawed processes lead to illegitimate outcomes – and this has proved to be the case with the UN-led constitution-making process in

¹⁶⁹ See Paulo Contini, "Integration of Legal Systems in the Somali Republic", *International and Comparative Law Quarterly*, Vol. 16 (1967): 1088–1105. See also Paulo Contini, *The Somali Republic: An Experiment in Legal Integration* (London: Frank Cass & Co. Ltd, 1969).

Somalia. More problematic is that besides the failure to regulate individual, institutional and group disputes, there is an increased risk of further conflicts, particularly if plans to establish the second chamber are implemented.¹⁷⁰

3.4 Conclusion

Since 1991, Somalis have lived in a situation of governance without a government and their lives have been disrupted by a conflict driven by warlords who thrive in the current anarchical situation in Somalia. Undoubtedly, warlords have benefited from the Somali war economy associated with the collapse of the state institution in 1991. A proper functioning state is therefore a threat to those who are thriving under the prevailing conflict situation. Importantly, peacemakers have come to perceive Somalia through the lenses of counterterrorism, counter-irredentism, state-building, and economic development. Therefore the logical approach to the Somali conflict resolution would be to deal with the reconciliation part of the process and not so much with the truth part, because it has the potential to rekindle the conflict. The Somali peace processes are not yet ripe for a reconciliation strategy; the most fundamental approach would have been to resolve the conflict first before embarking on any form of healing the scars of the past and any form of constitution making.

Moreover, the ability of the international community to demonstrate impartiality and neutrality in dealing with the Somali affairs is absolutely imperative. Often the regional and international actors engage with the local Somali stakeholders in resolving the conflict situations with prepared templates or pre-crafted lenses.

¹⁷⁰ Afyare Abdi Elmi, Revisiting the UN-Controlled Constitution-making process for Somalia, September 2, 2012.

CHAPTER FOUR

CONSTITUTION-MAKING IN SOMALIA: A CRITICAL ANALYSIS

4.1 Introduction

Chapter three discusses constitution making in Somalia: a critical analysis, 1960 - 2013. The study undertook a review from documented scholarly works on the subject matter.

The chapter sets the stage, which analyzed the emerging issues by critically analyzing the constitution making in Somalia. The study established; the role of Sharia courts and the Union of Islamic Courts, federalism and constitution in Somalia, the process of constitution making, the issue of local ownership and the role of the international community as the emerging issues which were looked at in this chapter.

4.2 Emerging Issues

4.2.2 The Federalist Debate in Somalia

Federations may foster peace, in the senses of preventing wars and preventing fears of war, in several ways. States can join a (con) federation to become jointly powerful enough to dissuade external aggressors, and/or to prevent aggressive and preemptive wars among themselves. The European federalists Altieri Spinelli, Ernesto Rossi and Eugenio Colomi argued the latter in the 1941 Ventotene Manifesto: Only a European federation could prevent war between totalitarian, aggressive states. Such arguments assume, of course, that the (con) federation will not become more aggressive than each state separately, a point Mill¹⁷¹ argued.

¹⁷¹ Mill John, *Considerations on Representative Government*, (New York: Liberal Arts Press, 1958)

Keohane and Joseph¹⁷² argue that Federations can promote economic prosperity by removing internal barriers to trade, through economies of scale, by establishing and maintaining inter-member unit trade agreements, or by becoming a sufficiently large global player to affect international trade regimes. Federal arrangements may protect individuals against political authorities by constraining state sovereignty, placing some powers with the center. By entrusting the center with authority to intervene in member units, the federal arrangements can protect minorities' human rights against member unit authorities.¹⁷³ Such arguments assume, of course, that abuse by the center is less likely.

Watts notes that federations can facilitate some objectives of sovereign states, such as credible commitments, certain kinds of coordination, and control over externalities, by transferring some powers to a common body. Since cooperation in some areas can 'spill over' and create demands for further coordination in other sectors, federations often exhibit creeping centralization. Federal arrangements may enhance the *political influence* of formerly sovereign governments, both by facilitating coordination, and particularly for small states by giving these member units influence or even veto over policy making, rather than remaining mere policy takers.

Karl and Otto also pointed out that, federal political orders can be preferred as the appropriate form of nested organizations, for instance, in 'organic' conceptions of the political and social order. The federation may promote cooperation, justice or other values among and within member units as well as among and within their constituent units, for instance by monitoring, legislating, enforcing or funding agreements, human rights, immunity from interference, or development. Starting with the family, each larger

¹⁷² Keohane Reuben and Joseph Swift, *Power and Interdependence: World Politics in Transition* (New York: Manchester University Press, 2001)105-117

¹⁷³Watts Reid, *Comparing Federal Systems*, (Montreal: McGill-Queens University Press, 1999.), 14.

unit responsible for facilitating the flourishing of member units and securing common goods beyond their reach without a common authority. Such arguments have been offered by such otherwise divergent authors as Althusius, the Catholic traditions of subsidiarity as expressed by Popes Leo XIII (1891) and Pius XI (1931), and Proudhon.¹⁷⁴ Acton in support of federalism stated that federal arrangements may protect against the central authorities by securing immunity and non-domination for minority groups or nations. Constitutional allocation of powers to a member unit protects individuals from the center, while interlocking arrangements provide influence on central decisions via member unit bodies. Member units may thus check central authorities and prevent undue action contrary to the will of minorities: “A great democracy must either sacrifice self-government to unity or preserve it by federalism. The coexistence of several nations under the same State is a test, as well as the best security of its freedom... The combination of different nations in one State is as necessary a condition of civilized life as the combination of men in society”.¹⁷⁵

According to Oates, federations may facilitate the efficient preference maximization more generally, as formalized in the literature on economic and fiscal federalism, though many such arguments support decentralization rather than federalism proper. Research on ‘fiscal federalism’ addresses the optimal allocation of authority, typically recommending central redistribution but local provision of public goods. Federal arrangements may allow more optimal matching of the authority to create public goods to specific affected subsets of the populations. If individuals' preferences vary systematically by territory,

¹⁷⁴ Lewis loan, *Understanding Somalia and Somaliland*, (London: Hurst Publishers, 2008), 34.

¹⁷⁵ Acton, Leo “Nationality,” in J. N. Figgis (ed.), *The History of Freedom and Other Essays*, London: Macmillan. . (1907).

according to external or internal parameters such as geography or shared tastes and values, federal or decentralized arrangements that allow local variables may be well suited for several reasons. Local decisions prevent overload of centralized decision-making, and local decision-makers may also have a better grasp of affected preferences and alternatives, making for better service than would be provided by a central government that tends to ignore local preference variations. Granting powers to population subsets that share preferences regarding public services may also increase efficiency by allowing these subsets to create such 'internalities' and 'club goods' at costs borne only by them.¹⁷⁶

Buchanan likewise argues that federal arrangements may not only protect existing clusters of individuals with shared values or preferences, but may also promote mobility and hence territorial clustering of individuals with similar preferences. Member unit autonomy to experiment may foster competition for individuals who are free to move where their preferences are best met. Such mobility towards member units with like-minded individuals may add to the benefits of local autonomy over the provision of public services, absent economies of scale and externalities¹⁷⁷ though the result may be that those with costly needs and who are less mobile are left worse off.

4.2.3 The Role of *Sharia* Courts

From the late 1990s onwards much of southern Somalia experienced slight improvements in local systems of governance. In certain areas local polities, generally comprised of

¹⁷⁶ Oates, Wegner. *Fiscal Federalism*, (New York: Harcourt Brace Jovanovich, 1972).

¹⁷⁷ Buchanan Johnson, *Federalism, Liberty and the Law, Collected Works (Volume 18)*, (Indianapolis: Liberty Fund, 2001), 87.

Sharia courts sprung up, providing some amount of law and order of the population¹⁷⁸. Sharia courts first emerged in northern Mogadishu in August 1994 and were local, clan based initiatives funded by local Muslim clerics or businessmen, and aimed at providing a degree of law, order and security in a stateless and anarchic situation¹⁷⁹. The resources of these courts were usually derived from a combination of private contributions and taxation of various business and militia activities.

The first generation of Sharia courts was widely popular. After years of protracted and bloody fighting in which families and clans suffered, local populations were displaced and local businesses were held hostage to militia tax-levies and protection money, Somali communities welcomed Sharia courts and supported them as a means of restoring the rule of law¹⁸⁰. Since these courts were very local in jurisdiction and served specific sub-clans or local neighborhoods, Sharia courts offered local communities a strong and legitimate governance mechanism. Controlled by a coalition of clan elders, Islamic clerics, and local businessmen these early Islamic courts were moderate in nature and generally opposed to radical Islam¹⁸¹.

By late 2005, eleven clans-based Islamic courts were established in Mogadishu alone; some favoring radical Islam, others embodying a more traditional character¹⁸². These

¹⁷⁸ Sharia courts generally administer Islamic Law (Sharia), and in some instances offer the parties a choice between the application of Sharia or Somali customary law, the Xeer (Menkhaus 2006, 85-86; Johnson and Vriens 2011).

¹⁷⁹ Mwangi Oscar. "The Union of Islamic Courts and security governance in Somalia." (New York: Harcourt Brace Jovanovich, 2010). 88-94

¹⁸⁰ Menkhaus, Ken. "Governance without Government in Somalia: Spoilers, State Building, and the Politics of Coping." (America: Affairs Council of Northern California, 2006), 74-106.

¹⁸¹ Clarke Walter and Robert Gosende, "Somalia: Can a Collapsed State Reconstitute Itself?" In *State Failure and State Weakness in a Time of Terror*, (Washington: Brookings Institute Press, 2003), 129-158.

¹⁸² Mwangi Oscar. "The Union of Islamic Courts and security governance in Somalia." (New York: Harcourt Brace Jovanovich, 2010). 88-94.

courts formed a loose coalition dubbed the Union of Islamic Courts (UIC), and while most of these courts were primarily concerned with security in their own areas of the capital, they did contribute troops and equipment to a combined UIC militia force of 400 members¹⁸³. What is important to remember in regards to the popularity of these Islamic courts with local communities is that their militias were formed by very religious and highly disciplined young men. They were a far cry from the parasitical and ill-disciplined group of youngsters first controlled in the early 1990s by Mogadishu's warlords, and then left to develop their own exploitation and criminal groups. As a more disciplined and often better equipped force, these Islamic court militias were able to successfully deal with security issues in their local spheres of influence, and when united under the UIC formed an impressive fighting force.

In June 2006, the UIC defeated the various clans based warlords who had effectively reigned over Mogadishu since the early 1990s and restored to a high degree of peace to the capital; a feat neither the warlords nor the internationally backed TFG were capable of. For the first time since the collapse of the Somali state, an organization managed to unite Mogadishu and deliver peace and security to its population. However, the success of the UIC was perceived as a threat by the TFG and Ethiopia, both of whom claimed that the UIC's leadership included Muslim terrorists implicated in bombings in Ethiopia and Kenya, a claim reiterated by the US¹⁸⁴. The rule of the UIC, which had, for the first time since the late 1980s, brought relatively centralized political governance to southern Somalia was brought to an end by the oncoming Ethiopian invasion.

¹⁸³ Ibid.

¹⁸⁴ Lewis loan, *Understanding Somalia and Somaliland*, (London: Hurst Publishers, 2008), 34.

The Ethiopian invasion began towards the end of 2006 with thousands of troops, tanks, heavy artillery and air support pushing into Somalia. The US supported the Ethiopian army indirectly, and the invasion seemed a success when the UIC retreated from Mogadishu¹⁸⁵. However, the Ethiopian army was soon embroiled in intense street-fighting, and turned their heavy artillery against civilian quarters in the city. What ensued were extremely high rates of civilian casualties and it is estimated that as many as half a million civilians fled what some have called the “holocaust” in Mogadishu¹⁸⁶. Since the Ethiopian withdrawal in January 2009, the TFG has been supported by AMISOM troops, and this is still the case today. Once the Ethiopians withdrew the TFG quickly lost control of southern Somalia. What sprung up from the remnants of the UIC, and is currently in control of large parts of southern Somalia is the loosely affiliated *Al-Shabaab* group. This affiliation of militias and clan-based groups is designated as a terrorist group by the US and other Western governments because of its links to Al-Qaeda¹⁸⁷. It is only recently that *Al-Shabaab* has been forced out of Mogadishu, and the joint AU, Ethiopian, and Kenyan military offensive currently underway is attempting to defeat the group.

4.2.4 The Process of Constitution-Making

Unlike many other African countries, Somalia upon independence actually enjoyed a significant sense of national identity. As one observer put it, the Somalis constituted a nation, but not a state, although they did possess the cultural prerequisites for statehood¹⁸⁸. The reasons why the Somalis are considered to have a strong national

¹⁸⁵ In 2007, the US also supported Ethiopia directly by bombing UIC positions in Somalia (Reynolds 2007).

¹⁸⁶ Lewis loan, *Understanding Somalia and Somaliland*, (London: Hurst Publishers, 2008), 34.

¹⁸⁷ Al-Shabaab formally joined Al-Qaeda in 2012 (BBC 2012a).

¹⁸⁸ Lewis loan, *Understanding Somalia and Somaliland*, (London: Hurst Publishers, 2008), 34.

identity is because they share a common culture based on folk traditions, a pastoralist way of life, common language, and common religion-Sunni Islam¹⁸⁹.

During the period of colonialism from roughly the 1880s to World War Two, the Somali people were administered by several European colonial powers: the French (in what is now Djibouti), the British (in what is now the self-proclaimed state of Somaliland, and Northern Kenya), and the Italians (in Somalia proper). As a result of these different colonial administrations and their administrative and governance traditions, the inhabitants of these regions experienced very different colonial legacies¹⁹⁰.

According to some scholars, during the first 9 years of civilian rule in Somalia, the government "proved to be experimental, inefficient, corrupt, and incapable of creating any kind of national political culture"¹⁹¹. While this may be a strong indictment of the first civilian administrations, they did prove to be highly corrupt and unable to deal with the many problems the newly independent nation faced. Some of these problems included the newly unified Republic's legal system - four of which she inherited (Italian law, British common law, Islamic law-Sharia, and Somali customary law-Xeer) and needed to merge so as to create an integrated legal code. Also, within the first year the enthusiasm for the unification waned as northerners began to realize how marginalized they were becoming. In British Somaliland members of the northern Issaq clan constituted the majority of administrative appointments and were finding themselves in a very small minority in the new Mogadishu based government. About one quarter of seats in the new parliament

¹⁸⁹ Clarke Walter and Robert Gosende, "Somalia: Can a Collapsed State Reconstitute Itself?" In *State Failure and State Weakness in a Time of Terror*, (Washington: Brookings Institute Press, 2003), 129-158.

¹⁹⁰ Lewis loan, *Understanding Somalia and Somaliland*, (London: Hurst Publishers, 2008), 34.

¹⁹¹ Clarke Walter and Robert Gosende, "Somalia: Can a Collapsed State Reconstitute Itself?" In *State Failure and State Weakness in a Time of Terror*, (Washington: Brookings Institute Press, 2003), 129-158.

were allocated to northerners, and with most, if not all senior posts in the government and military allocated to southerners, the political marginalization felt by northerners was considerable¹⁹². To this, should be added the experience of economic marginalization, highlighted by the distance between Hargeisa (capital of Somaliland), and the new Republic's capital of Mogadishu, and lack of state administrative services in Somaliland. This was to a great extent influenced by the British colonial lack of investment in and development of Somaliland, but nevertheless served as a reason for frustration. All of this contributed to the troublesome referendum to approve a provisional constitution in June 1961, where the northerners rejected the constitution, while it was strongly supported in the south. Worse was to follow when in December of the same year a group of British trained junior military officers in the north unsuccessfully attempted a coup with the aim of ending the union. Towards the end of the 1960s, corruption was seriously disrupted the cohesion of the political class in the country, and competition for governmental resources was rife.

Constitution-making can be compared with designing a major public building¹⁹³. The authorities might think about their tasks as deciding what the building is for, why it is needed, where it should be situated, what facilities and spaces they want it to contain, what it should look like, and how it should be designed and built to achieve those results. They might want to consult the public, as users, about the design, layout, and location; questions of accessibility to certain users would arise, as would issues of time, scale, and cost.

¹⁹² Bradbury Mark, *Becoming Somaliland*. (London: Progression, 2008), 45.

¹⁹³ Sam Brooke, *Constitution-Making and Immutable Principles*, (M.A. Thesis), (Boston: The Fletcher School, 2005) (Online at ...<http://fletcher.tufts.edu>).

Similarly, the constitution-making task involves decisions about design, including who will use the product and how¹⁹⁴. There are decisions about how to consult the public and how to use the resulting contributions. Municipal authorities do not have to educate their architects, but someone may need to educate the constitution-makers, as well as the public, about what a constitution is and what it can and cannot do. And the constitution-making process will require complex administration. In this part, therefore, we offer sections about decision-making on policy and technical issues, on educating the decision-makers and the public, and on carrying out public consultation. There is a section on the specific task of drafting the words of the document, and a section on the administrative tasks involved in managing this sort of process.

Constitutions and corresponding concepts of constitutionalism are classified in various ways depending on the purpose for which the categorization is sought. According to the realist approach, a constitution is an expression of “the balance of power”¹⁹⁵ obtaining at the time of its making. Hence, a constitution represents that which is sanctioned or permitted by the existing state of affairs as regards power; it “merely divides the spoils between political elites”¹⁹⁶. It is not an agent playing a mediating role in a process of “change or transition”. The idealist perspective on the other hand views a constitution as having a “foundational” function. It represents the end of the old order and the

¹⁹⁴ Yash Gai, *The Constitution Reform Process: Comparative Perspectives*, [paper presented at a conference “*Toward Inclusive and Participatory Constitution-Making*”, 3-5 August, 2004, in Kathmandu (Nagarkot).

¹⁹⁵ Kirsti Samuels, *“Balance of power” is a concept applied in international relations*. (New York: Columbia University Press, 2000), 35.

¹⁹⁶ Kristi Samuels, “Post-Conflict Peace-Building and Constitution-Making”, *Chicago Journal of International Law*, (New York: Columbia University Press, 2006), 4.

establishment of a new one. In other words, according to the idealist perspective, a constitution is the “foundation of a new political order¹⁹⁷.”

The “transitional” or “new” perspective differs from both the “realist” and the “idealist” approaches, even though not to the same degree. It is close to the “idealist” approach; but it envisages a deeper and broader appreciation of a constitution’s role in the establishment and development of a new order. It focuses on the significance and role of a constitution in times of political transformation, as distinguished from a period of stability. It relates to “constitutional developments” taking place immediately following a “political change” of great magnitude. It is a type of constitutionalism in which law –i.e. The constitution in this case- has “an extraordinary constituting role’ in the stabilization of democratic governance¹⁹⁸”.

While this perspective “recognizes” the complex and many-sided function of constitutions, it views constitutionalism as an ongoing process, “inextricably enmeshed in transformative politics¹⁹⁹”. In other words, according to this perspective, constitutionalism reckons with and “codifies” the predominant “consensus” but “transforms it” as well. This means that it continues to strengthen the process that upgrades the environment and stabilizes and develops the new order or governance. And hence, according to this perspective, constitution-making is “a forum for negotiation

¹⁹⁷ Kristi Samuels, “Post-Conflict Peace-Building and Constitution-Making”, *Chicago Journal of International Law*, vol. 6, no. 2, (Winter 2006)..

¹⁹⁸ Samuel Issacharoff, “Constitutionalizing Democracy in Fractured Societies”, *Journal of International Affairs*, (New York: Columbia University, Fall 2004), 58.

¹⁹⁹ Kristi Samuels, “Post-Conflict Peace-Building and Constitution-Making”, *Chicago Journal of International Law*, (New York: Columbia University Press, 2006), 4.

amid conflict and division”²⁰⁰, a forum in which - inter alia - the foundation for the process of “democratic education” and empowerment of the people is laid.

Notwithstanding the plausibility of the above classification of the perspectives on constitutionalism and constitution-making, many scholars opt for a simpler categorization. To them, there are two basic approaches – namely, the traditional and the new. According to the traditional approach, a constitution is “an ‘act of completion’”. It is perceived as “*a contract, negotiated by appropriate representatives, concluded, signed, and observed.*”²⁰¹ The issues are deemed settled with presumed finality and conclusiveness.

The new constitutionalism, on the other hand, is an approach centering “on ‘participatory constitution-making’ or ‘conversational constitutionalism’”²⁰². It is perceived as “*a continuing conversation between the elites of a given society and the population.*”²⁰³ It is carried on by all the stakeholders and is “*open to new entrants and issues*”; and its aim is to fashion and provide “*a workable formula that will be sustainable rather than assuring stable.*”²⁰⁴ The issues are not deemed disposed of for good and all, although a consensus is reached on how they should be resolved presently.

²⁰⁰ Vivien Hart, “*Democratic Constitution Making*”, -Special Report, (Washington: United States Institute for Peace, July 2003), (Online).

²⁰¹ Vivien Hart, “*Democratic Constitution Making*”, -Special Report, (Washington: United States Institute for Peace, July 2003), (Online).

²⁰² William Paul, “*The Constitution Making Process*” -*Workshop*, (Austin: University of Texas Press, 2006).

²⁰³ Louis Aucoin, “Building the Rule of Law and Establishing Accountability for Atrocities in the Aftermath of Conflict”, *The Whitehead Journal of Diplomacy and International Relations*, (Winter/Spring 2007) (Online).

²⁰⁴ Vivien Hart, “*Democratic Constitution Making*”, -Special Report, (Washington: United States Institute for Peace, July 2003), (Online).

This approach - i.e. new constitutionalism - is more sensible, especially considering the essential nature or function of a constitution. A constitution can be neither value-neutral nor agenda-free. It is necessarily informed by some desiderata that may be expressly declared - usually recited in its preamble - or tacitly stated. What this means is that a constitution is designed bearing in mind the apprehensions or anxieties of the polity concerned as well as the ends or goals aspired Okoth-Ogendo²⁰⁵ in effect points to this idea when he characterizes the constitution

"As a 'power map' upon which the framers may delineate a whole set of concerns which may range all the way from an application of the Hobbesian concept of 'the covenant', ... to an authoritative affirmation of the basis of social, moral, political or cultural existence including the ideals towards which the policy is expected to strive...."

It suggested that Somalia is putting its priorities in the wrong order by trying to proceed with constitution-making when even the extent of the government's control over the capital city is contested. Either that country could build on local institutions and gradually build up a state, or it could use one of the earlier constitutions (or make it an interim charter more permanent). The last course—relying for an extended time on an interim constitution—has been used in various countries, including Nepal and Sudan.

4.2.5 The issue of Somali ownership

Despite the fact that Somalia is the only country in the Horn of Africa in which the population is almost entirely Muslim, Somalia has never been the home of radicalism as its neighbors like Ethiopia and Sudan that are internally religiously divided. Historically

²⁰⁵ Julius Ihonvbere, "Towards A New Constitutionalism in Africa", CDD Occasional Paper Series 0.4 (London: Centre for Democracy & Development, April 2000).

Somalia is based on clannism and not on religion, however currently various types of Islamist activism (Sharia Courts, al-Ittihad cells) “tend to be organized by clan and work within the parameters of clannism”²⁰⁶.

In the absence of a nationalist ideology, political Islam in Somalia began its ascent in the mid-1970s, for want of overcoming clannism, encouraged during the violent and repressive Barre’s regime. The patronage of Saudi Arabia has also encouraged young Somalis to emigrate in Saudi Arabia to seek education and employment, and many have been influenced by the radical Islamic cells.

In Somalia There are both informal clan-based governance structures and criminalized warlord power structures. Whether or not specific provisions are included in the constitution to recognize these local power structures, modify them, or seek to override them, it is clear that their existence must be taken into account. Attempts to dissolve or ignore informal mechanisms that have served the public effectively can produce chaos.²⁰⁷ New structures that are neither trusted nor understood and undermine informal systems may leave society worse off than before. In Somalia this issue also arises with respect to the sources of law. Some codified law exists, but in the absence of a functioning judicial system, *xeer* (traditional law) and *Shari’a* are currently the dominant sources of law. Making progress will require careful weaving of a hierarchy of laws that builds on the current reality. This should not mean that there is no scope for improving the existing laws and interpretations to better comply with international standards of human rights, but rather the reality must be taken into account when designing the constitutional rules on these issues. Some of these challenges may be ameliorated by an extended period of

²⁰⁶ Menkhaus K. *Political Islam in Somalia*, Middle East Policy Journal, Vol 9 No 1 March 2002.

²⁰⁷ Kristi Samuels. ACCORD, An international review of peace initiatives. An opportunity for peace building dialogue, Somalia’s constitution making process 2010.

civic education and dialogue. But it remains uncertain whether attempts to transfer models, lessons and institutional structures from other stable and developed societies in Somalia will ever be successful. Given the weak, mistrusted formal legal and judicial structure and the lack of bureaucratic capacity, the prospects for implementing a constitution are very low. Furthermore the informal traditional structures are likely to compete with any new institutions or rules adopted in the constitution. A public education campaign could inflame divisions if it adopts extremist views rather than encouraging moderation and compromise. A process could be rendered illegitimate by the exclusion of the voices of women or minorities. Also, the constitution adopted may be unrealistic and unenforceable if it is too ambitious and too expensive. Finally, it may also induce conflict if it does not fairly address issues of land ownership, war crimes, or the division of power and resources. Nevertheless, despite the disappointments so far, as well as the risks, there remains a valid role for constitution building in peacemaking in Somalia. But such a process could prove divisive if it is not sufficiently representative, participatory or consensus based.²⁰⁸

4.2.6 The role of international community

On the 26 March 1993, the UN Security Council invoked Chapter VII of the UN Charter and unanimously adopted Resolution 814 (1993) to expand the UN's role in Somalia. At times, diagnosing the Somali conflict has been influenced by external factors and interests not relevant to the conflict. When the AU made pronouncements in January 2007 that endorsed the Ethiopian occupation and even went a step further by saying that the occupation presents a unique opportunity to resolve the conflict finally,

²⁰⁸ Ibid, p 88.

pronouncements failed to recognize that Ethiopians are blamed by Somali's for the current state of affairs. This outlook can be traced back to the imperial partitioning in Somalia in 1897 and the defeat of Somalia in the 1978 Ogaden War, which act as catalysts in the current Somali intractable conflict.

The AU analysts also failed to understand pan-Somali nationalism. This ideology is based on the notion of a Greater Somalia, which includes the Ogaden, Somaliland, the NFD of Kenya and Djibouti. The AU's pronouncements were informed by Ethiopia's subjective view of developments in Somalia. Wolff²⁰⁹ refers to this kind of behavior as the bad leader syndrome and the bad neighbor syndrome and is also known as proximate causes of conflict by conflict resolution practitioners.

Rutherford asserts that the AU's misdiagnosis of the Somali conflict follows on the early diagnosis by the UN in 1992. Intervention by the UN in Somalia was initially intended to provide humanitarian support to what was known as the "Triangle of Death" (Mogadishu, Baidoa and Kismayo). The food crisis was caused by the civil war and famine that were ravaging the country. The crisis was commonly referred to as a man-made disaster due to the conflict implications for the general population. The UN Security Council resolution 794 (1992), which authorized the deployment of 30,000 US troops in Somalia, had a limited scope. The operation was codenamed Operation Restore Hope (ORH) by the US. The UN referred to it as the United Nations International Task Force (UNITAF). The primary objective of the operation was to create a secure environment for the delivery of humanitarian relief throughout Somalia. The impact of the crisis was so severe that

²⁰⁹ Ibid, p 58.

300,000 Somalis had died, while 3,000 were still dying daily and 500,000 had fled to refugee camps in neighboring countries by mid-March.

By the end of 1992, Bradbury estimates that over 400,000 people had died and 1.5 million had fled the country to seek refuge abroad. The magnitude of the crisis made it possible for the UN to mobilize international support to alleviate the impact of the crisis on the civilian population mainly, particularly women and children. The noble cause of the UN was compromised when the situation was misdiagnosed by military commanders on the ground, perhaps because ORH was primarily a military operation with a humanitarian strategic objective.

The argument by Rutherford that in the case of Somalia, it was the first time that the politically neutral International Committee of the Red Cross (ICRC) had hired armed forces to protect its relief supplies and convoys, which is indicative of the militarization of humanitarian intervention. The question is should the ICRC have protected its neutrality by refusing the idea of hiring armed militias to protect its operation? Only time will tell, once the conflict has finally been resolved.

4.3 Other issues

The impact of civil war

Prior to 1960, Somalia was ruled by Italy in the South and Great Britain in the North. Following World War II and the gradual decolonization of Africa, Somalia achieved its independence in 1960 and formed the Somali Republic. Somalia's experiment with democracy was however short lived. In October of 1969, the commander of the Army,

General Mohammed Siyad Barre, seized power in a military coup. Over the course of the next twenty years, Barre's government grew ripe with corruption. During this period, the Somali people felt increasingly alienated by their own government, which led them to define themselves more by tribal association than nationality. In 1988, open rebellion began in Northern Somalia and gradually spread throughout the country. Finally, in January, 1991, General Farrah Aideed's United Somali Congress forces stormed the capital of Mogadishu forcing General Barre to fly to Nigeria. However, Somalia's many tribes were unable to form a consensus government and by April of 1991, the country had *plunged into all out civil war.*²¹⁰

When the Somali state collapsed in 1991, there was no formidable political formation capable of filling the vacuum left by the weak government of Siyad Barre. The country was fragmented in terms of clan lineage and patronage and the devastating drought and ensuing famine introduced food security as a source of conflict. Another element consistent with the concept of an intractable conflict concept was introduced: the changing goalpost in the life cycle of such a conflict. A lack of political vision and the politics of exclusion became the ingredients for the current civil war in Somalia. The absence of a political formation capable of channeling the anger of the Somalis to change the divisive legacy of the Siyad Barre regime constructively was another factor in Somalia's protracted civil war.

According to Clapham the fall of the Mohamed Siyad Barre regime in 1991 had unintended consequences for the Somali state institution. The fall of a government did not necessarily signal the collapse of a state in democratic societies. The basic

²¹⁰ F. M. Lorentz "Confronting Thievery in Somalia", *Military Review* 74, no. 8 (1994):p 2.

assumption is that the threat of state collapse unsurprisingly arises in countries in which the preconditions for state formation and maintenance were most uncertain in the first place and derives from the relatively recent assumption that the entire world should be divided into states²¹¹. When Siyad Barre seized power in a military coup in 1969, the Somali state was nine years into its formation with visible structural weaknesses. The military government destroyed even the rudimentary structures of a functioning state such as the legislature, judiciary and the civil service. Therefore, the collapse of the Somali state was not a chance, event, but a process, which began at the time of independence in 1960. Thus, it can be stated that the state “collapse was triggered when the Siyad Barre government fell in 1991.

In the summer of 1992, the U.S. Agency for International Aid (USAID) and the International Committee of the Red Cross began reporting that somewhere between one-third and two-thirds of the Somali population were at risk of dying from malnutrition.²¹² Unlike the Ethiopian famine that had occurred in the region 8 years earlier, the hunger crisis in Somalia was not a result of a lack of food, but rather a lack of access to food. Constant clan warfare had made it virtually impossible to safely transport humanitarian relief. Hunger had become a weapon used by rival clans against one another. A lack of security also led to the failure of the first UN humanitarian mission to Somalia (UNOSOM).²¹³ The complete failure of the Somali state had made it impossible for relief

²¹¹ Clapham, C. (2003). *The Challenge to the State in a Globalised World*, part one. In *State Failure, Collapse and Reconstruction*, edited by J. Milliken. Oxford: Blackwell Publishing.

²¹² James Dobbins, Michael Poole, Austin Long, Benjamin Runkle, *After the War: Nation Building from FDR to Gorge W. Bush* (Santa Monica, California: Rand Corporation, 2008), 43

²¹³ United Nations operation in Somalia (UNISOM 1).

workers to safely distribute aid to those in need and thus food was often left to rot in the Port of Mogadishu.²¹⁴

UNITAF successfully completed its short term mission of providing security for the humanitarian convoys; the American military leadership was fundamentally opposed to engaging in long term efforts to stabilize Somalia on a political level. Following the deaths of 18 Army Rangers and the wounding of 75 others, the U.S. military mission became focused on transferring authority to the United Nations Operation in Somalia (UNOSOM II). The political pressure to hastily withdraw from Somalia forced UNITAF to hastily transfer operational control to UNOSOM II, despite the fact that only half the UN forces were in place. Furthermore, while UNITAF had been supported by tanks, helicopters, armored personnel carriers and AC-130 gunships, UNOSOM II was equipped with only a minimal amount of armor and a complete lack of military gunships.²¹⁵ Overall, the intervention in Somalia was a failure. However, despite a detrimental shortage of personnel, the civil affairs units operating in Somalia were able to accomplish their short term mission of coordinating the civilian and military operations and responded well to unforeseen challenges. The formal timelines incorporated into the planning of UNITAF forced the rushed execution of the mission and led to the transfer of authority to a U.N. A mission that was not equipped to handle the chaotic situation on the ground. The U.S. military's eagerness to withdraw its forces ultimately led General Aideed to test the resolve of the remaining international peacekeeping force by ordering the murders of 24 Pakistani soldiers on June 4, 1994. The U.N. The decision to arrest

²¹⁴ Ibid.

²¹⁵ Kenneth Allard, *Somalia Operations: Lessons Learned* (Washington, DC Ft. McNair: National Defence University Press, 1996), 206

Aideed following this attack ultimately led Aideed's forces to declare war on the peacekeepers who eventually abandoned their mission in March of 1995.

Refugees

The three adjacent countries of the Horn (Sudan, Ethiopia and Somalia) today are thus more fragmented, weaker and poorer than ever before. In all cases the political leaders and the political system in general have not been able to accommodate the legitimate (seemingly legitimate) claims of the different forces and to build the state. Rather than make compromises to solve the problems peacefully, the authoritarian regimes preferred the use of force (political and economic militarization). For the same reason, they invited the superpowers and other countries to assist in maintaining their power. Such external involvement helped neither to solve the problem of the region nor to maintain the rulers in power as long as they wanted. Rather, worsened the problems, destroyed the state, impoverished the society and produced a mass exodus of refugee migration. Finally, the political leaders, who pushed their people to flee, joined them as refugees themselves (Mengisto Haile Marian of Ethiopia and Siyad Barre of Somalia are two examples).²¹⁶

Mass exodus of refugee migration has also been the other major feature of the Horn of Africa. The three countries are well known as both refugee generating and receiving countries. Ever since the 1960s the region has been well known for its huge refugee migration, and the refugee problem has become a permanent political and socioeconomic factor in the region. Barely a month passes without yet another refugee flow clamoring for attention. Current concept of refugee protection and assistance now face critical tests,

²¹⁶ Wondem Asres. *The State, The Crisis of State Institutions, and Refugee Migration In The Horn Of Africa. The Case of Sudan, Ethiopia, and Somalia*, Saverance Publishing Services (SPS) 2007

as even long-term advocates of generous asylum and relief wonder whether the world will be able to care for all its refugees and their seemingly interminable needs.²¹⁷ Moreover, as Smyser (1985: 155-159) has correctly put it 'what is most worrisome about the current refugee burden is not only the sheer number of refugees, however large it may be, but the long periods of time that they have spent in asylum... Most have little immediate prospect of going home or moving on... As crisis has followed crisis, and a new conflict obscured old ones, the world has been unable fully to absorb the consequences of one refugee flow before being faced with yet another'. As noted above, Smyser's description is a very clear reflection of the problem encountered in Africa in general and Somalia in particular.

The issue of referendum

It is possible to use the referendum to resolve a particular controversy about the design of the process or a substantive issue. It has been used, particularly in Latin America, to ask the people if they would prefer a constituent assembly to draft the constitution, or to secure the mandate for negotiations on a new constitutional order (as in the referendum of the white community in South Africa), on the mandate of the constitution-making body (as in France in 1957).

However, contrary to many developed countries where people vote for or against the document through a referendum, in Somalia, 621 elders endorsed the draft that ended the Transitional period. The draft was to be subjected to a nationwide referendum as soon as security improves. Somali Muslim scholars and other religious groups have condemned the latest adoption of the draft document and have questioned the manner in which the

²¹⁷ Ibid, P 4.

process of obtaining a new constitution had been conducted by both the Somali constitution committee and the United Nations.

The religious groups also noted that the constitution is a project of the West and accuse the Somali leaders for failing to notice some of the contentious clauses in the draft that touch on critical matters like the religion of Islam. Somalia factions, however say that the constitution can only be applied once the Somali government and the Muslim clerics reach an agreement on the contentious clauses since Somalis share the same religion.

4.4 Conclusion

Even though one cannot absolve the Somalis themselves of responsibility for their present *conundrum*, it is obvious that external actors have throughout played important and unfortunately mostly negative roles. Most of the time most of these actors have primarily become involved because it suited their own purposes rather than due to any sincere desire to help the Somali population. Even when they have been motivated by altruism, this has usually not sufficed to ensure that their involvement has had beneficial consequences. According to an assessment by International Crisis Group in a report published on the 23rd of December 2008: The international response has been inadequate. Instead of engaging meaningfully and forcefully in the search for a political solution, including with such regional actors as Ethiopia, Eritrea and Saudi Arabia, major outside actors have hurt the process (the U.S.) or sought *vainly* to prop up the TFG (the Europeans) and are now willing to support its extension, despite its disastrous record, while concentrating on the piracy issue to protect their own commercial interests.

The study thus concludes that quite a few external actors have “meddled” in Somali affairs for a wide variety of different reasons and with very divergent results. On balance,

the consequences of their involvement seem to have been negative in the sense of having exacerbated the conflict rather than solving it. Somalia would thus probably have been better off left alone. The study also concludes that Somalia is going to need considerable external support for the foreseeable future... If the assistance that is offered comes in the package of lots of conditionality and lots of demands and lots of top-down orders from the international donors, it is going to go down badly, and it is not going to work. So there is a need to find a way to provide the maximum support that Somalis need, while giving the Somalis maximum ownership of this recovery process.

CHAPTER FIVE

CONCLUSION

5.1 Summary of the Findings

The main purpose of this study was to analyze constitution making in Somalia from 1960-2013. The findings of the study established that the constitution-making task involves decisions about design, including who will use the product and how. The study established that there are decisions about how to consult the public and how to use the resulting contributions. Constitutions and corresponding concepts of constitutionalism are classified in various ways depending on the purpose for which the categorization is sought. According to the realist approach, a constitution is an expression of “the balance of power obtaining at the time of its making. Hence, a constitution represents that which is sanctioned or permitted by the existing state of affairs as regards power; it “merely divides the spoils between political elites

The study established that unlike many other African countries, Somalia upon independence actually enjoyed a significant sense of national identity because they share a common culture based on folk traditions, a pastoralist way of life, common language, and common religion-Sunni Islam. The study established that during the period of colonialism from roughly the 1880s to World War Two, the Somali people were administered by several European colonial powers: the French (in what is now Djibouti), the British (in what is now the self-proclaimed state of Somaliland, and Northern Kenya), and the Italians (in Somalia proper). As a result of these different colonial administrations and their administrative and governance traditions, the inhabitants of these regions experienced very different colonial legacies.

The study also established that during the first 9 years of civilian rule in Somalia, the government “proved to be experimental, inefficient, corrupt, and incapable of creating any kind of national political culture also, within the first year the enthusiasm for the unification waned as northerners began to realize how marginalized they were becoming. The study further established that from the late 1990s onwards much of southern Somalia experienced slight improvements in local systems of governance. In certain areas local polities, generally comprised of Sharia courts sprung up, providing some amount of law and order of the population. The resources of these courts were usually derived from a combination of private contributions and taxation of various business and militia activities. After years of protracted and bloody fighting in which families and clans suffered, local populations were displaced and local businesses were held hostage to militia tax-levies and protection money, Somali communities welcomed Sharia courts and supported them as a means of restoring the rule of law.

The study established that in June 2006, the UIC defeated the various clans based warlords who had effectively reigned over Mogadishu since the early 1990s and restored to a high degree of peace to the capital; a feat neither the warlords nor the internationally backed TFG were capable of. For the first time since the collapse of the Somali state, an organization managed to unite Mogadishu and deliver peace and security to its population. However, the success of the UIC was perceived as a threat by the TFG and Ethiopia, both of whom claimed that the UIC’s leadership included Muslim terrorists implicated in bombings in Ethiopia and Kenya, a claim reiterated by the US²¹⁸. The rule of the UIC, which had, for the first time since the late 1980s, brought relatively

²¹⁸ Lewis loan, *Understanding Somalia and Somaliland*, (London: Hurst Publishers, 2008), 34.

centralized political governance to southern Somalia was brought to an end by the oncoming Ethiopian invasion.

The study established that Somalia is going to need considerable external support for the foreseeable future... If the assistance that is offered comes in the package of lots of conditionality and lots of demands and lots of top-down orders from the international donors, it is going to go down badly, and it is not going to work. So we need to find a way to provide the maximum support that Somalis need, while giving the Somalis maximum ownership of this recovery process.”

The study also found that, contrary to many developed countries where people vote for or against the document through a referendum, in Somalia, 621 elders endorsed the draft that ended the Transitional period. The study also established that Somali Muslim scholars and other religious groups condemned the adoption of the draft document and questioned the manner in which the process of obtaining a new constitution had been conducted by both the Somali constitution committee and the United Nations. The study also found that religious groups also noted that the constitution is a project of the West and accuse the Somali leaders for failing to notice some of the contentious clauses in the draft that touch on critical matters like the religion of Islam.

5.2 Conclusion

Constitution making is a crucial moment where nations choose a constitution to be either instrument of democracy or discrimination, inequality, social unrest, a legalized dictatorship or others which defines undemocratic polity. The way constitutions are made necessarily leaves marks on the future polity. If constitutions are made involving all segments of interests with serious and genuine articulation of the situation the country

has long been lived; it will create a polity where actors are committed to live in and safeguard it. The reverse is, however, true in a polity where constitutions are made excluding factions who allege to have normative claim on the country's politics. In Somalia, constitutions had never been the product of negotiation of factions and the people.

While constitutions can fully be drafted even by expertise or a single group; it should necessarily consult the public and be approved by publicly praised organ involving all interest groups. The making of the new constitution, however, is short of this prerequisite. The Constitutional Commission, although attempted to consult the public; it was with no adequate civic education where more than 85% the population used to be illiterate; where the crowds were very minimal and with shy culture to express one's political opinions in public gatherings. Besides, the draft was not offered for public discussion in its full text with proper meanness. More importantly, the constitution was approved by a Constituent Assembly electives by the First-Past the Post electoral system and where TGF won 539 seats out of the total 557.

The Constituent Assembly, hence, played rather rubber- stamp function to TGF party program. This is clearly demonstrated on the content of the constitution as existed now. Self-determination on the bases of ethnicity, which make up the basic ideal of the constitution, and the land policy are among the predominant provisions which TPLF, in particular, had been fighting for. Besides, the absence of an independent organ to watchdog the process and in the existence of a considerable peace and stability also degraded the legitimacy of the process.

The fact of exclusion of all factions representing the diverse views and interests endured the constitution with foes which struggle for its eradication. The constitution is, therefore, in a threat. It is rather survived by military forces rather than actors feeling of ownership of the text. Besides, the fact of the government's domination and manipulation of the process has forced the opposition to associate the constitution with the government. As a result, while some are struggling for constitutional change others, on the other hand, proposed dozen of provision for a constitutional amendment which almost amount to a constitutional revision (i.e. Defined as a fundamental constitutional change or replacement). They also demanded a referendum, which is a non-constitutional means, to amend (as they call it) /revise the provisions they proposed. Moreover, the feeling of annoyance oppositions developed as a result of the exclusion from the process has stayed the people for long out of multi-party democracy.

Despite the successful end of the transition, the following points should be taken seriously in sustaining the gains made so far. After more than two decades of a lack of governance structures and leadership, there has been an exodus of human resources out of the country in search of greener pastures elsewhere. To sustain the successes of the transition, all actors should be capacitated. Investment must be made in building and restoring educational infrastructure to address the existing educational gap. Major plans must be drawn up to attract the human resources in the diaspora to return to meet the critical mass of people required for engagement and reconstruction efforts in the country.

Whilst the above plans are important, the ability of the Somali leadership to implement them on its own is challenged by the number of competing issues for it to address. This provides the context for the international community and development partners of

Somalia to continue engaging with the country in identifying and implementing priority projects needed for sustainable peace in the country. Fortunately, the new leadership has identified six priority areas that require international support to enable the leadership to deliver. It is, however, important that these efforts are based on Somali leadership and ownership. There is also a role for civil society organizations to play in building the capacity of the government to fulfill these requirements and priorities. The new government, with the support of the UN mission, needs to engage consistently with the diaspora and their representatives. This is because the diaspora has an important role to play in sustaining the gains made on the ground.

The lack of synchronization of the AMISOM and UNPOS operation sometimes creates confusion in the delivery of certain tasks. There has to be a structure where the political and military wings meet regularly to discuss and coordinate their activities on the ground and to operate as processes complementing each other. With the transition of UNPOS into a new expanded Special Political Mission as directed by the UN Security Council Resolution 2093, this challenge will cease to exist. However, synchronizing the activities of the new structure is crucial and important.

Traditional leaders are the custodians of Somali society. The Somali society is very conservative and that cannot be ignored when dealing with the country in the quest for peace. Where necessary, the traditional leaders should be involved in the running of the country, particularly in the post-conflict reconstruction stage. Their involvement should not be considered only when there is a crisis.

The issue of women representation and inclusivity is absolutely important, hence women as a critical component of civil society need to be incorporated as stakeholders. There

was a realization that despite the important role of women in the country, their involvement in leadership was minimal. Owing to the fact that the traditional leaders are also the principal custodians of the traditions and customs of the people, the marginalization of women in the Somali culture is always brought to the fore. It is particularly difficult to get the buy-in of the elders in achieving representation of women in political leadership positions. Somali society is patrilineal and male dominated and that is an influencing factor. The number of representatives assigned to the various clans also affects the participation of women in matters undertaken. For instance, if each sub-clan is entitled to one representative then that makes it difficult for women to become representatives since every sub-clan sought to be represented by a man, in this way locking out the participation of women.

5.3 Recommendation

Constitutional design is synonymous with walking on eggs. It can be done, but only with great skill and discretion. Constitutions are always done in time when the existing arrangement has been shown illegitimate as in Eastern Europe, ineffective as in the United States or both as in Indonesia or discriminatory and non-inclusive as in Nepal, South Africa and many other nations. Constitutional designs are, hence, always headed by instability, turmoil, distrust international pressure and a rushed time or are made in time when there are no purely constitutional moments.

The study proposes the following recommendations;-

The government of Somalia needs to fully involve public participation in constitution-making, so as to facilitate an inclusive process as well as include opportunities related to

a highly participatory process. Any civic education program should be inclusive, open, and credible. Because the constitution has an impact on all people in the country, it should represent everyone—all age groups (from school children to the elderly), and every possible significant group within the society, whether defined by class, culture, ethnicity, religion, or on any other basis. It should prioritize reaching those who seldom participate in the political life of the country (such as minorities and marginalized groups). Successfully preparing the people in this regard is not just a matter of holding an isolated event or workshop, but an ongoing process of cultivating a culture of public participation and democratic values and practices as well as constitutionalism.

The study also recommends that governments should focus on the tasks undertaken by the constitution-making bodies to promote public participation in the official process. They include preparing the public to participate through civic education and public information campaigns, as well as consulting the public on issues such as whether a process should take place (and how) and what should be in the constitution itself.

The study also recommends greater level of media activity in constitution making and stronger tradition of representation in helping to ensure that people have a chance to hear debates on constitutional issues without necessarily having direct involvement in the official process. A constitution-making body that develops good working relationships with civil society and the media in presenting an effective and helpful civic education program will often establish a precedent for open and democratic participation in governance in the future. It may lead the constitution-making body and the process itself to be viewed as more credible, accessible, and transparent.

The study also recommends that constitution-making processes should avoid the perils of manipulation of the people by interest groups, ethnicization of opinion, populism, and so forth. Otherwise the constitution-making process will become just another form of politics and not a deliberative process that generates consensus-building and reconciliation. It should promote conversations not only between the people and the constitution-makers (constitutional commissions, constituent assemblies, and the like) but also among the people themselves. This can make them aware of the histories, contributions, anxieties, and aspirations of others, and deepen the understanding that is so critical to developing national unity, conflict resolution, and peacebuilding.

Oppositions need also to take notice of the fact that amending the cornerstone of the constitution on the basis of party ideology is technically equivalent to the reconstitution of the country, which, is a making and breaking exercise. Unlike the experience of other nations, the fact that the constitution is with the very tight amendment provision and political body to interpret the constitution to make a redemption on our constitution most impossible. As a result, it is the ruling party which has a responsibility to do more tasks than anyone else in creating a feeling of ownership on the constitution and the constitutional order.

The study also recommends that governments should include the restoration of democracy in constitution-making process to make the process transparent and authentic. Greater attention needs to be given to the dynamics of public participation, the phases where such participation is appropriate, and the methods of public participation.

Finally, the new constitution was provisionally adopted on the basis that on achieving progress with security in the country, attempts would be made to subject the document to nationwide review and a referendum. Certain areas in the constitution are also to be decided in the future by parliament. These include issues around the role of sharia, citizenship, and the demarcations of the borders of the country. Regarding sharia, clarification about whether 'Sharia is a source of law' or 'the source of law' is still outstanding. Also outstanding is the issue of the nature and form of federalism in the country. Towards sustaining peace, the question of the constitution ought to be revisited to deal with the outstanding issues and eliminate existing criticisms of the document.

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