

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**EXAMINING APPROPRIATE ACCOUNTABILITY MECHANISMS FOR AL-
SHABAB ACTIVITIES IN SOMALIA**

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A Thesis submitted in fulfillment of the requirements for the Award of Master of Laws

NAIROBI, KENYA

DECLARATION

I, **BENSON WAWERU THUO**, declare that this thesis is my original work and has not been submitted for any degree in another university.

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LIST OF ABBREVIATIONS

AMISOM	African Mission on Somalia
AU	African Union
ICC	International Criminal Court
ICD	International Crimes Division
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICU	Islamic Courts Union
IGAD	Intergovernmental Authority on Development
IMFTE	International Military Tribunal for the Far East
KDF	Kenya Defence Forces
MDC	Movement for Democratic Change
NPA	National Prosecution Authority
PCIJ	Permanent Court of International Justice
SALC	Southern Africa Litigation Centre
SAPS	South African Police Service
SNA	Somali National Army
SRRC	Somali Restoration and Reconciliation Council
TFG	Transitional Federal Government
TNG	Transitional National Government
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly

UNHCR	United Nations High Commissioner for Refugees
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNOSOM	United Nations Operation in Somalia
UNSC	United Nations Security Council
USA	United States of America
ZEF	Zimbabwe Exiles Forum

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CHAPTER ONE

1.0. Introduction

Somalia and the Horn of Africa region are bound to be tested to the limits as foreign forces withdraw from the country over the next year. The African Mission on Somalia (AMISOM) will withdraw all its troops from Somalia by end of December 2021 upon the expiry of its mandate.¹ Other countries with contingents not part of AMISOM are also withdrawing their troops for domestic reasons. The United States, pursuing reduced overseas military engagement under President Donald J. Trump, has already begun its troop withdrawals. Ethiopia is said to have already withdrawn at least 3,000 troops from Somalia as it faces internal disturbances, particularly in the Tigray region² Critically, the troops are not just leaving a country. They leave behind millions of victims of the Al-Shabab terrorist group who have not been accorded justice and who face grim chances of ever attaining criminal justice.

States, whether individually or collectively, have a duty to investigate, prosecute and punish criminals for human rights violations. Failure to do so amounts to a breach of the victims' right of access to justice. The international community has always attached immense value to criminal justice. First, numerous regional and international human rights instruments recognise and define cardinal fundamental rights and freedoms, and spell out the obligations of States in observing, fulfilling, and protecting such rights. Beyond the treaties, under customary international law, there are certain crimes that the community of States has deemed an affront to humankind, and the perpetrators must be punished whether their States have ratified treaties prohibiting the crimes or not. Second, the international community has over the years established elaborate enforcement mechanisms designed to ensure States comply with obligations. The Human Rights Committee monitors the compliance of States with the International Covenant on Civil and Political Rights (ICCPR). The Committee against Torture monitors compliance with the United Nations Convention Against Torture, Inhuman or Degrading Treatment or Punishment. Moreover, the international community has always established accountability mechanisms for perpetrators of

¹ UNSC Res 2520 (29 May 2020) UN Doc S/RES/2520; Vincent Achuka, 'East Africa: Tough Times Ahead for Somalia as Troops Start Pulling Out' (AllAfrica 22 December 2020)

<<https://allafrica.com/stories/202012220086.html>> accessed 22 December 2020

² Ibid Vincent Achuka

grave crimes. Such mechanisms have ranged from international and regional courts as well as specialised international and hybrid tribunals. Third, there is rich jurisprudence emphasizing that victims of violations of human rights must be accorded justice by their State. Further, States have a legal duty to take reasonable steps to prevent human rights violations and to use the means at their disposal to seriously investigate violations committed within their jurisdiction, identify those responsible, punish them, and adequately compensate the victims.³ Where States are unable to undertake those duties, the international community must intervene to punish perpetrators and accord justice to victims.

There has not been any hope for victims of Somalia's armed conflict. Despite prima facie evidence that Al-Shabab is committing the gravest crimes of terrorism and even crimes against humanity and war crimes, there is a complete lack of accountability for perpetrators. This study focuses on the two later crimes whose prohibition constitutes a peremptory (*jus cogens*) norm in international law. Somalia is itself hampered by a lack of a functional government and weak institutions since 1991 when the government of Siad Barre fell at least until 2012 when the country managed to install its first permanent government post-Barre. With international support, Somalia has managed to establish a police force and a fairly remunerated, independent, and professional judiciary. However, challenges of deeply embedded corruption, clannism, and weak institutions persist. Somali institutions have still yielded limited results when it comes to holding Al-Shabab fighters accountable for their crimes in and around Somalia. There is a need to examine the available accountability mechanisms to ascertain how they can be improved or how mechanisms not being applied can be applied and in the process deliver justice to millions of Al-Shabab victims.

2.0. Background

There is growing alarm over a resurging growth of the Al-Shabab terror group in Somalia. According to the UN Sanctions Committee on Somalia, Al-Shabab's expenditure increased to \$21 million in just the past year⁴. Through a letter to the President of the UN Security Council,

³ *Velasquez-Rodriguez v. Honduras* (Judgment) (1988) IACHR Case Ser. C No. 4; *Garcia Franco v. Ecuador* (Judgment) (1997) IACHR Case 10.258 OEA/Ser.L/V/II.95 Doc. 7; *Trufin v Romania* (Judgment) (2009) IACHR Case no. 3990/04 32-34

⁴ UNSC, 'Letter Dated 28 September 2020 from the Chair of the Security Council Committee pursuant to Resolution 751 (1992) concerning Somalia Addressed to the President of the Security Council' S/2020/949 (28 September 2020) at p.12

the UNSC Committee on Somalia revealed that Al-Shabab is raising funds by collecting taxes (zakat) at the ports of Kisimayu and Mogadishu as well as checkpoints set up on roads in areas it controls⁵. Al-Shabab is operating without detection by Somalia's monetary and financial institutions. The Sanctions Committee reports that the group has been running two bank accounts at Salam Somali Bank in which one account is holding \$ 1.1 million raised through levies at the Mogadishu port in just four months.⁶ Fictitious persons made deposits to the account with little documentation. For instance, a person named "ABC" was said to have deposited \$25,000 supposedly without detection by the bank or Somali authorities.⁷

Al-Shabab's attacks have proportionately increased in brutality, frequency and intensity. Al-Shabab uses autonomously operated vehicles laden with explosive devices (VBIEDs) and other forms of improvised explosive devices (IEDs).⁸ On one occasion the group detonated two trucks in a civilian-populated area in Mogadishu thereby killing more than 512 people.⁹ The group punishes those who fail to conform to its stringent version of Islam by burying suspected persons of adultery in holes that reach the suspects' chest who they then pelt with rocks until death, in

⁵ UNSC, 'Letter Dated 28 September 2020 from the Chair of the Security Council Committee pursuant to Resolution 751 (1992) concerning Somalia Addressed to the President of the Security Council' S/2020/949 (28 September 2020) at p.8

⁶ Ibid, p.11

⁷ Ibid

⁸ UN Security Council, 'Security Council Press Statement on Terrorist Attack in Mogadishu, Somalia' (United Nations 29 November 2021) <<https://www.un.org/press/en/2019/sc14067.doc.htm>> accessed 26th November 2021; UN Security Council, 'Security Council Press Statement on Terrorist Attack in Kismayo, Somalia' (United Nations 15 July 2019) <<https://www.un.org/press/en/2019/sc13883.doc.htm>> accessed 26th November 2021; Aljazeera, 'Al-Shabab bombing near Mogadishu school kills at least 8' (Aljazeera 25 November 2021) <<https://www.aljazeera.com/news/2021/11/25/large-explosion-rocks-somali-capital-mogadishu>> accessed 26 November 2021; Daily Sabah, '3 dead, many injured as al-Shabaab terror hits Somalia's Mogadishu' (Daily Sabah 11 November 2021) <<https://www.dailysabah.com/world/africa/3-dead-many-injured-as-al-shabaab-terror-hits-somalias-mogadishu>> accessed 26 November 2021; Reuters, 'At least 30 Killed in Al Shabaab Attack in Somalia - Security Official' (Reuters 28 June 2021) <<https://www.reuters.com/world/middle-east/least-30-killed-al-shabaab-attack-somalia-security-official-2021-06-28/>> accessed 26 November 2021; AFP, 'Al Shabaab Jihadists Kill at Least 12 in Somalia Raid: Sources' (AFP 28 June 2021) <<https://www.thedefensepost.com/2021/06/28/al-shabaab-kills-12-somalia/>> accessed 26 November 2021; Kizzi Assala, 'Somalia: At least Nine Dead in Al-Shabaab Suicide Car Bombing' <<https://www.africanews.com/2021/07/10/somalia-at-least-nine-dead-in-al-shabaab-suicide-car-bombing/>> accessed 26th November 2021; Andrew Wasike, 'At least 15 al-Shabaab terrorists killed by their own bomb in Kenya' (AA 28 September 2021) <<https://www.aa.com.tr/en/africa/at-least-15-al-shabaab-terrorists-killed-by-their-own-bomb-in-kenya/2376535>> accessed 7 December 2021; Janet Mugambi, 'Al-Shabaab Militants kill Two in Lamu IED Attack' (The Standard 3 May 2021) <<https://www.standardmedia.co.ke/coast/article/2001411766/two-killed-in-lamu-al-shabaab-attack>> accessed 7 December 2021

⁹ Reuters, 'Death Toll from Somalia Truck Bomb in October now at 512: Probe Committee' (Reuters 30 November 2017) <<https://www.reuters.com/article/us-somalia-blast-toll/death-toll-from-somalia-truck-bomb-in-october-now-at-512-probe-committee-idUSKBN1DU2IC>> accessed 4 March 2021

barbaric and gruesome scenes that terrified villagers are forced to watch.¹⁰ Many more similar cases have been witnessed¹¹ including one in which a 13-year-old girl was stoned to death on accusations of adultery while those who tried pleading with the group not to stone her to death were shot dead.¹² They further abduct children and forcefully enlist them as fighters.¹³ At one point the UNSC found that at least 1,442 boys as young as 8 years had been recruited and enlisted in Al-Shabab ranks.¹⁴ More reputable sources have documented the enlisting of minors by Al-Shabab to its ranks. Young girls are frequently defiled and forcefully married off to fighters under whose custody the young girls undergo sexual violence.¹⁵ Abroad, the group has been just as

¹⁰ Amnesty International, 'Somalia: Unlawful Killings and Torture Demonstrate Al Shabaab's Contempt for the Lives of Civilians' (Amnesty International 24 November 2009) <<https://www.amnesty.org/download/Documents/44000/afr520092009en.pdf>> accessed 25th April 2018; Mail Foreign Service, 'Pictured: Islamic Militants Stone Man to Death for Adultery in Somalia as Villagers are Forced to Watch' (Mail Online 2nd May 2018) <<http://www.dailymail.co.uk/news/article-1235763/Pictured-Islamic-militants-stone-man-death-adultery-Somalia-villagers-forced-watch.html>> accessed 23rd April 2018; BBC News, 'Somali Woman 'with 11 Husbands' Stoned to death by Al-Shabab' (BBC News 9 May 2018) <<https://www.bbc.com/news/world-africa-44055536>> accessed 26 November 2021

¹¹ AllAfrica, 'Somalia: Al-Shabaab Sentences 3 People in Lower Shabelle Region' (AllAfrica) <<https://allafrica.com/stories/202110310051.html>> accessed 26 November 2021; BBC News, 'Somalia: Seven killed in Suicide Attack near Presidential Palace' (BBC News 25 November 2021) <<https://www.bbc.com/news/world-africa-58691016>> accessed 26 November 2021; VOA, 'Al-Shabab Stones Man to Death in Somalia' (VOA 28 May 2017) <<https://www.voanews.com/a/somalia-al-shabab-execution-by-stoning/3874724.html>> accessed 26 November 2021; Garowe Online, 'Somalia: Al-Shabab Stones Woman to Death for Polygamy' (Garowe Online 9 May 2018) <<https://www.garoweonline.com/en/news/somalia/somalia-al-shabab-stones-woman-to-death-for-polygamy>> accessed 26 November 2021; BBC News, 'Who are Somalia's Al-Shabab?' (BBC News 22 December 2017) <<https://www.bbc.com/news/world-africa-15336689>> accessed 7 December 2021;

¹² BBC News, 'Stoning victim 'begged for mercy' (BBC News 4 November 2008) <<http://news.bbc.co.uk/2/hi/7708169.stm>> accessed 7 December 2021

¹³ Laetitia Bader, Zama Coursen-Neff, Tirana Hassan, Human Rights Watch, *No Place for Children: Child Recruitment, Forced Marriage, and Attacks on Schools in Somalia* (Human Rights Watch 2012); Human Rights Watch, 'Somalia: Al-Shabab Demanding Children Residents Threatened to Hand Over Boys, Girls' (Human Rights Watch 14 January 2018) <<https://www.hrw.org/news/2018/01/15/somalia-al-shabab-demanding-children>> accessed 7 December 2021; Naomi Graves, 'The impact of explosive weapons on children in Somalia' (Action on Armed Violence 19 October 2021) <<https://aoav.org.uk/2020/the-impact-of-explosive-weapons-on-children-in-somalia/>> accessed 7 December 2021

¹⁴ UNSC, 'Children and Armed Conflict' (2020) A/74/845-S/2020/525 at page 19

¹⁵ Salvador Santino Jr. Fulo Regilme, and Elisabetta Spoldi, 'Children in Armed Conflict: A Human Rights Crisis in Somalia' (2021) *Global Jurist* at p.365; Human Rights Watch, 'Somalia: Al-Shabab Demanding Children: Residents Threatened to Hand Over Boys, Girls' (Human Rights Watch 14 January 2018) <<https://www.hrw.org/news/2018/01/15/somalia-al-shabab-demanding-children>> accessed 26 November 2021; DW, 'Rights group: Al Shabab Forcibly Recruits Children' (DW 15th January 2018) <<https://www.dw.com/en/rights-group-al-shabab-forcibly-recruits-children/a-42155456>> accessed 26 November 2021; Human Rights Watch, 'No Place for Children Child Recruitment, Forced Marriage, and Attacks on Schools in Somalia' (HRW 2012) <https://www.hrw.org/sites/default/files/reports/somalia0212ForUpload_0.pdf> accessed 26 November 2021; Jessica Trisko Darden, *Tackling Terrorists' Exploitation of Youth* (American Enterprise Institute May 2019) at p.4;

lethal. In Kenya, Al-Shabab has attacked and killed civilians killing scores.¹⁶ The United Nations High Commissioner for Refugees estimates that Al-Shabab's actions have resulted in the internal displacement of 2.1 million men, women and children from Somalia. Close to a million are living as refugees in Yemen, Kenya, and the Horn of Africa at large while scores of civilians have died in the fighting. The UN has blamed Al-Shabab for 60% of the deaths owing to its hindrance of humanitarian aid to starving and sick populations as well as gruesome killings.¹⁷

As AMISOM and other partner countries withdraw their forces, there is no end in sight for Al-Shabab's actions. They are part of a larger web of a global jihadist movement with long-term objectives. Al-Shabab declared their allegiance to Al-Qaeda in 2012, which was welcomed by Al-Qaeda's leader Ayman Al-Zawahri as a symbol of 'jihadi unity against the Zio-Crusader campaign and their assistants amongst the treacherous agent rulers'.¹⁸ They have declared that they will not relent until they establish an Islamic caliphate in the Horn of Africa. Failure to hold them accountable for their crimes only hardens their resolve and mocks their victims. It is the punishment that will bring about deterrence. Plato argues that punishment is not intended to retaliate the beastly acts of the perpetrator but to deter the perpetrator from committing the wrong again.¹⁹ The search for appropriate accountability mechanisms is further guided by lessons from Rwanda, DR Congo, Yugoslavia, Cote d'Ivoire, Kenya and Zimbabwe where armed conflicts and post-election violence were followed by internationally backed investigations and prosecutions

¹⁶ Cyrus Ombati, 'Two Cops Killed, 10 injured after Al-Shabaab ambush in Mandera' (The Star 04 December 2021) <<https://www.the-star.co.ke/news/2021-12-04-two-cops-killed-10-injured-after-al-shabaab-ambush-in-mandera>> accessed 7 December 2021; BBC News, 'Kenya attack: Mpeketoni near Lamu hit by Al-Shabab Raid' (BBC News 16 June 2014) <<https://www.bbc.com/news/world-africa-27862510>> accessed 7 December 2021; BBC News, 'Westgate attack: Two Jailed over Kenyan Shopping Mall Attack' (BBC News 30 October 2020) <<https://www.bbc.com/news/world-africa-54748341>> accessed 7 December 2021; Farai Sevenzo, Faith Karimi and Laura Smith-Spark, 'At Least 21 Killed as Kenya Hotel Siege is Declared Over' (CNN 17 January 2019) <<https://edition.cnn.com/2019/01/16/africa/kenya-hotel-complex-terror-attack/index.html>> accessed 7 December 2021; AlJazeera, 'Kenya Court Convicts three over Garissa University Massacre' (Aljazeera 7 December 2021) <<https://www.aljazeera.com/news/2019/6/19/kenya-court-convicts-three-over-garissa-university-massacre>> accessed 7 December 2021

¹⁷ United Nations Assistance Mission in Somalia, 'Protection of Civilians: Building the Foundation for Peace, Security and Human Rights in Somalia' (UNSOM December 2017); United Nations Mission on Somalia, 'Statement of the Special Representative of the UN Security General for Somalia Mr. Nicholas Haysom to the UN Security Council on 3 January 2019' (UNSOM 3 January 2019) <<https://unsom.unmissions.org/statement-special-representative-un-secretary-general-somalia-mr-nicholas-haysom-un-security-council>> accessed 14 January 2019

¹⁸Tristan McConnell, 'Al-Shabaab and Al Qaeda Co-Produce Video' (The World 10 February 2012) <<https://www.pri.org/stories/2012-02-10/al-shabaab-and-al-qaeda-coproduce-video>> accessed 27 November 2020

¹⁹ Plato, *Protagoras*, in Works of Plato 1993, 211-12 (I. Edman ed. 1956)

of suspects deemed to be potentially the most culpable. Perpetrators were brought to account before international courts, tribunals and national courts.

2.1. Statement of the Problem

Al-Shabab is committing the gravest human rights abuses in Somalia. They include the mass killings of civilians by use of IEDs and VBIEDs in civilian-populated areas and the execution of civilians, humanitarian aid workers, and doctors by stoning, firing squads, and targeted shootings in civilian-populated areas. Al-Shabab is also committing amputations, public lashes, and other forms of torture, inhumane and degrading treatment. Numerous cases evidencing these atrocities have been highlighted. It is known that Somalia controls swaths of territory in Somalia, particularly Central and Southern Somalia.²⁰ The group has a membership of approximately seven thousand local fighters and one thousand foreign fighters many of who are recruited in an organized manner to participate as suicide bombers and frontline fighters.²¹ The group is organized, with a hierarchy in which it is led by the *Shura* Council headed by the *emir*/ leader and deputized by a deputy *emir*.²²

There is prima facie evidence that the widespread and systematic nature (to put it in a broader sense) in which these atrocities are being committed points to the possibility that Al-Shabab is committing IHL breaches, particularly war crimes and crimes against humanity. Crimes like these are deemed as the worst and the perpetrator is considered the enemy of mankind. Customary international law holds that the perpetrator must always be punished.²³ Despite this, Somalia's national criminal justice institutions have not brought Al-Shabab perpetrators of war crimes and crimes against humanity to account. International criminal justice and other accountability mechanisms have also not brought Al-Shabab perpetrators to account. This is the major problem that necessitates the need to investigate what possible accountability mechanisms can be utilized to try Al-Shabab perpetrators for war crimes and crimes against humanity committed in Somalia.

²⁰Ibid Colonel Godfrey Buluma, Page 9

²¹ Colonel Godfrey Buluma, 'Al-Shabab: The Threat to Kenya and the Horn of Africa' (Master of Strategic Studies thesis United States Army War College thesis 2014) p 12

²² Michael Pompeo, 'State Department Designates Two Senior Al-Shabaab Leaders as Terrorists' (US Department of State 17 November 2020) <<https://2017-2021.state.gov/state-department-designates-two-senior-al-shabaab-leaders-as-terrorists/index.html>> accessed 24 February 2021

²³ *North Sea Continental Shelf, Germany v Denmark* (1969) ICJ Rep 3, ICGJ 150 (ICJ 1969), 20th February 1969, International Court of Justice

2.2.Hypothesis

This thesis hypothesizes that the Al-Shabab group is committing the most egregious international crimes including war crimes and crimes against humanity in Somalia with little or no accountability.

2.3.Research Objectives

2.3.1. General Objective

The general objective of this thesis is to investigate which accountability mechanisms can be efficient in bringing Al-Shabab to book for war crimes and crimes against humanity committed in Somalia.

2.3.2. Specific Objectives

- a) To investigate what war crimes and crimes against humanity Al-Shabab is committing in Somalia.
- b) To examine to what extent national and international criminal accountability mechanisms have been efficient on war crimes and crimes against humanity committed by Al-Shabab.

2.4.Research Questions

- a) What war crimes and crimes against humanity are Al-Shabab committing in Somalia?
- b) Why have Somalia's national institutions and international mechanisms failed in bringing Al-Shabab to account for war crimes and crimes against humanity?

2.5. Justification of the Study

The study responds to regional and international concerns about the Somalia armed conflict. There is tremendous concern about the future of Somalia and the region now that the mandate of AMISOM is fast coming to an end. The accountability mechanisms by Somalia and the international community do not appear to be effective in bringing Al-Shabab to account and curbing the armed group's activities. UNSC reports indicate that within the past one-year Al-

Shabab increased its expenditure to just above \$21 million.²⁴ This enabled the group to allocate \$16.5 to its military arm for the purchase of weapons and ammunition while \$ 4.9 million was allocated to its intelligence wing the Amniyaat.²⁵ These developments have been consistent with its ramped-up wide-scale attacks. There is compelling *prima facie* evidence that Al-Shabab is committing war crimes and crimes and crimes against humanity, something that has not been purposefully investigated and ascertained. The study seeks to investigate this phenomenon.

There are questions over whether Somalia's national institutions and international mechanisms are efficient at all in bringing Al-Shabab to account and according its victims justice. There has seemingly been an over-reliance by Somalia and its international partners on three main approaches: the military approach, negotiations and DDR (disarmament, demobilization and reintegration).²⁶ Unfortunately, the mechanisms have not been efficient in making Al-Shabab accountable for their actions. Military action is failing as Al-Shabab still controls large swaths of territory after more than 5 years of AMISOM's presence. Negotiations and DDR have been criticised as amounting to 'red carpet treatment' for defectors with effectively no accountability at all for grave crimes committed through complete amnesties and reintegration into the same Somali society they brutalized. There have been calls for effective accountability mechanisms that will prevent new injustices and achieve sustainable peace'.²⁷ This study attends to those grave concerns by examining the efficacy of current accountability mechanisms and proposing effective remedies. While most studies have concentrated on analysing the progress in defeating Al-Shabab militarily, this study focuses on making them accountable and goes ahead to examine the bottlenecks in the current mechanisms. Beyond this, the study will examine any proposed mechanisms which may be tested in Somalia to achieve the goals of criminal accountability for war crimes and crimes against humanity. The angle of war crimes and crimes against humanity is also unique because many studies have often concentrated on the aspect of terrorism. War

²⁴ UNSC Res2520 (29 May 2020) UN Doc S/RES/2520; Vincent Achuka, 'East Africa: Tough Times Ahead for Somalia as Troops Start Pulling Out' (AllAfrica 22 December 2020) <<https://allafrica.com/stories/202012220086.html>> accessed 22 December 2020

²⁵ Ibid

²⁶ Dr. Vanda Felbab-Brown, *The Limits of Punishment: Transitional Justice and Violent Extremism* (United Nations University 2018)

²⁷ Ibid Dr. Vanda Felbab-Brown

crimes and crimes against humanity are prohibited by customary international law and treaty law provisions that can circumvent a State being non-signatory due to the seriousness of the crimes.

The study will be beneficial to the international community including regional countries like Kenya and Ethiopia which have borne the brunt of the humanitarian crisis by hosting millions of refugees displaced by the armed conflict. Any mechanism that brings about accountability for Al-Shabab and limits their activities is of interest to them. Similarly, the study is vital to countries that have borne the brunt of Al-Shabab's brutal actions, as well as troop-contributing countries of the AMISOM. The study will further be of interest to the European Union, IGAD and AU countries that are interested in supporting Somalia's efforts in establishing efficient accountability mechanisms. For international organizations such as UNDP, UNODC, and other partner NGOs which support Somalia in the fields of Law, Governance, and Justice, the findings of this thesis could help guide them to identify the bottlenecks in Somalia's national institutions that hamper the country in achieving accountability for Al-Shabab atrocities. Within Somalia, the study will be beneficial to national institutions like its Parliament which may utilize the findings and proposals herein to inform its legislative and reform agenda. The study is also important to the Somali public and civil society in informing them of areas that they could push for legal reform.

Finally, the study will be of immense benefit to scholars of international criminal law and international humanitarian law, and the Somalia armed conflict in general. It will assist legal practitioners and policy makers in the Law, Governance and Justice sectors as well as students undertaking research. It will also contribute to the wealth of knowledge accumulated by my university through theses and other forms of published and unpublished works.

2.6.Theoretical Framework

2.6.1. Natural Law Theory

One of the earliest proponents of natural law was Socrates, a major Stoic philosopher. He argued that there was a natural law that guided man to choose between what is good and what is bad and from which individuals would appreciate moral values. He argued that there exist two kinds of justice: natural justice and legal justice. Natural justice is derived from natural law and its rules are applicable across the world regardless of time.²⁸ Socrates's work had a great impact on his

²⁸ Paul A. Vander Waerdt, *The Socratic Movement* (Cornell University Press 1994) p.18

students Plato and Aristotle. In his contribution to Greek philosophy, Aristotle was christened the father of natural law. He argued that there exists natural law which forms the foundation of natural justice which is valid everywhere and bears the same binding force irrespective of peoples' perspectives.²⁹ This is in contrast to what he called legal justice, which depends on the laws of a specific nation.

Plato took the discourse further arguing that the ideal society is founded on natural law³⁰. Beyond society, we live in an orderly universe whose foundations are forms, most importantly the form of good³¹. It is the form of good that enabled Socrates to resist the temptations of wealth and sex and reach the heights of prominence that he achieved and which enables us to overcome perversions.³² On a larger scale, Plato argued that the form of good prevents anarchy where the more ruthless and strong prey on the less strong and that it should therefore guide man-made law. St. Thomas Aquinas argued that there are moral principles, written on the human heart, which can be understood by all mature human beings immediately with little thought. St. Thomas Aquinas gave the example of the Decalogue (ten commandments) which he said derive from natural law and the most basic moral principles immediately, with little thought, *statim, modica consideratione*.³³ However, he maintained that although the Decalogue are inferences from the most basic moral principles and human beings could have either way deducted such principles on their own, the promulgation of the Law of Moses preserved these moral concepts from obscurity caused by sinful customs. This way, Aquinas affirmed the connection between natural law and positive or man-made law. Aristotle addressed the connection between natural law and positive or man-made law. To him, there exists an unwritten law common to all people on what is just and what is unjust, which concerns more important matters and has more authority than Statutes. The supremacy of natural law is since natural law is linked to customs, which are based on ancient and widely shared norms while written laws originate from temporary and partisan regimes.³⁴

²⁹ Aristotle, *The Politics* (University of Chicago Press 1984)

³⁰ Plato, *The Republic* (Cambridge University Press 2000)

³¹ Plato, *Gorgias* (Oxford University Press 1994) p.41

³² Plato, *Symposium* (Hackett Publishing 1976) p.15

³³ Joseph Boyle, 'Natural Law and the Ethics of Traditions' in Robert P. George Ed., *Natural Law Theory: Contemporary Essays* (Oxford 1994) p.11; Ibid St. Thomas Aquinas;

³⁴ Ibid Aristotle

The study seeks to examine mechanisms through which Al-Shabab can be brought to account for their crimes in Somalia. It posits that some of the crimes committed in Somalia are too egregious and breach universally accepted principles of morality and justice. To this extent, they are an affront to the entire international community and must be punished. The natural law theory is of great utility to the study mainly because of its emphasis on accountability for criminal acts. It further holds that national and international laws must at all times pursue the ends of according justice to victims of the most heinous crimes. States and the international community must collaborate to punish the offender so that the dignity of the person who was hurt is restored and the humiliation of the offence is undone.³⁵

While many of the natural law proponents believe in the primacy of God in setting the universal order, some are indeed atheists. Hugo Grotius, an atheist, believed that natural law is still valid even if there is no God and can be affirmed through reason in the absence of God. This study does not rely on a theological perspective to advance the natural law ends of punishment for egregious crimes. The thoughts of Marcus Cicero possess great utility. He proposed that natural law seeks the ends that cause our human happiness and lead humans to live in perfect union and charity cemented by mutual benefits and those who breach it should suffer the harshest penalties.³⁶ Looking at the thoughts of Hugo Grotius emphasizing the role of States individually and collectively to punish crimes for the ends Cicero finds to include human happiness, the United Nations Charter represents the current world order consensus. In Article 1 it states that the United Nations shall remove all threats to peace in line with the principles of justice³⁷ and achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.³⁸ The collaboration between national and international law in achieving criminal responsibility cannot be understated. This study goes beyond the United Nations Charter and looks at many international instruments relevant to criminal responsibility. The consensus represented by international treaties is important to bridge the gap found by critics of natural law theory. One of

³⁵ Hugo Grotius, *On the Law of War and Peace* (Library of Alexandria 2020) p.146

³⁶ Marcus Tullius Cicero, *The Republic and the Laws* (Oxford University Press 14 August 2008)

³⁷ United Nations Charter (Signed 24 October 1945) 1 UNTS XVI, Article 1(1)

³⁸ Ibid Article 1(3)

the criticisms aims at challenging its universality. Joseph Boyle³⁹ for instance argues that it is not reasonable that people across countries, civilizations, and cultures acknowledge the same unwritten moral laws. Some people may not know them because of cultural distortion or personal immorality.

2.6.2. Legal Positivism

This theory holds that only that law that is passed by man is valid. Law and morality are separate and have no connection. As a result, the authority of law is not dependent on morality validating it. The law's validity is determined by its source rather than its content. John Austin⁴⁰ coined the 'command theory' which holds that law originates from the commands issued by a sovereign to who subjects are in habitual obedience. In this theory, John Austin held that there are legitimate sanctions for those who do not comply with the command of the sovereign. The identity of the sovereign became a point of contention among positivists. Another positivist Hans Kelsen differed with John Austin primarily on who the sovereign to be obeyed should be. Kelsen questioned Austin's theory by giving the example of bandits who have the threat of force and can enforce their will. Kelsen thus argued that for a command to be binding, it must be issued not just by someone who is superior in power but one who is empowered by law through a normative order, to make commands.

The positive law theory has its position on the validity of law. This is also found in the debate between Hans Kelsen and Herbert Lionel Hart. While Kelsen had attributed the origin of law to the command of the sovereign, H.L.A Hart disagreed, terming Kelsen's theory insufficient and effectively holding that the sovereign's coercive orders cannot sustain the continuity of the law-making process in the modern legal system.⁴¹ Hart argued that a legal system is made up of primary rules of conduct and secondary rules of recognition which exist in a unity of rules. While primary rules are concerned with regulating the conduct of individuals, secondary rules work to provide certainty where the primary rules are uncertain or vague.⁴² Another positivist is Ronald Dworkin known for his 'Third Theory of Law'.⁴³ Principally in an attack on the natural school of

³⁹ Ibid Joseph Boyle

⁴⁰ John Austin, *The Province of Jurisprudence* (J.Murray 1832) p.139

⁴¹ Herbert Lionel Adolphus Hart, *The Concept of Law* (Legal Classics Library 1990)

⁴² Ibid Herbert Lionel Adolphus Hart p. 207

⁴³ Ronald Dworkin, *Law's Empire* (Fontana Press 1986) p.34

thought, he premised his theory on three pillars. The first pillar (termed the social fact thesis) held that the validity of law depends on social facts such as promulgation by the legislature. The second thesis, (the conventionality thesis) posited that the criteria that determine whether or not any given norm is binding are considered a legal norm if it arises from an implicit or explicit agreement among officials e.g. ratification. The third thesis (the separability thesis) rejected the argument that law and morality are interconnected. The positivist theory rejects the validity of international law over individuals. John Austin deemed international law not to be law *per se* but a collection of international collective responsibility. He further identified challenges lying in the enforcement of international law. He observed that international law which governs states and international organisations, is different from municipal law because it is not developed and lacks a super sovereign or law giver.⁴⁴

This study examines accountability mechanisms (both national and international) that can bring the perpetrators of heinous crimes to account. The positive school of thought bears great utility to the various discussions forming this study. John Austin expressed concern about the principle of legality in relation to international law. The principle holds that a person should only be punished if he does something prohibited by a sufficiently clear law. That law must have been in place before the alleged act was committed and must apply to that specific person. Paul Feuerbach coined the maxims *nullum poena sine lege* (no penalty without law) and *nullum crimen sine lege* (no crime without law) referred to in his renowned publication, *The Textbook of the Penal Law Commonly Valid in Germany* (1801)⁴⁵. John Austin⁴⁶ expressed concern that the principle of legality lacks clarity in international law. This was witnessed especially in the Nuremberg Trials.

The International Military Tribunal, trying accused persons for crimes against humanity, war crimes, and crimes against peace, was challenged on whether international law could try and punish crimes that had hitherto not been criminalised. It justified its ouster of the maxim *nullum* principle stating that it would be an injustice not to punish the accused in this respect.⁴⁷ In support, Hans Kelsen argued that considering the serious nature of crimes committed by the accused, it was in the interests of justice that the accused is punished even if the acts the accused committed

⁴⁴ Ibid John Austin

⁴⁵ Markus Dirk Dubber, *Foundational Texts in Modern Criminal Law* (Oxford University Press 2014) p. 119

⁴⁶ Ibid John Austin

⁴⁷ *Judgment of the Nuremberg International Military Tribunal* 1946 (1947) 41 AJIL

had not been prohibited by positive law since punishing those who had committed the most reprehensible crimes was more important than complying with rules. Bearing in mind that the principle of legality today bears greater international recognition through the Statutes of subsequent international criminal tribunals (International Criminal Tribunal for Rwanda and International Criminal Tribunal for Yugoslavia), the positivist school of thought and the debates under it are vital to the study. The ICTY for instance has held that the right to a fair trial under the International Covenant for Civil and Political Rights did not mean that the accused has to be tried before a court or tribunal pre-established by law but that an accused person may enjoy those rights before that tribunal. These arguments are bound to arise in this study.

2.6.3. Legal Realism

The theory holds that in interpreting the law or determining disputes, judges are influenced by personal biases on the economic, cultural and political underpinnings of the society. Oliver Wendell Holmes argued that law is beyond logic. He posited that in determining the rules that should govern men, judges are influenced by the present societal demands, the predominant moral and political beliefs as well as interests of public policy (emphasis mine). To Roscoe Pound⁴⁸, the law is dynamic and a product of social engineering. He viewed the law as less abstract and more practical or ‘real’. The law is all about interests be they societal or individual. Pound’s theory viewed societal interests from a utilitarian point of view. Interests are what people think their interests are. They can be economic development or public security. The common thread in the arguments by Holmes⁴⁹ and Pound⁵⁰ is that they both believed that the law can be interpreted purely based on what judges perceive as the public interest. Pound arguments are to the effect that judges may make certain decisions to protect the interests of the society even where the society in its ignorance doesn’t favor or appreciate the intended decision of the judges.

The exercise of criminal jurisdiction by courts is of great concern, especially where crimes such as those widely discussed herein, are concerned. There is an undoubted public interest that the most horrific crimes must be investigated and perpetrators held to account. This can be proven by the universal condemnation of such crimes. Prosecutors and judges do not need to seek

⁴⁸ Roscoe Pound, *An Introduction to the Philosophy of Law* (Amazon Digital Services LLC) P. 231

⁴⁹ Oliver Wendell Holmes, *The Common Law* (Cosimo Inc 2009); Oliver Wendell Holmes Jr, ‘The Path of Law’ 10 Harvard Law Review 457 at 469

⁵⁰ Ibid Oliver Wendell Holmes

affirmation from the public whenever they are confronted by decisions to bring about accountability for horrendous crimes. However, matters are not always in black and white. There have been various scenarios where the public has portrayed indifference towards mass murders for instance. The reaction of the law and the interpretation by judges in such scenarios has revealed controversies. How do judges ascertain what the desire of the public is if public discussion of matters before courts is restricted by the common law principle of *sub judice*? Fortunately, the boundaries of the *sub judice* principle are ever more decreasing. From a common law foundation where the intention was to prevent jury members from being swayed by public statements, judges in systems without juries no longer see the utility of the *sub judice* principle. After all, judges and magistrates are ‘well trained and capable of rising above the racket of public discussions and render objective, just and factual decisions’. It therefore follows that courts and prosecutors can rely on the universal condemnation of grave crimes even where enthusiasm for such prosecutions is lacking.

Beyond societal interest, legal realism also considers individual interests. These comprise legal rights which are neither granted by law or Parliament. Hugo Grotius argued that such rights (natural rights) were thus inherent in persons and every person had a duty not to injure another person as well as a corresponding right to seek recourse for injuries occasioned to him by another person. Courts have a duty to provide justice to victims of grave crimes. Ultimately, Roscoe Pound’s arguments leave us with an unresolved problem as he argues that in a situation of conflicting interests the judge should do no more than acknowledge the problem. The commission of grave crimes is an affront of both societal and individual interests. Such crimes are not victimless crimes. The victims are human beings individually and collectively. The term *hostis homini generis* comes to play. An analysis of how courts have approached similar cases is indispensable to provide a practical foundation for a comprehensive study.

2.6.4. Fairness Theory

John Rawls⁵¹ proponent that societies are founded and based on justice, specifically what would be fair. To him, the role of laws in society is to protect and uphold individual rights and freedoms. The law provides prohibitions that create institutions that are then given authority but also

⁵¹ John Rawls, *A Theory of Justice* (Harvard University Press 2009)

duties.⁵² Rawls provided a contemporary view of justice, different from the views espoused earlier by people like Aristotle. Perhaps mindful of other existing views, he was ever more careful to distinguish his as one purely based on the existence of institutions in a society that distribute rights and duties to the members of the society and determine the equal allocation of the resources held by the society in common. This view was completely different from Aristotle⁵³ who argued that justice is not part of virtue but the whole of it. The idea of Rawls can be summarized to mean that many things can be considered to be just but ultimately what is just should be what is fair and what is fair does not point to justice for society as a whole but justice that is owed to an individual and the accountability of each institution or individual for the denial of rights and freedoms of another individual in the society.

This theory is important for this study because it reinforces the notion of accountability in a society. Perpetrators of the most heinous crimes must be brought to book individually and collectively. War crimes and crimes against humanity have been identified under international customary law as crimes against the whole of mankind and the perpetrator is deemed *hostis generis humanis* (an enemy of mankind). Rawls' concept of fairness implores an obligation by Somali national institutions to bring to account perpetrators of the two crimes to book. Failure by the institutions amounts to a denial of the right to justice owed by Somali citizens by the State. Rawls' theory of fairness reinforces the importance of criminal responsibility which for Al-Shabab would be at the individual and the collective level. At the individual level, international criminal law strives to bring to account perpetrators who carry out various roles as part of a larger group. Individual criminal responsibility should rope in those who abet, finance, commit, aid, instigate, solicit, induce and facilitate the commission of the crime.⁵⁴ Such responsibility has been extended to those who occupy senior positions and give orders and commands.⁵⁵ Others have argued that there should also be criminal responsibility for groups as a collective because their offences are based on their collective participation.⁵⁶ This has led to international mechanisms

⁵² John Rawls, *Justice as Fairness: Original Edition* (Harvard University Press 2009) p.164

⁵³ Aristotle, *The Nicomachean Ethics* (Clarendon Press 1970) at p.260

⁵⁴ Rome Statute of the International Criminal Court (signed 17th July 1998 entered into force 1st July 2002) UN Doc 2187 U.N.T.S 90, Article 25

⁵⁵ *Ibid*, Article 28

⁵⁶ Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II 2, 26 [ARISWA]; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) at p.133; M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with

being developed to respond to the actions of NSAGs by curtailing their actions and attributing their actions (where the NSAGs act on behalf of States) to their State principals and financiers. The purpose of this thesis is to examine appropriate accountability mechanisms for Al-Shabab in Somalia. This theory is central to the study because it will examine to what extent Al-Shabab has been held accountable for war crimes and crimes against humanity. For Rawls, the major proponent of this theory, the absence of such mechanisms would mean there is no fairness and by extension justice in Somali society.

2.7. Literature Review

The Study will rely on several texts enumerated below and categorized in five main themes identified by Brian H. Bix⁵⁷ as core themes of jurisprudence:

Justice

Justice refers to the application of societal rules and regulations in a manner where the rules and regulations are adhered to, what is right is done and also parties receive equitable treatment.⁵⁸ Aristotle⁵⁹ argued that when men are allies, they need not pursue justice. This study relies on several texts that speak to this.

1. **IBP-USA**⁶⁰ examines Somalia's political and institutional framework and the capacity of the frameworks to bring to account perpetrators of serious crimes in Somalia. The book is vital to this study because it provides a social-political and legal background to the lack of efficient accountability mechanisms in Somalia. The book recounts Somalia's history since the 1991 break-up of the Somali Unitary State when Siad Barre was overthrown.⁶¹ The authors attribute the genesis of the lack of accountability mechanisms to that occurrence and further link the persistence of the problem to an over-emphasis by Somalia and the international community on the power-sharing⁶² aspect of national reconciliation and rebuilding, rather than on

International Humanitarian Law', 1 *Journal of International Humanitarian Legal Studies* (2010) 5 at p21-22

⁵⁷ Brian H. Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell 2009) p.105

⁵⁸ Ibid Brian H. Bix, p.107

⁵⁹ Aristotle, 'Nicomachean Ethics Book VIII' in J. Barnes (ed.), *The Complete Works of Aristotle* (Princeton University Press 1984) p. 1785-1787

⁶⁰ International Business Publications USA, *Somalia Recent Economic and Political Developments Handbook Volume 1 Strategic Information and Developments* (Lulu.com 2007)

⁶¹ Ibid International Business Publications USA, page 50, page 241

⁶² Ibid International Business Publications USA, page 18, 37, 133, 172

accountability for those who have committed and continue to commit IHL violations. For instance, the book notes that the arrival of a constitution establishing a federal government and providing for decentralization still failed at providing mechanisms for accountability for perpetrators of crimes committed in the course of the armed conflict.⁶³ However, the book falls short of examining what appropriate accountability mechanisms may be appropriate for Somalia. It also does not identify what IHL violations have been committed by Al-Shabab. These are crucial gaps that this Study will bridge.

2. It is logical to conclude that the continued commission of grave human rights violations by Al-Shabab is an indicator that there are either no efficient accountability mechanisms in Somalia. Part of this thesis is dedicated to examining whether this is the case. **John Rawls**⁶⁴ posits that societies are founded on justice and that the law creates institutions with authority to uphold individual rights and freedoms, bequeath duties and enforce prohibitions.⁶⁵ What the text posits is that justice is dependent on the rights and duties of individuals in a society and the bringing to account of any institutions or individuals that deny an individual or collectivity of individuals, their rights and freedoms.⁶⁶ Concerning Somalia, this Study adopts these arguments and seeks accountability for Al-Shabab's commission of war crimes and crimes against humanity. The study not only examines the utility of Somalia's national institutions in criminal accountability but also international mechanisms. Further, beyond Rawls, the Study goes beyond, on the principle of individual criminal responsibility, to rope in more specialized forms of liability such as aiding, instigating, financing, and ordering the commission of an offence as recognised by the ICC Statute⁶⁷ for individuals, but also, as advanced by others⁶⁸, criminal responsibility for groups as a collective based on their collective participation.

⁶³ Ibid International Business Publications USA, p.240

⁶⁴ John Rawls, *A Theory of Justice* (Harvard University Press 2009)

⁶⁵ John Rawls, *Justice as Fairness: Original Edition* (Harvard University Press 2009) p.164

⁶⁶ Ibid John Rawls, p. 150 - 180

⁶⁷ Rome Statute of the International Criminal Court (signed 17th July 1998 entered into force 1st July 2002) UN Doc 2187 U.N.T.S 90, Article 25

⁶⁸Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II 2, 26 [ARISWA]; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) at p.133; M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law', 1 *Journal of International Humanitarian Legal Studies* (2010) 5 at p21-22

3. Justice cannot occur in a vacuum. Political, social, and economic factors eventually influence how international criminal accountability may operate in a State. **Prof Ken Menkhaus**⁶⁹ has written extensively about Somalia. He argues that the fall of Siad Barre's government in 1991 created an opportunity for terrorist groups to thrive⁷⁰. His publication is crucial because compared to other publications on Somalia, this book looks at Somalia beyond the ordinary lens of warlords and anarchy. Menkhaus stresses the importance of responding to the armed conflict in Somalia, particularly by the international community.⁷¹ He argues that the Somalia armed conflict threatens regional and international peace and security⁷² because the lack of a central government and anarchy makes Somalia be a transit zone for terrorist groups from the Middle East and as a breeding ground for African home-grown terrorists like Al-Shabab.⁷³ These arguments provide the major foundation for this study's justification. Though the book proposes mechanisms geared towards rebuilding the Somalia State, post-conflict reconstruction and counter-terrorism⁷⁴ the Study goes ahead in search of accountability mechanisms, an aspect missing in the aforementioned literature.

4. The **International Law Commission**⁷⁵ addresses the issue of accountability for international crimes positing that in circumstances that amount to armed conflict, a NSAG can be held accountable for international crimes where such group satisfies set criteria. Such criteria require the NSAG to have a governmental authority which it exercises in the absence of legitimate governmental authority.⁷⁶ The commentary on Article 9 of the ILC's Draft Articles notes that the exercise of governmental authority by the NSAG should not be taken to mean that there is a complete lack of a legitimate or *de facto* government but that there may indeed be a *de facto* government but such government has lost control over the territory. The thesis

⁶⁹ Ken Menkhaus, *Somalia: State Collapse and the Threat of Terrorism* (Taylor & Francis Group Routledge 2017)

⁷⁰ Ibid Ken Menkhaus, p.32-33

⁷¹ Ibid

⁷² Ken Menkhaus, *Somalia: State Collapse and the Threat of Terrorism* (Taylor & Francis Group Routledge 2017)

⁷³ Ibid Ken Menkhaus , p10, p.71-73

⁷⁴ Ibid, p.77

⁷⁵ Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II 2, 26 [ARISWA]

⁷⁶ Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II 2, 26 [ARISWA], Article 9

cannot overlook the **Additional Protocol II to the Geneva Conventions**⁷⁷ which establishes the criteria of organised NSAGs that operate under a responsible hierarchy and exercise their authority over a section of a State's territory to a level enabling them to carry out military operations.⁷⁸ These two texts are vital to this study in giving indications into how NSAGs like Al-Shabab can be brought to account for committing international humanitarian breaches like war crimes and crimes against humanity. There are however grey areas that the thesis will attempt to address. While accountability of NSAGs to IHL is based on the theory of the State's legislative authority that presupposes the legitimacy of States for themselves and their nationals, NSAGs may argue that they had not consented to such legitimacy and that they are challenging it in the context of the armed conflict.⁷⁹ The Study will provide a multi-faceted view but with Somalia's context.

Punishment

Punishment is viewed as a core theme in jurisprudence and its ends vary from retribution to deterrence and rehabilitation.

5. **Immanuel Kant**⁸⁰ championed the idea that punishment serves to retaliate against wrongful actions. Kant argued that any other perspective to punishment besides retribution serves as a means to an end and not the end.⁸¹ This text provides a good outlook to be utilized by this Thesis concerning what needs to be done in the face of a *prima facie* absence of efficient accountability mechanisms for war crimes and crimes against humanity committed by Al-Shabab. So radical was Kant that he argued that even upon the dissolution of a society the last remaining murderers must be would have to be executed.⁸² These thoughts will be a core foundation of this Study's search for accountability of Al-Shabab perpetrators of the most heinous crimes. This thesis posits that such crimes cannot go unpunished. However, it does not maintain the radical Kantian view. It is appreciative of other aims of criminal punishment such

⁷⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Adopted 26th March 1999, Entered into Force 9th March 2004

⁷⁸ Ibid, Article 1

⁷⁹ GSDRC, 'IHL and Humanitarian Assistance involving Non-State Armed Groups' (GSDRC 2013)

<<https://gsdrc.org/topic-guides/international-legal-frameworks-for-humanitarian-action/challenges/ihl-and-humanitarian-assistance-involving-non-state-armed-groups/>> accessed 4th January 2020

⁸⁰ Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press 1996)

⁸¹ Ibid Immanuel Kant para 6:242

⁸² Ibid Immanuel Kant para 6:332 – para 6:333

as deterrence at an individual and criminal level. For instance, the thesis will seek to demonstrate that where accountability has been achieved following an IAC or a NIAC, recurrence of IHL breaches has been effectively quelled.

6. The book by **H.L.A Hart**⁸³ will be vital to the Study because the author underscores the importance of international criminal law. Hart, in this respect, takes a similar position to Kant above, that offenders must always be punished. However, his viewpoint is through the lens of an offender who has hurt the society by diminishing the authority of its laws or hurting members of the society, the society must punish such person.⁸⁴ These views of H.L.A Hart find their foundation in the concept of a State, which Thomas Hobbes⁸⁵ argued was established when men laid down their arms to avoid a state of anarchy and thus donated their rights to the State which then exercises power to protect lives and property.⁸⁶ In the contemporary world and relating to the theme of punishment, it is the State that exercises that right to retribution as an agent or proxy of the victim.⁸⁷ This Study will analyse whether that is being achieved. However, a preliminary view it can be argued that the military campaign by the Somalia National Army against Al-Shabab provides some level of retribution. The fact that the Somalia conflict has continued for so long could be a pointer that the military campaign is not succeeding. This Study is therefore vital in bringing the angle of the Somalia conflict and examining the efficacy of the current mechanisms are bringing about accountability or even retribution to victims.

7. One of the texts that the Study relies on to show the successes of accountability mechanisms is the book by **Justice Bankole Thompson**⁸⁸. It analyzes Sierra Leone's track record of prosecuting crimes committed outside its national borders. The writer recounts the trial of Charles Taylor, former President of Liberia for crimes against humanity and war crimes among other crimes committed in Liberia. The book tests the ability of Sierra Leone's judicial system

⁸³ H.L.A Hart, *H.L.A Hart, Prolegomenon to Punishment* (OUP 6 March 2008)

⁸⁴ Ibid H.L.A Hart at page 72, 81, 159

⁸⁵ Thomas Hobbes, *Leviathan* (Broadview Press 2002) at page 264

⁸⁶ Ibid Thomas Hobbes, at page 594

⁸⁷ Daniel N. Robinson, *Praise and Blame: Moral Realism and Its Applications* (Princeton University Press 2002)

⁸⁸ Justice Bankole Thompson, *Universal Jurisdiction: The Sierra Leone Profile* (Asser Press 2015)

in exercising domestic jurisdiction⁸⁹. The author⁹⁰ sets out the rationale of universal jurisdiction being the mechanism through which States perform their obligations to prosecute crimes whose prohibition constitutes *jus cogens* norm⁹¹. These are viewpoints that are crucial to this thesis. In its analysis of what accountability mechanisms can be tested in Somalia, the thesis will test how war crimes and crimes against humanity committed in Somalia can be tried. This is an area that is not within the scope of the publication.

8. The book by **Aisling O’Sullivan**⁹² proves even more resourceful. It begins by recounting the enthusiasm of the international community in the 1990s to try perpetrators of serious crimes. The book first discusses the rationale of trying such crimes, wading into the discussion of the justification for the principle⁹³ and positing that one of the rationales of international criminal tribunals trying perpetrators for international crimes is the interest by the international community to end impunity.⁹⁴ The author goes ahead to argue that there is a universal moral code that is safeguarded by international law and applies to perpetrators who must be brought to account even if they are stateless.⁹⁵ This thesis will benefit from these arguments because they underpin the need to seek accountability for war crimes and crimes against humanity in Somalia.
9. One of the most vital accountability mechanisms for war crimes and crimes against humanity is the International Criminal Court. This explains that while the thesis will utilize several treaties, the **Statute establishing the International Criminal Court**⁹⁶ will be cardinal to this Study and deserves a notable mention. One of the most important contributions of the text is the international law position on crimes against humanity. The crime (as opposed to other international crimes) has no treaty dedicated to it. This is not the case with other crimes like war crimes, terrorism etc. Article 7 of the treaty is a representation of international consensus

⁸⁹ Ibid Justice Bankole Thompson, page 42, 48, 55

⁹⁰ Ibid Justice Bankole Thompson, page 29-37

⁹¹ Ibid Justice Bankole Thompson, page 75-79

⁹² Aisling O’Sullivan, *Universal Jurisdiction in International Criminal Law: The Debate and the Battle for Hegemony* (Routledge 2017)

⁹³ Ibid Aisling O’Sullivan p.8

⁹⁴ Ibid, p.29

⁹⁵ Ibid Aisling O’Sullivan p.53

⁹⁶ Rome Statute of the International Criminal Court (signed 17th July 1998 entered into force 1st July 2002) UN Doc 2187 U.N.T.S 90

since the treaty was arrived at by consensus among member states. Article 7 is important to this study because other than outlining the criminalised acts which amount to the offence, the text requires the offence to have been committed in a widespread and systematic fashion. This provision requires that attacks must have been committed in furtherance of a State or organisational policy. This thesis will enrich the discourse by considering what international criminal jurisprudence has said about what constitutes this organisational policy. These perspectives cannot be gotten from the Statute. Rather, they can be gotten from other explanatory texts like the ICC Elements of Crimes⁹⁷ as well as decisions of the ICC and international criminal tribunals.

10. This thesis will also review numerous cases decided by various international courts and tribunals. One of the most vital cases is the *Kenya*⁹⁸ decision of the ICC. The decision will provide among other things, the utility of the requirement of an organisational policy to prove crimes against humanity. In the decision, the court maintained the position that a State or organisational policy requires that the attack exhibits a consistent design in that if it pertains to a NSAG then the NSAG must have been able to exercise its authority. That the attack had been planned and organized would meet this test. Further, the determination that a NSAG has an organisational policy is a matter that needs to be confronted on a case to case basis, by checking to see whether the organisation has the means to carry out the attack, controls a part of the State's territory, conducts the breaches mainly against civilians, etc.⁹⁹ This decision is not uncontested. The major challenge to this approach is the school of thought that there should be a more liberal approach to organisational policy. It has been promoted by the ICC as well as ICTY and ICTR¹⁰⁰. This thesis will review all this jurisprudence and provide all alternative perspectives to the organisational policy element.

⁹⁷International Criminal Court, 'Elements of Crimes' 2nd November 2000 (ICC-ASP/1/3 (Pt II-B), UN Doc PCNICC/2000/1/Add.2), OXIO 195

⁹⁸International Criminal Court, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (31 March 2010)

⁹⁹Ibid International Criminal Court para 83 - 93

¹⁰⁰ International Criminal Court, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi' ICC-01/17-X-9-US-Exp (25 October 2017); Prosecutor v Dragoljub Kunarac, Radomir Kivac and Zoran Vukovic (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-96-23-T & IT-96-23/1-T (22 February 2001); Prosecutor v. Laurent Semanza (Judgment) Case No. ICTR-97-20-t, 15 May 2003; Prosecutor v Gacumbitsi (Judgment) Case No. ICTR-2001-64-T 299, 17 June 2004

Will and Reason

This theme has been explained by Brian Bix in two angles. He argues that will refers to the responses one gets when they make choices and conclusions at a personal level.¹⁰¹ Such responses or answers can be made by individuals, groups or institutions. This is why “will” is associated with positivists as they posit laws are deduced from rules and laws written down. On the other hand, reason refers to decisions one takes because it would be right to do so.¹⁰² This requires revelation from a higher being which becomes apparent to human beings through reason.¹⁰³

11. The text by **H.L.A Hart**¹⁰⁴ is particularly vital to this Study. Hart invented the theory of the “rule of recognition” in which a legal system is comprised of rules which are understood and recognised by all persons in that society.¹⁰⁵ However, beyond these rules, there is a primary rule that renders all other rules secondary. This primary rule determines the validity or invalidity of other laws. While the secondary rules are promulgated by selected officials, the primary rule is arrived at by officials at a convention and affirmed by citizens of the society.¹⁰⁶ While for Positivists the primary rule must be the measure of validity for all human actions and secondary laws, naturalists on the other hand argue that the actions of human beings and the validity of man-made laws must conform to moral reasoning.¹⁰⁷ These arguments possess great utility to this study in various angles. The study into the effectiveness of accountability mechanisms for crimes committed in Somalia must encompass an analysis of Somalia's national institutions. It is given that the corpus of law establishing these institutions will be found in Somalia's constitution (or the primary rule) as well as national laws enacted by their Parliament or elected officials. This study however goes beyond those two bodies of law to incorporate international law. This study will review what customary international law provides as well as treaty law and to what extent such law is binding in Somalia as pertains the bringing to account of Al-Shabab perpetrators for war crimes and crimes against immunity.

¹⁰¹ Brian H. Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell 2009) p.139

¹⁰² *Ibid.*

¹⁰³ *Ibid* Brian H. Bix, page 140

¹⁰⁴ H.L.A. Hart, *The Concept of Law* (2nd Edition, Clarendon Press 1992)

¹⁰⁵ *Ibid* H.L.A. Hart, p.44-49, 100-103

¹⁰⁶ *Ibid* H.L.A

¹⁰⁷ *Ibid* Brian H. Bix, page 142; Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) p.150

12. One of the core texts that bring out the application of international law in Somalia from a Somalia-specific angle is the publication by **Chris Albin-Lackey**¹⁰⁸. He posits that numerous grave crimes have been committed by various parties in Somalia and proposes the idea of the UNSC establishing a mechanism such as a Commission of Inquiry to document the grave human rights abuses and lay the groundwork for accountability.¹⁰⁹ The writer suggests that based on the findings of the proposed Commission of Inquiry, the Transitional Federal Government of Somalia can launch an independent, and transparent investigation into allegations of serious human rights violations committed by armed groups and TFG forces.¹¹⁰ Evidently, the TFG is now an institution of the past and Somalia has an indirectly elected and internationally recognised Federal government. Somalia also now has national institutions albeit nascent ones. To this extent, this discourse will benefit from this study immensely as the study is more current and captures the present reality. The publication is still important, especially to this study. This is because it reinforces the call for the investigation of grave human rights abuses in the Somalia armed conflict. The book posits that Al-Shabab should adhere to international humanitarian law and cease committing breaches against civilians, particularly in how they use civilians as human shields amid hostilities and carry out indiscriminate attacks that result in civilian deaths.¹¹¹ This study takes the approach of seeking accountability for the NSAG and does not consider the NSAG as one which would be interested in any way, to adhere to the IHL framework it has for long shown disdain for. Moreover, the study seeks to enrich the discourse by considering the involvement of new entrants into the armed conflict like the UNSC sanctioned AMISOM which the publication has not addressed. Finally, the study examines current accountability mechanisms, their efficacy, and how they can be improved. This is a significant gap the publication has and the thesis will see to address.

¹⁰⁸Chris Albin-Lackey, *“So Much to Fear”: War Crimes and the Devastation of Somalia* (Human Rights Watch 2008)

¹⁰⁹Ibid Chris Albin-Lackey, p.7

¹¹⁰ Ibid

¹¹¹Ibid Chris Albin-Lackey at p.11

Obligation to Obey the Law

Brian H. Bix¹¹² suggests that individuals follow the law based on factors like consent and consequences.¹¹³ Consent to obey a law comes through some activities such as voting or inaction where they are taken to have implicitly consented to the law.¹¹⁴ For consequences, it is expected that those who obey laws do so to avoid punishment. This theme is central to this thesis. It is important to find out whether the reason there is impunity in Somalia is that there are no laws that threaten punishment or whether there are no laws at all that NSAGs abide by and respect.

13. **Joseph Raz**¹¹⁵ poses questions regarding the obligation to obey laws. He first questions whether consent to laws creates a moral obligation to obey the laws and dictates of a regime and to what extent this moral obligation goes. Effectively he asks whether a person can consent to be killed where a law provides that he be killed as punishment.¹¹⁶ It may be argued, for instance, that the single act of voting for a government cannot be tantamount to consent to all the laws that the government enacts during its term in office.¹¹⁷ This text provides valuable lessons when it comes to the Al-Shabab group. For instance, while Somalia has laws that criminalise murder¹¹⁸, rape¹¹⁹ among other offences, Al-Shabab has continued to commit those crimes with little accountability.¹²⁰ To what extent, therefore, can Al-Shabab be expected to obey Somalia's national laws? Can the NSAG even be said to have consented to Somalia's national laws when a significant number of Somalia's fighters are foreign? The Study will look into these aspects which are not covered in Raz's publication.

14. The corpus of international law, whether international customary law or treaty law is created by State practice or the consent of States. The private individual is not involved. The

¹¹² Brian H. Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell 2009) p.139

¹¹³ Ibid Brian H. Bix at page 178

¹¹⁴ Ibid Brian H. Bix

¹¹⁵ Joseph Raz, *Ethics in the Public Domain* (Clarendon Press 1994)

¹¹⁶ Ibid Joseph Raz at page 344-353

¹¹⁷ Ibid Brian H. Bix at page 179

¹¹⁸ Penal Code Legislative Decree No. 5 of 16 December 1962, Article 434

¹¹⁹ Ibid, Article 398

¹²⁰ UNOSOM & UN OCHR, 'Protection of Civilians Report Building the Foundation for Peace, Security and Human Rights in Somalia 1 January 2017 – 31 December 2019' (OCHR)

<https://www.ohchr.org/Documents/Countries/SO/UNSOM_protection_of_civilians_2020.pdf> accessed 1 February 2020, page 2

publication by **Carsten Stahn**¹²¹ looks at international criminal law and posits that pegs its observance on its role in protecting individual and collective interests such as peace and security, individual and group rights.¹²² Beyond a country like Somalia, there is a global human rights framework that is respected and protected across nations. The author posits crimes that breach the framework and universal beliefs are deemed crimes against the international community and their punishment works to reinstate the universal beliefs.¹²³ It has been posited that in international criminal law war crimes and crimes against humanity are breaches that breach these values.¹²⁴ This study looks into these positions and examines to what extent a NSAG and/or its members can be held accountable for breaches of this manner. Carsten Stahn also brings a unique perspective to criminality which is State Criminality. Basically, he argues that a State may prosecute crimes because the crimes are a threat to its interests.¹²⁵ This Study would posit that expectedly, Somalia ought to be concerned with the human toll in terms of deaths of civilians¹²⁶ and destruction of property¹²⁷ caused by the armed conflict. There are also economic interests such as tourism and trade¹²⁸ which have been adversely affected by the actions of the NSAG. This Study will look into these perspectives and their weight in Somalia's interest in punishing the commission of war crimes and crimes against humanity. It will take the discussion further to examine the incentive by regional States like Kenya and Uganda in trying crimes committed in Somalia especially because of the insecurity and humanitarian crisis caused by the armed conflict and affecting such neighboring States.

¹²¹ Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019)

¹²² Ibid Carsten Stahn, page 16

¹²³ Ibid Carsten Stahn, page 157

¹²⁴ Cherif Bassiouni, M., *Crimes against Humanity: Historical Evolution and Contemporary Application*. Cambridge (Cambridge University Press 2011) at page 86

¹²⁵ Ibid Carsten Stahn, page 322-324

¹²⁶ UNOSOM & UN OCHR, page 19-33; Harun Maruf, 'Al-Shabab Attacks Killed 4,000 in Past Decade, Says Data-Gathering Group' (VOA 15 January 2020) <https://www.voanews.com/a/africa_al-shabab-attacks-killed-4000-past-decade-says-data-gathering-group/6182660.html> accessed 15 January 2020

¹²⁷ UNSC, 'Letter dated 5 October 2021 from the Chair of the Security Council Committee Pursuant to Resolution 751 (1992) concerning Somalia addressed to the President of the Security Council' (6 October 2021) S/2021/849, page 4, 13, 85

¹²⁸ African Development Bank Group, 'Somalia Bank Group Country Brief 2017-2020' (African Development Bank Group East Africa Regional Center September 2017) <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Somalia-Country_Brief_2017-2020.pdf> accessed September 2018

15. The applicability and observance of IHL in States depend on the classification because specific breaches are tied to the body of law dedicated to the classification of armed conflict that governs the situation. In his journal article, **Rogier Bartels**¹²⁹ addresses the legal controversies behind the classification of armed conflicts. He observes that international courts and tribunals have often avoided classifying an armed conflict as an IAC or a NIAC.¹³⁰ He provides a chronological account of the development of the classification itself, tracing the origin to the Geneva Conventions of 1949 and their Additional Protocols of 1977. Common Article 3 of the Geneva Conventions provided for conflicts not of international nature i.e. NIACs while Article 2 of the Geneva Conventions addressed IACs which may arise between two or more High Contracting parties, whether such wars are declared or not.¹³¹ However, beyond all this and due to the provisions under their Statutes which have often failed to differentiate, tribunals such as ICTY have opted not to differentiate the two conflicts.¹³² These lessons are important to this study because while this study examines the enforcement mechanisms that can be tested in Somalia, one cannot count out the possibility of an international criminal tribunal into the Somalia armed conflict. Where such an option is tested, the lessons from ICTY, ICTR and other specialised international criminal tribunals would be of great utility. The journal article also looks into the issue of internationalisation of non-international armed conflicts but looks at the situation where another State intervenes through its troops or some other parties on its behalf.¹³³ The article does not comprehensively address the effect of a multi-national force and whether the MNF internationalizes the conflict. This study will take the discourse further and address the effect of the MNF in a NIAC, especially within the context of the UNSC sanctioned AMISOM in Somalia.

¹²⁹ Rogier Bartels, 'The Classification of Armed Conflicts by International Criminal Courts and Tribunals' (2020) 595 *International Criminal Law Review*, p. 600

¹³⁰ *Ibid* Rogier Bartels, page 604, 607, 642

¹³¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Article 2

¹³² *Prosecutor v. Kvočka et al.* (Trial Chamber Decision on Judicial Notice) ICTY-IT-98-30/1 (8 June 2000); *Prosecutor v. Simić et al.* (Trial Chamber, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina Case) ICTY-IT-95-9-T (25 March 1999); *Prosecutor v. Halilović* (Trial Chamber, Judgment) ICTY-IT-01-48-T (16 November 2005) para. 25.

¹³³ *Ibid* Rogier Bartels, page 603

2.8.Limitations

The objectives of this research would be best realized if it was possible to travel to Somalia and carry out interviews with major players in Somalia's criminal justice system. Respondents would render vital insight into factors that hamper the success of Somalia in the pursuit of accountability for heinous crimes. Such insight is valuable because it is based on first-hand experiences. Unfortunately, travel to Somalia will not be possible as a result of logistical and security challenges. The research will attempt to mitigate these challenges by relying on reports of specialised UN committees, regional and international organisations such as the UNHCR, UNDP, UNSC, IGAD, AU, AMISOM etc. Their considerable presence in Somalia will help bridge the information gap that this research would have otherwise suffered as a result of the weak but budding judicial framework and law reporting system in Somalia.

2.9. Research Sources and Methodology

The thesis utilizes seven main research sources. First, the thesis will make use of regional and international treaties. This, in relation to Somalia or any other State, will be subject to the established status of accession and/or ratification in line with the doctrine of *pacta sunt servanda* that determines the applicability of such treaties in States. Second, the thesis will utilize the decisions of international judicial institutions. These include courts like the International Criminal Court or the International Court of Justice, as well as international criminal tribunals like the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda, as well as international hybrid courts. Third, the thesis will analyse and apply decisions made by national courts in leading democracies in Africa and abroad. Fourth, the study will utilize books by distinguished scholars, peer-reviewed journals, reports, and other publications of reputable institutions. Finally, the thesis will utilize theses written by postgraduate students in Africa and beyond.

This thesis will adopt several research methods. It will adopt descriptive research methodology, mainly seeking to define the most fundamental international humanitarian law concepts and phenomena and examine their applicability to the Somalia situation. The thesis will also adopt an analytical research methodology. This will require the application of premises established to suggest possible solutions to the problem identified by this study. Finally, the thesis will adopt a qualitative research methodology, comprising a textual analysis of the aforementioned seven

main research sources. Most of the publications will be accessed at the University of Nairobi Parklands Campus library, Jomo Kenyatta Library both in Nairobi. Others will be accessed online.

2.9.1. Geographical Scope

The study will focus on Somalia, the country in which the non-international armed conflict is centered on.

2.10. Chapter Breakdown

Chapter One: Introduction

Chapter One bears the overview of the study. It begins with an introduction to the Chapter that defines the theme of the thesis and the issues raised therein. This is followed by a background to give the context in which the issues raised in the thesis have occurred. Chapter one also provides a statement of the problem. This section aims to outline the legal issues that the thesis seeks to address. The next section presents the four hypotheses or assumptions that the thesis makes.

The thesis then outlines the general and specific objectives. The thesis has settled on four specific objectives. I have attempted to provide a brief justification of the study. The justification outlines reasons why the study is important and the different national and international players that the study will be beneficial to. This is followed by a section on literature review which outlines the various literature that the thesis has utilized and the gaps therein that the thesis seeks to address. Chapter one then concludes with limitations facing the thesis, research sources and methodology utilized and finally the chapter breakdown that provides an overview of Chapter One.

Chapter Two: Investigating War Crimes and Crimes Against Humanity by Al-Shabab

Chapter Two will investigate the possible commission of crimes against humanity and war crimes by Al-Shabab based on *prima facie* evidence that they are. The Chapter will not examine genocide because there isn't sufficient *prima facie* evidence to warrant a deeper analysis. Notwithstanding, the Chapter will look into the issue a bit further. For war crimes, the Chapter will examine whether the situation in Somalia satisfies the threshold required for an armed conflict under International Humanitarian Law. If this standard is found to have been satisfied, the study will investigate what war crimes Al-Shabab are committing. The study will rely on the Geneva Conventions and the

ICC Statute in the analysis of war crimes. As opposed to war crimes, there is no specific treaty dedicated to crimes against humanity. The study will have to evaluate how the crime has been tackled under the ICC Statute and other Statutes of specialised courts and tribunals. The study will investigate what crimes against humanity Al-Shabab is committing and if any.

Chapter Three: Examining the Efficacy of Accountability Mechanisms applied to Al-Shabab Crimes

Chapter Three will investigate to what extent the current accountability mechanisms have been efficient in Somalia. The continued commission of grave human rights abuses in Somalia is an earlier pointer that some or all of the mechanisms are not functioning well to bring Al-Shabab perpetrators to account and accord justice to victims. After evaluating what accountability mechanisms are in Somalia, the Chapter will investigate further the problem caused by the inefficiency of the accountability mechanisms. Finally, after the Chapter examines the factors that have hindered the success of accountability mechanisms, it will suggest measures that can improve those mechanisms for maximum results.

Chapter Four: Conclusion

Chapter Five provides a conclusion to the entire thesis by laying out a brief analysis of the main salient findings of each Chapter specifically the efficacy of current accountability mechanisms for crimes against humanity and war crimes in Somalia. The chapter also provides the study's thesis on any reforms that can be implemented to enhance or establish efficient accountability mechanisms for Al-Shabab war crimes and crimes against humanity in Somalia.

CHAPTER TWO

INVESTIGATING WAR CRIMES AND CRIMES AGAINST HUMANITY BY AL-SHABAB

2.0. INTRODUCTION

Most studies investigating terrorist groups often place focus on terrorism and its related offences. This Chapter's approach is different because it examines Al-Shabab's culpability for war crimes and/or crimes against humanity. The Chapter is comprised of four main parts. The first part will examine whether Al-Shabab is committing war crimes. It will begin by inquiring whether the Somalia situation presents a case of a rebellion, insurgency, or armed conflict. Where an armed conflict is determined, the Chapter will investigate if the armed conflict is international or non-international. Depending on the kind of armed conflict, international law recognizes actions, breaches and/or violations that constitute war crimes. This part will examine what actions of Al-Shabab constitute these breaches and whether or not Al-Shabab actions satisfy the legal threshold for such crimes.

The second part will examine whether Al-Shabab is committing crimes against humanity. Article 7 of the ICC Statute outlines 11 prohibited acts which when committed against a civilian population in line with an organisational policy and a widespread or systematic attack constitute crimes against humanity. This part will methodologically examine what prohibited acts Al-Shabab has committed by investigating whether its actions satisfy the elements set out by the ICC Elements of Crimes as constituting each crime. This section will also examine whether Al-Shabab possesses an organisational policy considering the jurisprudence surrounding the two mainstream approaches to an organisational policy: the restrictive approach and the liberal approach. Based on its findings, this part will conclusively determine whether Al-Shabab is culpable for committing crimes against humanity. The third and final section will conclude the Chapter by summarizing the Chapter's findings demonstrating to what extent the findings confirm the culpability of Al-Shabab for war crimes and crimes against humanity. The United Nations Assistance Mission in Somalia (UNSOM) has noted the challenge with the lack of sufficient information relating to human rights abuses by Al-Shabab in the areas it controls. This problem is mainly caused by insufficient information due to lack of access to the areas and the fact that many living in the NSAG's controlled areas are afraid of sharing information as the group may

kill them.¹³⁴ This study will therefore document the actions of Al-Shabab as reported by UN organs and agencies, other reputable organisations like Amnesty International and Human Rights Watch, as well as reputable news organisations.

2.1.WHETHER AL-SHABAB ARE COMMITTING WAR CRIMES

Determining whether war crimes are being committed or not depends on whether an armed conflict exists. An armed conflict is dependent on the degree of violence in a given situation that reaches the threshold of an armed conflict. This position has been maintained including by the UNSC which when defining the jurisdiction of the ICTY, determined that its jurisdiction would be limited to crimes committed during an armed conflict.¹³⁵ In *Tadic*¹³⁶ the ICTY held that to determine that war crimes have been committed, two things must be proven. An armed conflict, whether internal or international, must have existed. Secondly, the offences committed must have been committed within the context of the armed conflict. This decision was held by the ICTY in the *Slobodan Milosevic*¹³⁷ the ICTY Trial Chamber pointed out that the requirement of armed conflict in proving war crimes is also consistent with Article 8 of the ICC Statute. The Article creates a distinction between armed conflicts and scenarios bearing lesser intensity of violence such as internal disturbances that occur in a State like riots. Consequently, this part will start by examining whether there is an armed conflict in Somalia. It will then establish what war crimes are being committed if any.

2.1.1. Whether there is an Armed Conflict in Somalia

Whether an armed conflict has occurred or not depends on the degree of violence and the nature of the parties involved. Lower levels of violence could signal the existence of a rebellion or an

¹³⁴United Nations Assistance Mission in Somalia (UNSOM) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Protection of Civilians: Building the Foundation for Peace, Security and Human Rights in Somalia' (OCHR December 2017) <<https://reliefweb.int/sites/reliefweb.int/files/resources/ReportProtectionofCivilians.pdf>> accessed 25 January 2021, Page 18

¹³⁵ UNSC Res 827 (25 May 1993) UN Doc S/RES/827

¹³⁶ *Prosecutor v Dusko Tadic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-94-I-T (7th May 1997)

¹³⁷ *Prosecutor v. Slobodan Milosevic* (Decision on Interlocutory Appeal on Kosta Bulatovic Contempt Proceedings), IT-02-54-A-R77.4, International Criminal Tribunal for the former Yugoslavia (ICTY), 29 August 2005 para 20

insurgency which are dealt with by a State using its public order laws, mechanisms and institutions.¹³⁸ The international community has often shown little interest to intervene in such matters in line with the principles of state sovereignty, territorial integrity and political independence. Both the ICC Statute¹³⁹ and the Additional Protocol to the Second Geneva Convention¹⁴⁰ provide that where the violence is only characterized by ‘internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature’ then an armed conflict (even a non-international armed conflict) cannot be deemed to exist. Where the violence intensifies and the State no longer just relies on the police and similar public order mechanisms but engages the military, an armed conflict is deemed to exist.¹⁴¹ In *Tadic*¹⁴², the ICTY considered the involvement of paramilitary forces, Serbian military forces and non-State armed groups to determine that an armed conflict had occurred holding that where a State resorts to using its armed forces whether in a conflict with another State or with non-State armed groups, an armed conflict is deemed to exist. Common Article 3 of the Geneva Conventions also deems an armed conflict to arise where the insurgents are granted the status and rights of combatants by way of a special agreement by parties to the conflict. There is no evidence that Somalia has signed any special agreement with the NSAG. However, the use of armed forces by Somalia against the NSAG¹⁴³ would qualify the Somalia situation to amount to an armed conflict.

As stated earlier, low levels of violence could signify an insurgency as opposed to an armed conflict. Insurgencies are civil disturbances limited to a part of the territory of the State under the control of the rebels and with the support of a section of the people living in the territory under the rebels’ control. The insurgents must also be able and willing to comply with international

¹³⁸ Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (Clarendon Press 1990) p.23-24

¹³⁹ Rome Statute of the International Criminal Court (signed 17th July 1998 entered into force 1st July 2002) UN Doc 2187 U.N.T.S 90, Article 8(2)(d)

¹⁴⁰ Additional Protocol to the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, Article 1

¹⁴¹ *Ibid* Additional Protocol to the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)

¹⁴² *Prosecutor v Dusko Tadic* (Judgment), International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-94-I-T (7th May 1997)

¹⁴³ UNSC, ‘Situation in Somalia: Report of the Secretary-General’ (13 May 2020) S/2020/398 para 2, 8, 9, 18, 34, 35, 51, 66; UNSC, ‘Letter dated 5 October 2021 from the Chair of the Security Council Committee Pursuant to Resolution 751 (1992) concerning Somalia addressed to the President of the Security Council’ (6 October 2021) S/2021/849, para 10, 12, 17, 20, 21, 38, 39

obligations.¹⁴⁴ A review of the actions by Al-Shabab does not point to an insurgency because Al-Shabab neither enjoys the support of the people living in the areas it controls nor complies with international obligations. Instead, hundreds of thousands of civilians living in the areas it occupies have sought to escape the group's brutality. UNHCR reports that at least 256,000 Somali refugees have fled to Ethiopia while a further 272,490 refugees have fled to Kenya.¹⁴⁵ Those left in Somalia live in fear of Al-Shabab's brutality and have often urged foreign forces not to leave Somalia.¹⁴⁶ Al-Shabab is not willing to comply with international obligations. They have often breached international obligations by committing egregious crimes such as brutal killings of persons who are protected under international law such as civilians and humanitarian aid workers. It cannot, therefore, be determined that there is an insurgency.¹⁴⁷ The earlier finding that there is an armed conflict in Somalia therefore stands.

2.1.2. Whether the Somalia Armed Conflict is International or Non-International

The closest the Geneva Conventions get to distinguishing between an international or non-international is their common article 3.¹⁴⁸ Even so, the provision does not define armed conflicts. Rather, it distinguishes them through the violations that may be particularly committed in a non-international armed conflict. Common article 3 would have been best placed to define what a non-

¹⁴⁴ S.K. Verma, (1998) *An Introduction to Public International Law*, Eastern Economy Edn., at Pp 113; Dhokalia, R.P., "Civil wars and International law", 35 A.J.I.L. 219(1971) at p. 225

¹⁴⁵ UNHCR, 'Statistical Summary as of 31 December 2020: Refugees and Assylum Seekers in Kenya' (UNHCR 31 Dec 2020) <<https://www.unhcr.org/ke/wp-content/uploads/sites/2/2021/01/Kenya-Statistics-Package-31-December-2020.pdf>> accessed 1 February 2021

¹⁴⁶ AlJazeera, 'US Troop Withdrawal Dismays Some Somalis' (AlJazeera 5 December 2020) <<https://www.aljazeera.com/news/2020/12/5/some-somalis-dismayed-by-us-decision-to-withdraw-troops>> accessed 1 February 2021

¹⁴⁷ UNSC, 'Letter dated 5 October 2021 from the Chair of the Security Council Committee Pursuant to Resolution 751 (1992) concerning Somalia addressed to the President of the Security Council' (6 October 2021) S/2021/849, para 22, 30,31, pages 30-32; Xinhua, 'UN says 15 aid workers killed in Somalia in 2020' (Xinhua 25 March 2021) <http://www.xinhuanet.com/english/africa/2021-03/25/c_139833235.htm> accessed 11 December 2021; Katy Migiros, 'Attacks on aid workers in Somalia almost double in 2015, kill 17: U.N' (Thomson Reuters Foundation 26 January 2016) <<https://www.reuters.com/article/us-somalia-aid-attacks-idUSKCN0V428E>> accessed 11 December 2021; Moses Rono, 'Somalia food crisis: Has al-Shabab adopted new approach to food aid?' (BBC News 22 March 2017) <<https://www.bbc.com/news/world-africa-39296517>> accessed 11 December 2021

¹⁴⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287

international conflict should entail. Erik Castren¹⁴⁹ who was one of the drafters of the Convention contends that the provision's omission of a definitive description was deliberate and purposed to avoid providing a restrictive or inflexible definition of a non-international armed conflict. Similarly, the ICC Statute only provides what actions may constitute war crimes in international armed conflicts¹⁵⁰ and non-international armed conflicts¹⁵¹ while the ICC Elements of Crimes provides the constitutive elements of each war crime. International criminal jurisprudence from the ICC, ICTY and ICTR is more definitive. It posits that the difference between an international armed conflict and a non-international conflict is that while an international armed conflict involves two or more armed forces of States a non-international armed conflict involves armed forces of States and the military wings of non-state armed groups.¹⁵²

The Somalia armed conflict involves the Somalia National Army and Al-Shabab, a non-State armed group. Although this dynamic fits the description of a non-international armed conflict above, the involvement of foreign troops of Ethiopia, the USA and AMISOM contributing countries like Kenya, Uganda and Burundi must be taken into consideration, in terms of what effect they have in this categorization. Do they internationalise non-international armed conflict?

In *Tadic*¹⁵³ and *Celebici*¹⁵⁴ the ICTY held that a non-international armed conflict becomes "internationalized" where a foreign State backs a non-State armed group. The ICTY has suggested the "overall control test". Internationalization occurs when an outside State has 'overall control' over an armed group that participates in a *prima facie* non-international armed conflict.¹⁵⁵ This position was also shared by the ICC in *Katanga*¹⁵⁶. The ICC considered the non-international

¹⁴⁹ Erik Castrén, *Civil War* (Suomalainen Tiedeakatemia, Helsinki, 1966), p. 85

¹⁵⁰ Ibid Rome Statute of the International Criminal Court, Article 8(2) (a-b)

¹⁵¹ Rome Statute of the International Criminal Court Article 8(2)(c-d)

¹⁵² *Prosecutor v Dusko Tadic* (Judgment), International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-94-I-T (7th May 1997); *Prosecutor v. Zejnil Delacic, Zdravko Mucic, Hazim Delic, Esad Landzo* ("Celebici Case") (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-96-21/1-A (20 February 2001)

¹⁵³ *Prosecutor v Dusko Tadic* (Judgment), International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-94-I-T (7th May 1997)

¹⁵⁴ *Prosecutor v. Zejnil Delacic, Zdravko Mucic, Hazim Delic, Esad Landzo* ("Celebici Case") (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-96-21/1-A (20 February 2001)

¹⁵⁵ Rogier Bartels, 'The Classification of Armed Conflicts by International Criminal Courts and Tribunals' (2020) 595 International Criminal Law Review, p. 600

¹⁵⁶ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the confirmation of charges) ICC-01/04-01/07 OA 8 (30 September 2008) at para 243

armed conflict occurring in the Ituri region of the DRC that involved DRC's armed forces and several armed groups. The involvement of Uganda's army and its support to some of the armed groups was deemed to have internationalized the armed conflict. It is clear that an international armed conflict occurs where two States are engaged in an armed conflict or where a foreign State intervenes to support an armed group in a hitherto non-international armed conflict. None of these two criteria have been satisfied. No jurisprudence has been created by the ICC or international criminal tribunals to the effect that where a foreign State intervenes to aid the host State in its non-international armed conflict, the non-international armed conflict becomes internationalized. The International Committee of the Red Cross (ICRC) posits that a non-international armed conflict (NIAC) is internationalised where one or more foreign States or a multinational force (MNF) intervene in support of a State involved in an armed conflict against a non-State armed group (NSAG) or in support of an NSAG against a State.¹⁵⁷ This does not apply to multinational peacekeeping forces¹⁵⁸ which UNSC created AMISOM as.¹⁵⁹ It is for this reason that this Chapter can safely conclude that the Somalia non-international armed conflict has not been internationalized.

2.1.3. Examining Al-Shabab's Culpability for War Crimes

War crimes are prohibited under the four Geneva Conventions of 12 August 1949 and the ICC Statute. The difference between the two sets of Conventions is that breaches under the Geneva Conventions are considered to be breaches of international customary law and can thus be prosecuted by any State under its national jurisdiction. There have also been cases where the UN has established international criminal tribunals and specialised courts to prosecute such breaches. On the other hand, breaches of war crimes are prosecuted before the ICC. A further distinction is that circumstances in which war crimes can be prosecuted under the ICC Statute are limited and not open-ended as with war crimes under the Geneva Conventions. Prosecution before the ICC can only occur if a State Party, through the UNSC's referral or where the Prosecutor obtains

¹⁵⁷ ICRC, 'Internationalized Internal Armed Conflict' (ICRC) <<https://casebook.icrc.org/glossary/internationalized-internal-armed-conflict>> accessed 4th June 2021

¹⁵⁸ Eric David and Ola Engdahl, 'How does the Involvement of a Multinational Peacekeeping Force affect the Classification of a Situation?' (2013) 95 International Review of the Red Cross <<https://international-review.icrc.org/sites/default/files/irrc-891-892-david-engdahl.pdf>> accessed 4th July 2021

¹⁵⁹ UNSC Res 1725 (6 December 2006) S/RES/1725; UNSC Res 1744 (21 February 2007) S/RES/1744 (2007)

authorisation from the ICC Pre-Trial Chamber to investigate war crimes.¹⁶⁰ In terms of the content, the crimes are identical. The ICC Statute adopts the categorization of crimes under the Geneva Conventions.

Although Somalia is a State Party to the Geneva Conventions (Ratification / Accession: 12th July 1962), whether or not the State is a signatory would have been immaterial due to the customary international law status mentioned above. The same status cannot be extended to the Additional Protocols, which Somalia is not a State Party to. There is hardly any consensus on whether the Additional Protocols constitute customary international law. In *Tadic*¹⁶¹ the ICTY held that Additional Protocol II central to the protection of civilians in non-international armed conflicts is not universally considered to bear the status of customary international law. Organisations like Médecins Sans Frontières have suggested that since Common Article 3 of the Geneva Conventions constitutes customary international law and that the provision is the overarching theme of APII, certain provisions of APII may be considered to reach the status of customary international law.¹⁶² Even so, those provisions are yet to be identified. Somalia has however recognised Article 4 which provides guarantees to persons taking no active part in hostilities, Article 5 which prescribes humane treatment of persons whose liberty has been restricted and Article 6.¹⁶³ For Somalia, Al-Shabab is just as obligated to adhere to international humanitarian law. According to the International Law Commission¹⁶⁴ a NSAG can be held accountable for international crimes where such group satisfies set criteria. Such criteria require the NSAG to have the governmental authority which it exercises in the absence of legitimate governmental authority.¹⁶⁵ The commentary on Article 9 of the ILC's Draft Articles notes that the exercise of governmental authority by the NSAG should not be taken to mean that there is a complete lack of a legitimate or *de facto* government but that there may indeed be a *de facto* government but such government has lost control over the territory. Additional Protocol II to the Geneva

¹⁶⁰ Ibid Rome Statute of the International Criminal Court, Article 13

¹⁶¹ *Prosecutor v Dusko Tadic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-94-I-T (7th May 1997) at para 117

¹⁶² Médecins Sans Frontières, 'The Practical Guide to Humanitarian Law' (MCF) <<https://guide-humanitarian-law.org/content/article/3/international-humanitarian-law/>> accessed 12 January 2021

¹⁶³ Somalia, 'Report to the Human Rights Council' 11 April 2011 U.D. Doc A/HRC/WG.6.11/SOM/1, para 75

¹⁶⁴ Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II 2, 26 [ARISWA]

¹⁶⁵ Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II 2, 26 [ARISWA], Article 9

Conventions¹⁶⁶ establishes the criteria of organised NSAGs which operate under a responsible hierarchy and exercise their authority over a section of a State's territory to a level enabling them to carry out military operations.¹⁶⁷ Article 1 of the Hague Regulations provide that the laws, rights and duties of war apply not only to armies but also to militia and volunteer corps as long as they are commanded by a person responsible for his subordinates, the group has a fixed distinctive emblem recognizable at a distance, the group carries arms openly and the group conducts their operations per laws and customs of war. Groups bearing these characteristics are termed "belligerents". The 1907 Regulations annexed to the Hague Convention IV of 1907 and Hague Convention IX are widely accepted as international customary law and are binding on all parties in all conflicts at all times. Al-Shabab operates under a responsible command and maintains a hierarchical structure. It is headed by the *Shura* Council headed by the *emir*/ leader and deputized by a deputy *emir*.¹⁶⁸ The Al-Shabab group also has an emblem that includes a young man holding a rocket-propelled grenade, the Koran guarded by two guns with the map of Somalia, and parts of Kenya's and Ethiopia's territories.¹⁶⁹ The group has defined territory.¹⁷⁰ Al-Shabab is therefore subject to the laws of war with the Hague Regulations terming them as belligerents. A state of belligerency occurs where an insurgency increases in intensity and the belligerent group exhibits the aforementioned characteristics. Article 3 of the Hague Regulations¹⁷¹ provides that armed forces of the belligerent parties may consist of combatants and non-combatants. In the Somalia

¹⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Adopted 26th March 1999, Entered into Force 9th March 2004

¹⁶⁷ Ibid, Article 1

¹⁶⁸ Michael Pompeo, 'State Department Designates Two Senior Al-Shabaab Leaders as Terrorists' (US Department of State 17 November 2020) <<https://2017-2021.state.gov/state-department-designates-two-senior-al-shabaab-leaders-as-terrorists/index.html>> accessed 24 February 2021

¹⁶⁹ Abdisaid M. Ali, 'The Al-Shabaab Al-Mujahidiin - A Profile of the First Somali Terrorist Organisation' (The IGAD Joint Kenya-Uganda Border Security and Management Workshop, Jinja Uganda, 28 April 2008)

¹⁷⁰ United Kingdom Home Office, 'Country Policy and Information Note Somalia: Al Shabaab' (UK Home Office November 2020)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933800/Somalia-a-Al-Shabaab-CPIN-V3.0e.pdf> accessed 19th November 2020, para 2.4.1., para 2.4.9, para 2.4.10, para 2.4.25; European Asylum Support Office, 'Somalia Targeted Profiles Country of Origin Information Report September 2021' (EASO)

<https://reliefweb.int/sites/reliefweb.int/files/resources/2021_09_EASO_COI_Report_Somalia_Targeted_profiles.pdf> accessed 4th September 2021 pages 17, 23, 27, 96

¹⁷¹ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Entry into force 26 January 1910 Date of Adoption 18 October 1907)

case Al-Shabab may be considered combatants. To what extent are Al-Shabab committing the four main categories of war crimes?

2.1.3.1. Grave breaches of the Geneva Conventions of 12 August 1949

The four Geneva Conventions prohibit the same war crimes. Article 50 of the First Geneva Convention¹⁷², Article 51 of the Second Geneva Convention¹⁷³, Article 130 of the Third Geneva Convention¹⁷⁴ and Article 147 of the Fourth Geneva Convention¹⁷⁵ prohibit the grave breaches of willful killing, torture or inhuman treatment, willfully causing great suffering and unlawful deportation, transfer or unlawful confinement. The provisions also prohibit the destruction of property without military necessity. The last category of grave breaches relates to persons held by a party in a war. In this sense, the Geneva Conventions deem it to be a war crime to take hostages, to compel a prisoner of war (or any other protected person) to serve in a hostile power's forces and also to deprive a prisoner of war or other protected persons the right to a fair trial. The ICC Statute prohibits the same war crimes¹⁷⁶. All these provisions relate to international armed conflicts and cannot therefore be considered when it comes to the Somalia armed conflict. The ICC Statute which considers grave breaches of the Geneva Conventions to constitute war crimes also requires that each grave breach must have been committed in an international armed conflict.¹⁷⁷ It would therefore be erroneous to find that Al-Shabab has committed the grave breaches and consequently prosecute them for the commissions within the definition of the ICC Statute.

In *Blaskic*¹⁷⁸ and *Tadic*¹⁷⁹ the ICTY held that for willful killing, even where it is determined that a person committed a physical act or omission that resulted in the death of the victim (*actus reus*)

¹⁷² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31

¹⁷³ Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85

¹⁷⁴ Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135

¹⁷⁵ Geneva Convention Relative to the Protection of Civilian Persons in Times of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287

¹⁷⁶ Ibid Rome Statute of the International Criminal Court, Article 8(2)a)

¹⁷⁷ International Criminal Court, 'Elements of Crimes' 2nd November 2000 (ICC-ASP/1/3 (Pt II-B), UN Doc PCNICC/2000/1/Add.2), OXIO 195, p.13-31

¹⁷⁸ *Prosecutor v. Tihomir Blaskic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-95-14-T (3 March 2000)

¹⁷⁹ *Prosecutor v Dusko Tadic* (Judgment), International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-94-I-T (7th May 1997)

while bearing the intent to kill, or to inflict serious bodily injury in reckless disregard of human life (*mens rea*), a perpetrator would only be held liable for willful killing if the killings had been committed in an international armed conflict.¹⁸⁰ Consequently, Al-Shabab's killings of innocent civilians, politicians and humanitarian aid workers in Somalia and Kenya through bombings in densely populated civilian areas like hotels, markets, schools and even hospitals¹⁸¹ cannot be deemed to constitute grave breaches of the Geneva Conventions under the Geneva Conventions or ICC Statute. The same rationale excludes the second category of war crimes recognised by Article 8(2)b) of the ICC Statute in terms of the listed 26 serious violations of the laws and customs applicable in international armed conflict.

2.1.3.2. Serious violations of Article 3 common to the Geneva Conventions committed in a non-international armed conflict

Common Article 3 addresses armed conflicts not of an international character that are committed in the territory of any one of the High Contracting Parties. As noted earlier, common Article 3 is deemed to form part of customary international law thus it applies to situations appearing in any State.¹⁸² The provision recognizes four serious violations. First is violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. The second violation is that of taking of hostages. The third violation is that of outrages upon personal dignity, in particular humiliating and degrading treatment. Finally, Article 3 prohibits the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Is Al-Shabab committing these violations?

First, on the war crime of murder the ICC Elements of Crimes requires that the perpetrator must have killed one or more victims knowing his/their status (of a civilian, medical personnel, or religious personnel taking no active part in the hostilities or any person placed *hors de combat*). Further, the perpetrator must have committed the murders in a non-international armed conflict

¹⁸⁰ Ibid International Criminal Court, 'Elements of Crimes' 2nd November 2000, Article 8 (2) (a) (i)

¹⁸¹ UNSC, 'Situation in Somalia: Report of the Secretary-General' (13 May 2020) S/2020/398 para 20-23, 40, 49, 52, 55, 68

¹⁸² *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgement (27 June 1986) ICJ Reports 1986, p.100

while in the full knowledge that there is an armed conflict¹⁸³. A review of Al-Shabab's actions reveals numerous cases of Al-Shabab's murders of civilians, medical personnel and humanitarian aid workers and journalists in roadside improvised explosive devices as well as targeted shootings and grenade attacks.¹⁸⁴ Al-Shabab has also indiscriminately launched mortar attacks from densely civilian-populated areas in attacks that kill civilians not involved in the fighting.¹⁸⁵ Al-Shabab murders protected persons while in full knowledge of their status. They have on several occasions stated that their actions are intended to demonstrate their outright rejection of the authority of the Mogadishu-based and western supported federal government, that they intend to fight till all their objectives are met.¹⁸⁶ This proves that the terrorist group is aware of factual circumstances that established the existence of an armed conflict. This demonstrates that Al-Shabab is committing the war crime of murder as prohibited under Article 8(2)c) of the Rome Statute.

The term “committing” here is used loosely. Under Article 25(3)b) of the ICC Statute it is a mode of criminal liability encompassing ordering, soliciting and inducing the commission of such a crime which in fact occurs or is attempted. In *Furundzija*.¹⁸⁷ the ICTY while enunciating the mode of commission, held that a person who in a superior position gives orders which are then obeyed by a perpetrator due to the armed group's hierarchical structure, is criminally liable. Consequently, an Al-Shabab commander or *Emir* who orders his fighters to kill civilians may be found liable for the war crime of murder under the mode of commission, for ordering the commission of murder. Commission also includes the direct or indirect participation in the elements of the crime individually or jointly with others through positive acts or if there is a duty to act, through omissions.¹⁸⁸ The numerous cases involving the murder of civilians, humanitarian workers and medical personnel by Al-Shabab create a strong case for the findings of many Al-

¹⁸³ Ibid International Criminal Court, 'Elements of Crimes', Article 8 (2) (c) (i)-1

¹⁸⁴ UNSC, 'Situation in Somalia: Report of the Secretary-General' (13 May 2020) S/2020/398 para 20-23, 40, 49, 52, 55, 68

¹⁸⁵ Ibid Human Rights Watch p.59; Amnesty International, 'Fatal Insecurity: Attacks on Aid Workers and Rights Defenders in Somalia' 2008; Human Rights Watch, 'So Much to Fear: War Crimes and the Devastation of Somalia' 2008

¹⁸⁶ Ibid n.168

¹⁸⁷ *Prosecutor v. Anto Furundzija* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-95-17/1-A (24 March 2000) at p.238

¹⁸⁸ Ibid Rome Statute of the International Criminal Court, Article 25(3)(a); *Prosecutor v Milomir Stakic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-97-24-T (31 July 2003) para. 439

Shabab members to be liable for the war crime of murder¹⁸⁹ both in cases where they commit such acts individually or jointly with another person with whom they share a criminal purpose.

Second is the war crime of torture. Torture is committed where the perpetrator, in a non-international armed conflict inflicted severe physical or mental pain or suffering upon a person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities, where the perpetrator inflicted the pain or suffering to obtain information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind. Further the perpetrator must have been aware of the status of the victims as well as the existence of an armed conflict.¹⁹⁰ Multiple accounts have shown how Al-Shabab runs courts that try persons accused of committing crimes like fornication, working for the federal government, practicing sorcery etc. Most accused persons are denied the right to legal representation and are convicted based on confessions obtained through torture. This is through amputations and beatings and is a common policy used by various Al-Shabab administrations governing different regions.¹⁹¹ By such a practice being a common policy in a group with such an entrenched hierarchical structure like Al-Shabab, it means that senior commanders and military leaders of Al-Shabab can be found liable under the principle of superior or command responsibility aside from the ordinary mode of liability of commission.

Command responsibility bears two aspects. First, a person can be held criminally responsible if he actively directs perpetrators under his command and control, or his juniors, to commit a crime under the jurisdiction of the Court.¹⁹² The second aspect establishes the individual criminal responsibility of military commanders and civilian superiors who do not order or direct the criminal acts *per se* but fail to exercise control to prevent the commission of crimes they know or ought to know are being committed by their juniors.¹⁹³ Criminal responsibility of superiors for the action of their subordinates however requires a personal neglect of duty. Such dereliction

¹⁸⁹ Ibid International Criminal Court, 'Elements of Crimes', Article 8 (2) (c) (i)-1

¹⁹⁰ Ibid n.60, Article 8(2) (a) (ii)-1

¹⁹¹ Ibid Harun Maruf; Stig Jarle Hansen, *Al-Shabab in Somalia: The History and Ideology of a Militant Islamist Group 2005-2012* (Hurst Publishers 2013) p.87; Human Rights Watch, 'So Much to Fear: War Crimes and the Devastation of Somalia' 2008

¹⁹² Ibid Rome Statute of the International Criminal Court, Article 25(3)(b)

¹⁹³ Ibid Rome Statute of the International Criminal Court, Article 28(b)

occurs when the superior fails to properly supervise his subordinates. It can amount to criminal negligence or acquiescence.¹⁹⁴ Effectively, the military heads of the military arm, the *emir* and the deputy *emir* for instance can be held individually criminally responsible for failing to take all necessary measures to prevent or stop the commission of crimes against humanity and war crimes by their subordinates. The requirement of a personal dereliction of duties was emphasized in the US *High Command Case*. In *Celebici*¹⁹⁵ the ICTY found a commander of a prison camp guilty for torture inflicted on prisoners by his juniors on the account that he failed to exercise his authority to ensure that such crimes were not committed. Not all senior officials would however be found individually criminally responsible under superior or command responsibility. A stronger case could be found for the head of the military arm for instance, compared to the head of finance for the commission of war crimes by Al-Shabab fighters in civilian-populated areas. Overall there is a strong case to find that Al-Shabab is committing the war crime of torture.

The third serious violation is the war crime of cruel treatment. It is committed where the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons protected under one or more of the Geneva Conventions of 1949. Further, that the perpetrator must have been aware of the protected status and the existence of an armed conflict. Finally, that the conduct was committed in a non-international armed conflict.¹⁹⁶ Al-Shabab has committed outrages upon personal dignity, in particular inhuman and degrading treatment. In Lower Shebelle, a man was executed for practicing sorcery while three more were killed by firing squad for being government employees.¹⁹⁷ There have also been numerous accounts of Al-Shabab cutting the tongues of civilians¹⁹⁸ and amputating limbs of civilians¹⁹⁹. Several refugees at

¹⁹⁴ William H. Parks, 'Command Responsibility for War Crimes' in Department of the Army, *Military Law Review Volumes 62-66* (Headquarters, Department of the Army 1973); *United States v. Von Leeb* (High Command Case), 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, at 462 (1951) (the High Command Case)

¹⁹⁵ *Prosecutor v. Zejnir Delacic, Zdravko Mucic, Hazim Delic, Esad Landzo* ("Celebici Case") (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY Appeals Chamber Case No. IT-96-21/1-A (20 February 2001)

¹⁹⁶ *Ibid* International Criminal Court, 'Elements of Crimes', Article 8 (2)c)(i)-3

¹⁹⁷ *Ibid* Harun Maruf

¹⁹⁸ Campaign for Innocent Victims in Conflict, *Civilian Harm in Somalia: Creating an Appropriate Response* (Refworld 2011) p.21

¹⁹⁹ United Kingdom Home Office, 'Country Policy and Information Note Somalia: Al Shabaab' (Home Office 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933800/Somalia- Al Shabaab - CPIN - V3.0e.pdf> accessed 7th January 2022, at page 9, 43, 44; UNSOM and the Office of the United Nations High Commissioner for Human Rights, 'Protection of Civilians: Building the Foundation for Peace, Security and Human Rights in Somalia' (Reliefweb 2017)

Daadab Refugee Camp have been found to have amputated limbs and upon interviews by NGOs working there, revealed that the perpetrator was Al-Shabab.²⁰⁰ The NSAG has amputated scores of men who it accused of working for the Somali government, in public and without any medical assistance to the victims during the amputations.²⁰¹ These actions show Al-Shabab has committed the war crime of inhuman treatment.

The war crime of taking hostages cannot be overlooked. It involves the seizing and detaining of a person and thereafter threatening to kill or injure them to compel a State, international organization, or another legal or natural person to do something or refrain from doing something as an explicit or implicit condition for the safety or the release of such person or persons. Such actions must have been committed in a non-international armed conflict and the perpetrator must be aware of the existence of an armed conflict.²⁰² There is a lot of evidence of Al-Shabab's taking of hostages. Following the attack on Garissa University in Kenya, Al-Shabab took 15 hostages.²⁰³ Al-Shabab has threatened that they may continue to hold hostages until the Kenyan government withdraws its forces in Somalia. During the attack on the Westgate Shopping Mall Nairobi, the group took civilian hostages and used some as human shields during the gunfight with Kenyan security forces threatening that they could kill the hostages unless the security forces relented on the security offensive.²⁰⁴ Al-Shabab has also taken hostages during its attacks on KDF camps in Somalia and taken hostages. They have then released video and audio recordings of the hostages reading out pleas for help.²⁰⁵ In an attack in Mogadishu, the group was reported to have taken at least 70 hostages, 50 of which were rescued by Somalia security forces.²⁰⁶ Many low-level fighters could be found liable for this war crime under the mode of liability of committing.

<<https://reliefweb.int/sites/reliefweb.int/files/resources/ReportProtectionofCivilians.pdf> > accessed 7th January 2022 at page 19, 21 and 23

²⁰⁰Ibid Campaign for Innocent Victims in Conflict

²⁰¹ Ibid, page 21 32, 33,

²⁰² Ibid International Criminal Court, 'Elements of Crimes', Article 8 (2)c)iii)

²⁰³ BBC News, 'Kenya Garissa students taken hostage by Al-Shabab' (BBC News 2 April 2015)

<<https://www.bbc.com/news/world-africa-32157342>> accessed 1 February 2021

²⁰⁴ Duncan Miriri, James Macharia, 'Islamist Gunmen Hold Hostages in Kenya Siege after 68 Killed' (Reuters 22 September 2013) <<https://www.reuters.com/article/us-kenya-attack-idUSBRE98K03V20130922>> accessed 1 February 2021

²⁰⁵ Tres Thomas, 'Listen: Al-Shabaab Release Audio of Kenyan Military Hostages' (Somalia Newsroom 17 January 2016) <<https://somalianewsroom.com/2016/01/17/listen-al-shabaab-release-audio-of-kenyan-military-hostages/>> accessed 20th November 2020

²⁰⁶ Abdi Sheikh, 'At Least 20 held Hostage in Mogadishu' (The Sydney Morning Herald 15 June 2019) <<https://www.smh.com.au/world/at-least-20-held-hostage-in-mogadishu-20170615-gwrea6.html>> accessed 20th December 2020

However, senior commanders are also liable for ordering or inducing the commission of this war crime where it is proven that they ordered the commission of the war crime or here through neglect they failed to stop their subordinates from committing the war crime.²⁰⁷

The fifth serious violation is the war crime of outrages upon personal dignity, in particular humiliating and degrading treatment ordinarily committed where the perpetrator humiliates or violates the dignity of one or more protected persons with such severity that the action is generally recognized as an outrage upon personal dignity.²⁰⁸ Al-Shabab has such acts on numerous occasions. In Lower Shebelle, a man was stripped, caned and beaten in public and later executed for allegedly practicing sorcery.²⁰⁹ Three more suffered a similar fate for being government employees.²¹⁰ The aforementioned accounts of Al-Shabab cutting the tongues of civilians²¹¹ and amputating limbs of civilians²¹² in public can also be said to amount to outrages upon personal dignity. The group also canes women for greeting men in public even where the persons they greet are their relatives.²¹³ The group has given assurances that it may stop the caning²¹⁴ although it is not expected that such a group that never has any regard for international humanitarian law may abide by its assurances. Floggings in public have almost constituted a policy for the NSAG and has been reported by reputable organisations working in Somalia.²¹⁵ Al-Shabab committed these actions in the full knowledge that the victims were civilians. It has also been established that these actions were committed and continue to be committed in various parts

²⁰⁷ Ibid Rome Statute of the International Criminal Court, Article 25(3)(b); *Prosecutor v. Anto Furundzija* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-95-17/1-A (24 March 2000) at p.238

²⁰⁸ Ibid International Criminal Court, 'Elements of Crimes', Article 8 (2)(c)(ii)

²⁰⁹ Ibid Harun Maruf

²¹⁰ Ibid Harun Maruf

²¹¹ Campaign for Innocent Victims in Conflict, *Civilian Harm in Somalia: Creating an Appropriate Response* (Refworld 2011) p.21

²¹² United Kingdom Home Office, 'Country Policy and Information Note Somalia: Al Shabaab' (Home Office 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933800/Somalia- Al Shabaab - CPIN - V3.0e.pdf> accessed 7th January 2022, at page 9, 43, 44; UNSOM and the Office of the United Nations High Commissioner for Human Rights, 'Protection of Civilians: Building the Foundation for Peace, Security and Human Rights in Somalia' (Reliefweb 2017) <<https://reliefweb.int/sites/reliefweb.int/files/resources/ReportProtectionofCivilians.pdf>> accessed 7th January 2022 at page 19, 21 and 23

²¹³ BBC News, 'Somalia: Al-Shabab 'to stop Caning Civilians' (BBC News 21 August 2013)

<<https://www.bbc.com/news/blogs-news-from-elsewhere-23784995>> accessed 25 January 2021 page 1, page 52

²¹⁴ Ibid

²¹⁵ Human Rights Watch, 'Somalia "You Don't Know Who to Blame": War Crimes in Somalia' (Human Rights Watch 2011) <<https://www.hrw.org/sites/default/files/reports/somalia0811webwcover.pdf>> accessed 25 January 2021

of Somalia. Al-Shabab has stated that they will continue to wage jihad until their goal of establishing an Islamic caliphate in the horn of Africa. It therefore shows that they are aware of the existence of an armed conflict. This therefore establishes that Al-Shabab is committing the war crime of outrages upon personal dignity, in particular humiliating and degrading treatment.

Passing sentences on accused persons and executing them without previous judgments passed by a regularly constituted court, and further denying them judicial guarantees recognized as indispensable by civilized peoples is also recognised as a serious violation of common Article 3 of the Geneva Conventions.²¹⁶ This Chapter has demonstrated how Al-Shabab runs a court system in which those who breach its strict version of Islam are charged and convicted. Multiple accounts show that accused persons are not allowed the right to legal representation. Most accused persons are tortured to confess to charges. During such tortures many accused persons have had their fingers, limbs amputated using long knives commonly used to slaughter camels. Others were beaten up and threatened that they would be killed in what appears to be a policy of the armed group.²¹⁷ Finally, this Chapter found that the Somalia armed conflict is not international. Beyond the main modes of criminal liability requiring the direct perpetration or personal dereliction of duty analysed above, Al-Shabab members can be found accountable under the mode termed JCE-III. This mode targets consequences that occur indirectly and unintendedly though were natural and foreseeable consequences of the criminal enterprise.²¹⁸ The ICTR in *Ntakirutimana and Ntakirutimana* gave the example of where a group has a common purpose or plan to forcibly remove at gun-point members of one ethnicity from their town, village or region with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.²¹⁹ Consequently Al-Shabab fighters who for instance abduct hostages²²⁰ or Al-Shabab police who arrest civilians could be found liable for the war

²¹⁶ Ibid International Criminal Court, 'Elements of Crimes', Article 8 (2) (c) (iv)

²¹⁷ Ibid Harun Maruf; Stig Jarle Hansen, *Al-Shabab in Somalia: The History and Ideology of a Militant Islamist Group 2005-2012* (Hurst Publishers 2013) p.87; Human Rights Watch, 'So Much to Fear: War Crimes and the Devastation of Somalia' 2008

²¹⁸ Ibid Carsten Stahn

²¹⁹ *Prosecutor v Elizaphan Ntakirutimana and Gerard Ntakirutimana* (Judgment) Appeals Chamber ICTR-96-10-A and ICTR-96-17-A (13 December 2004) at para 465

²²⁰ BBC News, 'Kenya Garissa students taken hostage by al-Shabab' (BBC News 2 April 2015)

<<https://www.bbc.com/news/world-africa-32157342>> accessed 1 February 2021; Tres Thomas, 'Listen: Al-

crime of passing sentences and carrying out executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by civilized peoples. Were such hostages are killed as has occurred in some cases, those who took hostages could be found criminally liable for the war crime of taking of and that of killing hostages through the mode of JCE III.

Finally, there are war crimes constituting serious violations of the laws and customs applicable in non-international armed conflicts within the established framework of international law. The ICC Statute provides 15 extra enumerated which evidence of commission by Al-Shabab has already been enumerated in the course of this Chapter. Firstly, this Chapter has shown how Al-Shabab frequently, unceasingly and intentionally directs attacks against civilians not taking direct part in hostilities²²¹ thereby committing a serious violation of the laws and customs applicable in armed conflicts not of international character Second, Al-Shabab targets ICRC and its assets²²² in Somalia and Kenya thereby killing ICRC staff. They have also “banned” ICRC from operating in Somalia on allegations that ICRC was distributing expired food to the Somali population.²²³ During some of the attacks, Al-Shabab has taken ICRC nurses hostage.²²⁴ By so doing Al-Shabab has intentionally attacked buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions and protected under the Geneva Conventions.²²⁵ Third, as has been demonstrated in the course of this Chapter Al-Shabab targets humanitarian assistance personnel such as the ICRC, killing, injuring, maiming and abducting many humanitarian workers. The armed group’s police wing has also arbitrarily arrested and

Shabaab Release Audio of Kenyan Military Hostages’ (Somalia Newsroom 17 January 2016) <<https://somalianewsroom.com/2016/01/17/listen-al-shabaab-release-audio-of-kenyan-military-hostages/>> accessed 20th November 2020; Abdi Sheikh, ‘At Least 20 held Hostage in Mogadishu’ (The Sydney Morning Herald 15 June 2019) <<https://www.smh.com.au/world/at-least-20-held-hostage-in-mogadishu-20170615-gwrea6.html>> accessed 20th December 2020

²²¹ UNSC, ‘Situation in Somalia: Report of the Secretary-General’ (13 May 2020) S/2020/398 para 20-23, 40, 49, 52, 55, 68

²²² Voice of America, ‘Red Cross Says Staffer Dies after Car Bombing in Somalia’ (VOA 29 March 2018) <<https://www.voanews.com/africa/red-cross-says-staffer-dies-after-car-bombing-somalia> > accessed 4th February 2021

²²³ AlJazeera, ‘Al-Shabab bans Red Cross from Somalia’ (Aljazeera 30 January 2012) <<https://www.aljazeera.com/news/2012/1/30/al-shabab-bans-red-cross-from-somalia> > accessed 4th December 2020

²²⁴ Peter Beaumont, ‘Gunmen abduct German Nurse after Storming Red Cross Facility in Somalia’ (The Guardian 3 May 2018) <<https://www.theguardian.com/global-development/2018/may/03/gunmen-abduct-german-nurse-after-storming-red-cross-facility-in-somalia>> accessed 3rd December 2020

²²⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, Article 38 - 54

detained humanitarian workers.²²⁶ Fourth, this Chapter has shown how Al-Shabab carries out targeted shootings and bombings of schools and hospitals without military necessity.²²⁷ Fifth, Al-Shabab has committed the war crime of pillaging a town or place, even when taken by assault contrary to Article 8(2)(e)(v) of the ICC Statute by burning and destroying houses and villages in Somalia. In just one attack, Human Rights Watch and the UN established that Al-Shabab had burnt over 100 houses and 18 villages.²²⁸ Sixth, Al-Shabab commits rape, sexual slavery and other forms of sexual violence by abducting young girls who are then used as sex slaves²²⁹ or according to the UN Working Group on Children and Armed Conflict, forced into marriages by fighters leaving many with early pregnancies.²³⁰ Seventh, Al-Shabab abducts children from schools, playgrounds and homes and has in other instances forced elders, teachers and rural communities to hand over children for indoctrination. In Kenya, Al-Shabab agents have lured scores of children, some aged below fifteen years in the North Eastern and Coastal region only to kidnap them and recruit them into the group's membership.²³¹ The group's membership now consists of approximately seven thousand local fighters and one thousand foreign fighters. Most of the kidnapped and recruited are forced into military training and made suicide bombers and frontline fighters.²³² They also use radicalization messages and propaganda to recruit more members.²³³

²²⁶Ibid UNSC 15 October 2020, S/2020/1004, Letter dated 12 October 2020 from the Chair of the Security Council Committee pursuant to resolution 751 (1992) concerning Somalia addressed to the President of the Security Council, Report of the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator

²²⁷ VOA, 'Al-Shabab Attacks Peacekeeping Hospital in Somalia' (VOA 25 January 2010) <<https://www.voanews.com/africa/al-shabab-attacks-peacekeeping-hospital-somalia>> accessed 5th December 2020; Abdi Guled, 'Deadly siege in Somalia's capital ends, attackers killed' (AP News 1 March 2019) <<https://apnews.com/article/1019a0dc49cd4722b825694494e4a8c8>> accessed 3rd December 2020

²²⁸ Human Rights Watch, 'Somalia: Al-Shabab Forces Burn Villages' (HRW 26 July 2017) <<https://www.hrw.org/news/2017/07/27/somalia-al-shabab-forces-burn-villages>> accessed 5th December 2020

²²⁹ DW, 'Escape from Al-Shabab: 'I was Turned into a Sex Slave' (DW) <<https://www.dw.com/en/escape-from-al-shabab-i-was-turned-into-a-sex-slave/a-42762342>> accessed 28th January 2021; Charlotte Attwood, 'The Sex Slaves of Al-Shabab' (BBC News 24 May 2017) <<https://www.bbc.com/news/magazine-40022953>> accessed 28th January 2021

²³⁰ UN Security Council, 'Report of the Secretary General on Children and Armed Conflict in Somalia' (13 July 2017) (S/2016/1098)

²³¹ DW, 'Escape from Al-Shabab: 'I was Turned into a Sex Slave' (DW) <<https://www.dw.com/en/escape-from-al-shabab-i-was-turned-into-a-sex-slave/a-42762342>> accessed 28th January 2021

²³² Colonel Godfrey Buluma, 'Al-Shabab: The Threat to Kenya and the Horn of Africa' (Master of Strategic Studies thesis United States Army War College thesis 2014) p 12

²³³ UN General Assembly, 'Report of the Independent Expert on the Situation of Human Rights in Somalia' (19 July 2018) (A/HRC/39/72); Michael Taamby, 'Recruitment of Islamic Terrorist in Europe, Trends and Perspective' A Report by Danish Ministry of Justice 14 January 2005; Human Rights Watch, 'Somalia: Stop War Crimes in Mogadishu: United Nations should Establish International Commission of Inquiry' (HRW 14 February 2011) <<https://www.hrw.org/news/2011/02/14/somalia-stop-war-crimes-mogadishu>> accessed 3rd July 2020; Human Rights Watch, 'Somalia: Al-Shabab Demanding Children – Residents threatened to Hand Over Boys, Girls' (HRW

Eighth, this Chapter recounted how Al-Shabab regularly orders refugee camps in Baidoa and other areas to be closed as it seeks to conceal the scale of suffering attributed to their actions. They have forcibly ordered the displacement of populations by claiming they were putting the civilians to work to build the nation.²³⁴ Ninth, this Chapter has sufficiently demonstrated how Al-Shabab tries civilians for various crimes and finds them guilty without judicial safeguards. Further, contrary to Article 8(2)(e)(xi) of the ICC Statute Al-Shabab has subjected persons in its custody to physical mutilation by amputating the limbs of accused persons as punishment for crimes under its strict version of Islam.²³⁵

2.2.WHETHER AL-SHABAB IS COMMITTING CRIMES AGAINST HUMANITY

In contrast to the crime of genocide with its Genocide Convention, there is no specific treaty dedicated to crimes against humanity. The prohibition of crimes against humanity is only found in Article 7 of the Rome Statute establishing the International Criminal Court. Article 7 is a product of international consensus arising from concerted efforts to reconcile differences in jurisprudence emanating from the hitherto international criminal tribunals for Rwanda, and Yugoslavia earlier. One of the major products was a requirement that a crime against humanity should be committed as part of a widespread and systematic attack. The ICTY was one of the earliest criminal tribunals of the 20th century. The constituent Statute required crimes against humanity to only have been committed in an armed conflict whether international or internal in character²³⁶. This definition was broadened later when the ICTR was established. Its constituent Statute introduced the requirement of a widespread and systematic attack based on national, political, ethnic, racial or religious grounds²³⁷. The Statutes of the ICTR and the ICTY and litigation done before them revealed the gap in international consensus on the definition of crimes against humanity. The international community efforts culminated in Article 7 of the ICC Statute

14 January 2018) <<https://www.hrw.org/news/2018/01/14/somalia-al-shabab-demanding-children>> accessed 4th July 2020

²³⁴ Ibid Matt Bryden

²³⁵ Xan Rice, 'Somali Schoolboy Tells of How Islamists Cut off His Leg and Hand' (The Guardian 20 October 2010) <<https://www.theguardian.com/world/2010/oct/20/somali-islamists-schoolboy-amputation-ordeal>> accessed 20th October 2020

²³⁶ Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), U.N. Doc. S/RES/827 (1993), Article 5

²³⁷ Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006) (UN Doc S/RES/955 (1994), Article 3

which now provided that a crime against humanity need not be committed within the context of war. This provision was important because it now covered attacks conducted during peacetime. This requirement possesses great utility because it can now cover terror groups like Al-Shabab who's attacks in Kenya and some regions of Somalia are committed in peacetime.

Article 7 of the ICC Statute further provides that a crime against humanity will be deemed to have been committed where the perpetrator commits any of 11 prohibited acts in line with a State or organisational policy and committed as part of a widespread or systematic attack directed against a civilian population. The prohibited acts include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape (including sexual slavery, enforced prostitution, forced pregnancy or any other forms of sexual violence of comparable gravity), persecution (against any identifiable group or collectivity on political, racial, ethnic, cultural, religious, gender or other grounds universally recognised as impermissible under international law), enforced disappearance of persons, apartheid, and other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health²³⁸. The following part will then examine what an organisational policy as well as what a widespread and systematic attack entails. This will be useful to determine whether Al-Shabab are committing crimes against humanity. This is because the ICC Elements of Crimes require that the prohibited acts are committed in a widespread and systematic attack.

2.3.1. What is an Organisational Policy and Does Al-Shabab Possess One?

Following WWII the Nuremberg Tribunal set the ball rolling on the discourse surrounding the requirement of an organisational policy element. The judges in Nuremberg applied upheld it to be an essential element of crimes against humanity. This was notable because the tribunal's statute did not expressly require it.²³⁹ Even so, Nuremberg was concerned primarily with state-like organisational policy, manifesting itself through institutions, resources and personnel of the State.

²³⁸ Ibid Rome Statute of the International Criminal Court, Article 7

²³⁹ *Judgment of the Nuremberg International Military Tribunal* 1946 (1947) 41 AJIL

The ICTY in a similar fashion in *Kupreskic*²⁴⁰ held that although there was no express requirement in the tribunal's Statute the concept of crimes against humanity implies that there be an organisational or State policy as an essential element. This position was abandoned in *Kunarac*²⁴¹ where the ICTY, held that an organisational policy was not required in customary international law or the ICTY Statute and thus operated to satisfy the evidentiary burden in proving crimes against humanity. The next year the ICC Statute was adopted requiring a State-like or organisational policy. Nevertheless, this position would soon be challenged again by the ICTR two years later in *Semanza*²⁴² and *Gacumbitsi*²⁴³ The ICTR rejected the requirement adopted the earlier position of the ICTY in *Kunarac*²⁴⁴ that an organizational policy is not a requirement for proving crimes against humanity but that it operates to satisfy the evidentiary burden.

In contrast, the ICC has maintained that for crimes against humanity an organisational policy must be proven. In its *Decision to Authorize Investigation into the Burundi situation*²⁴⁵ Pre-Trial Chamber III considered the involvement of the Burundian National Police, Burundian Intelligence Service and the Army in subjecting perceived opposition supporters to arrests, imprisonment, interrogations and executions. The State institutions operated largely through chains of command that were *de facto* headed by persons loyal to the government. The ICC further found that pro-government militia termed the *Imbonerakure* had demonstrated possession of an organisational policy and could thus be held liable for crimes against humanity.²⁴⁶ Overall, there are two approaches to the organisational policy requirement: the restrictive approach and the liberal approach.

²⁴⁰ *Prosecutor v Kupreskic* (Judgment), International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-95-16-T (14 January 2000)

²⁴¹ *Prosecutor v Dragoljub Kunarac, Radomir Kivac and Zoran Vukovic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-96-23-T & IT-96-23/1-T (22 February 2001)

²⁴² *Prosecutor v. Laurent Semanza* (Judgment) Case No. ICTR-97-20-t, 15 May 2003

²⁴³ *Prosecutor v Gacumbitsi* (Judgment) Case No. ICTR-2001-64-T 299, 17 June 2004

²⁴⁴ *Ibid Prosecutor v Dragoljub Kunarac, Radomir Kivac and Zoran Vukovic*, n.77

²⁴⁵ International Criminal Court, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi' ICC-01/17-X-9-US-Exp (25 October 2017)

²⁴⁶ *Ibid* International Criminal Court, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', para 42

2.2.1.1. The Restrictive Approach

The restrictive approach calls for the strict application of Article 7(2)(a) of the ICC Statute. The provision requires that an attack against a civilian population must be committed in line with a state or organisational policy. For the restrictive approach, this principle is comprised of several elements which were summarized by ICC Judge Hans-Peter Kaul in his dissenting opinion in the ICC *Decision authorizing an Investigation into the Situation in Kenya*²⁴⁷. The elements are that an organisation must have a collectivity of persons who formed the organisation for a common purpose. The organisation must be under a responsible command or a hierarchical structure with a capacity to impose the policy on its members and to sanction them. In addition, the organisation must have the capacity and means available to attack any civilian population on a large scale and exercise control over part of the territory of a State where the group commits criminal activities against the civilian population for a primary purpose. Finally, the group must articulate explicitly or implicitly an intention to attack a civilian population. The organisation is not required to bear all the characteristics. Al-Shabab satisfies these criteria because it is a group of persons consisting of approximately seven thousand local fighters and one thousand foreign fighters²⁴⁸ most of who have been actively recruited.²⁴⁹ Al-Shabab also abducts children from schools, playgrounds and homes and has in other instances forced elders, teachers and rural communities to hand over children for membership. In Kenya Al-Shabab agents have lured scores of young people in the North-Eastern and Coastal region only to kidnap them and recruit them into the group's membership.²⁵⁰

²⁴⁷ International Criminal Court, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul' (31 March 2010), para 10

²⁴⁸ Colonel Godfrey Buluma, 'Al-Shabab: The Threat to Kenya and the Horn of Africa' (Master of Strategic Studies Thesis United States Army War College thesis 2014) p 12; Michael Taamby, 'Recruitment of Islamic Terrorist in Europe, Trends and Perspective' A Report by Danish Ministry of Justice 14 January 2005

²⁴⁹ UN General Assembly, 'Report of the Independent Expert on the Situation of Human Rights in Somalia' (19 July 2018) (A/HRC/39/72); Human Rights Watch, 'Somalia: Stop War Crimes in Mogadishu: United Nations should Establish International Commission of Inquiry' (HRW 14 February 2011)

<<https://www.hrw.org/news/2011/02/14/somalia-stop-war-crimes-mogadishu>> accessed 3rd July 2018; Human Rights Watch, 'Somalia: Al-Shabab Demanding Children – Residents threatened to Hand Over Boys, Girls' (HRW 14 January 2018) <<https://www.hrw.org/news/2018/01/14/somalia-al-shabab-demanding-children>> accessed 4th July 2020

²⁵⁰ DW, 'Escape from Al-Shabab: 'I was Turned into a Sex Slave' (DW) <<https://www.dw.com/en/escape-from-al-shabab-i-was-turned-into-a-sex-slave/a-42762342>> accessed 28th January 2021; Charlotte Attwood, 'The Sex Slaves of Al-Shabab' (BBC News 24 May 2017) <<https://www.bbc.com/news/magazine-40022953>> accessed 28th January 2021

Al-Shabab operates under a responsible command and maintains a hierarchical structure. It is headed by the *Shura* Council headed by the *emir*/ leader and deputized by a deputy *emir*. It has several arms headed by its respective branch leaders. Such arms include the military arm and the intelligence wing or the *Amniyat*. security arm, operations arm, finance arm, preaching arm, a media wing and the explosives operations and manufacturing.²⁵¹ Al-Shabab further has a spokesman responsible for issuing public statements including the group's stances on various issues as well as threats to mainly western countries and their allies.²⁵² In addition, Al-Shabab satisfies the criteria of having a common purpose. It seeks to establish an Islamic caliphate in Somalia and the Horn of Africa to be formed after its takeover of the Ogaden region of Ethiopia, Somalia and the North-Eastern region of Kenya, areas inhabited by ethnic Somalis. Al-Shabab pursues its objectives by waging war and establishing control of territories gained. Al-Shabab is also exercising control over part of the territory of a State. Since its formation in 2006 Al-Shabab has consistently recorded swift gains and taken control over parts of Somalia including Central and Southern Somalia, the port of Kisimayu and Baidoa.²⁵³ In these areas, the group enforces its stringent version of *Sharia* law, imposes taxes and manages road and port checkpoints even issues receipts for tickets.²⁵⁴ Finally the restrictive approach requires that the group must have criminal activities against the civilian population as a primary purpose. A review of various reports indicates that the majority of Al-Shabab attacks are aimed at the civilian population. These include the bombing of civilian populated areas, flogging of innocent civilians considered to have committed crimes under its strict version of sharia law.²⁵⁵

²⁵¹ Michael Pompeo, 'State Department Designates Two Senior Al-Shabaab Leaders as Terrorists' (US Department of State 17 November 2020) <<https://2017-2021.state.gov/state-department-designates-two-senior-al-shabaab-leaders-as-terrorists/index.html>> accessed 24 February 2021

²⁵² Ibid Colonel Godfrey Buluma p.9

²⁵³ Ibid Colonel Godfrey Buluma, Page 9

²⁵⁴ Ibid Tricia Bacon

²⁵⁵ CNN World, 'Blast Kills 19 at Graduation Ceremony in Somalia' (CNN 4 December 2009) <<http://edition.cnn.com/2009/WORLD/africa/12/03/somalia.attacks/>> accessed 7 July 2020; Reuters, 'Death Toll from Somalia Truck Bomb in October now at 512: Probe Committee' (Reuters 30 November 2017) <<https://www.reuters.com/article/us-somalia-blast-toll/death-toll-from-somalia-truck-bomb-in-october-now-at-512-probe-committee-idUSKBN1DU2IC>> accessed 8 July 2020

2.2.1.2. The Liberal Approach

In this approach, an organisational policy serves to satisfy the evidentiary burden in proving crimes against humanity rather than as an essential element. The policy must be of organisations that have *de facto* control over territory in which they easily move unhindered, or have the capability to perform acts that infringe on basic human values. This movement started with the ICTY in *Tadic*²⁵⁶. As opposed to Nuremberg where an organizational policy possessed by state-like organisations was required, the ICTY in *Tadic* opted for an expanded definition that included organisations that are not state-like *per se*, or are not legitimate government forces but have some form of *de facto* control over or can move freely within defined territory.²⁵⁷ This decision was criticised for its abrupt departure from international consensus and disregarding the ICC Statute.²⁵⁸ However the ICTY maintained it in *Kupreskic*²⁵⁹ 3 years later stating that an organizational policy was not a requirement in proving crimes against humanity but that it was more of a useful threshold. The ICTY upheld it again in *Kordic*²⁶⁰ and *Kunarac*²⁶¹. while the ICTR adopted the position in *Semanza*²⁶² and *Gacumbitsi*²⁶³.

Notably, the ICC has also reached majority decisions on two occasions holding that an organisational policy can be deemed to have been satisfied where the group is demonstrated to have had the capacity to perform acts that infringe on basic human values. In the *Decision Authorising Investigation into the Situation in the Republic of Kenya*²⁶⁴ and *Decision on the Confirmation of Charges against William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap*

²⁵⁶*Prosecutor v Dusko Tadic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-94-I-T (7th May 1997)

²⁵⁷ *Ibid Prosecutor v Dusko Tadic*, para 654

²⁵⁸ Charles Chernor Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity?' 28 Am. U. Intl L. Rev. 381 (2013)

²⁵⁹ *Prosecutor v Kupreskic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-95-16-T (14 January 2000)

²⁶⁰ *Prosecutor v Dario Kordic et al* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeal Chamber Case No. IT-94-14/2-T (26 February 2001)

²⁶¹ *Prosecutor v Dragoljub Kunarac, Radomir Kivac and Zoran Vukovic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-96-23-T & IT-96-23/1-T (22 February 2001)

²⁶² *Prosecutor v. Laurent Semanza* (Judgment) ICTR-97-20-t, 15 May 2003

²⁶³ *Prosecutor v Gacumbitsi* (Judgment) ICTR-2001-64-T 299, 17 June 2004

²⁶⁴ International Criminal Court, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya', ICC-01/09 (31 March 2010), para 90

*Sang*²⁶⁵ the ICC adopted what Mathias Holvoet²⁶⁶ calls the progressive and functional approach which dismisses the formal nature of a group or level of its organisation and instead emphasizes on the group's capability to perform acts which infringe on basic human values. In the *Decision Authorizing Investigation into the Burundi Situation*²⁶⁷ the court considered the ability of the *Imbonerakure* to commit atrocities. The *Imbonerakure* was the youth wing of the ruling party. Following the 2015 disputed general elections violence broke out and the group was widely reported to have robbed, raped and killed perceived opposition supporters.²⁶⁸ The ICC found that the group had satisfied the requirement of an organisational policy and held,

‘Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether the group has the capability to perform acts that infringe on basic human values’

The shift represents persistent attempts by the international criminal justice to progressively cut back the organizational policy requirement mainly due to the view that if it was removed or cut back, it would make it easier to bring perpetrators of crimes against humanity to justice (emphasis mine).²⁶⁹ This Chapter has demonstrated that Al-Shabab has *de facto* control over territory in which they easily move unhindered. Its capability to perform acts that infringe on basic human values is demonstrated by how it has committed grave breaches of fundamental human rights and freedoms embodied in the UDHR, ICCPR and the ICESCR. The right to life is enshrined in the UDHR²⁷⁰. Numerous cases have been enumerated in this Chapter on the numerous brutal killings

²⁶⁵ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, (ICC Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2011) para 33

²⁶⁶ Prof. Mathias Holvet, ‘The State or Organisational Policy Requirement within the Definition of Crimes Against Humanity in the Rome Statute: An Appraisal of the Emerging Jurisprudence and the Implementation Practice by ICC States Parties’ (International Crimes Database October 2013)

<<http://www.internationalcrimesdatabase.org/upload/documents/20131111T105507-ICD%20Brief%20%20%20-%20Holvoet.pdf>> accessed 22 February 2021

²⁶⁷ Ibid Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi

²⁶⁸ BBC News, ‘Burundi's Imbonerakure leader named head of RTNB’ (BBC News 14 July 2019)

<<https://www.bbc.com/news/world-africa-48980959>> accessed 22 February 2021

²⁶⁹ Charles Chernor Jalloh, ‘What Makes a Crime Against Humanity a Crime Against Humanity?’ 28 Am. U. Intl L. Rev. 381 (2013)

²⁷⁰ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Article 3

committed by Al-Shabab. There is also the freedom from slavery²⁷¹ torture²⁷² right to a fair trial²⁷³ as well as the right to food, water and medicine.²⁷⁴ These rights have been breached in a large-scale manner, resulting in millions of victims who have either been killed, maimed and either made IDPs or refugees.

2.2.2. Do Al-Shabab Attacks Constitute Widespread or Systematic Attack Against a Civilian Population?

A crime against humanity must have been committed as part of a widespread or systematic attack directed towards a civilian population.²⁷⁵ A systematic attack must be massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against multiple victims. Whether an attack satisfies some of the criteria is determined on a case-to-case basis. For instance, what constitutes a large-scale or massive attack? Should it be in terms of geographical scope or the number of victims /civilians affected? What constitutes the seriousness with which an attack should be carried out? Is it the size of firepower or the number of attackers involved or is it the magnitude of damage or injuries caused? International judicial institutions have continued to deliver conflicting decisions thereby contributing to the uncertainty on this issue. The lack of uniform criteria has created the need to determine situations on a case-to-case basis.

On the issue of a systematic attack, the ICTR in *Akayesu*²⁷⁶ held that an attack is conducted in a systematic manner if it was thoroughly organized and following a consistent method based on a common policy involving substantial public or private resources. The UN Monitoring Group on Somalia terms Al-Shabab as one of the most cardinal obstacles hindering the access of food to

²⁷¹ Ibid Universal Declaration of Human Rights, Article 4

²⁷² Ibid Universal Declaration of Human Rights, Article 5; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 7

²⁷³ Ibid Universal Declaration of Human Rights, Article 10; Ibid International Covenant on Civil and Political Rights, Article 14, Article 16

²⁷⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3 (ICESCR), Article 11; Ibid International Covenant on Economic, Social and Cultural Rights, 11-12

²⁷⁵ Ibid Rome Statute, Article 7(1); *Prosecutor v Akayesu* (Judgment) ICTR Appeal Chamber Case No. IT-96-4-T, T Ch I (2 September 1998)

²⁷⁶ Ibid *Prosecutor v Akayesu*

areas facing acute food shortages.²⁷⁷ The group has destroyed food supplies thereby contributing to the starvation of food-deprived civilians.²⁷⁸ Al-Shabab further threatens civilians against receiving food from certain countries or humanitarian organisations linked to them. Organisations that are granted access to deliver humanitarian food are subjected to hefty taxes and fines in areas where Al-Shabab controls.²⁷⁹ These actions have been cited as the causes of deaths of starving Somalis and the acceleration of famine in Somalia.²⁸⁰ The actions by Al-Shabab of limiting access of civilians to humanitarian food as a way of controlling them²⁸¹ have been held to constitute the crime against humanity of extermination.²⁸² In *Nikolic*²⁸³ the ICTY held breaches of economic and social rights can be deemed to constitute crimes against humanity if the said breaches cause widespread death and suffering. Further, that inhumanely withholding necessities of life which leads to deaths amounts to crimes against humanity.

Finally, Al-Shabab has continued to attack several classes of civilians. These include students (since Al-Shabab views western education as prohibited in its strict version of Islam)²⁸⁴ and government officials of the western-backed Federal Government targeted for collaborating with the west.²⁸⁵ Others include Somalia civilians found guilty in Al-Shabab courts for various

²⁷⁷ United Nations Security Council, 'Letter dated 7 October 2016 from the Chair of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council' (31 October 2016) S/2016/919 at p.131- 134

²⁷⁸ Ibid United Nations Security Council

²⁷⁹ Ibid

²⁸⁰ Jason Burke, 'Al-Shabaab Militants Ban Starving Somalis from accessing Aid' (The Guardian 27 July 2017) <<https://www.theguardian.com/world/2017/jul/27/al-shabaab-militants-ban-starving-somalis-from-accessing-aid>> accessed 11 December 2021; Katy Migiro, 'People dying of drought in Somalia as U.N. issues Pre-Famine Alert' (Reuters 2 February 2017) <<https://www.reuters.com/article/us-somalia-famine-idUSKBN15H21G>> accessed 11 December 2021

²⁸¹ Co-Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/ 18-07-2007/ ECCC/TC, Judgement (Extraordinary Chambers in the Courts of Cambodia 26 July 2010) para 269

²⁸² Ibid n189, para 335, 457

²⁸³ Prosecutor v Nikolic (Indictment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Case No. IT-94-2-1-24 (4 November 1994)

²⁸⁴ Reuters, 'Death Toll from Somalia Truck Bomb in October now at 512: Probe Committee' (Reuters 30 November 2017) <<https://www.reuters.com/article/us-somalia-blast-toll/death-toll-from-somalia-truck-bomb-in-october-now-at-512-probe-committee-idUSKBN1DU2IC>> accessed 8 July 2020

²⁸⁵ AlJazeera, 'Several killed in suicide bombing outside mosque in Somalia' (AlJazeera 11 September 2020) <<https://www.aljazeera.com/news/2020/9/11/several-killed-in-suicide-bombing-outside-mosque-in-somalia>> accessed 8 July 2020

crimes²⁸⁶, foreign troops²⁸⁷ and western diplomats and humanitarian workers. The International Criminal Court Statute requires that for the crime to amount to a crime against humanity, the attack must be directed towards a civilian population. The ICC has held that the phrase “any civilian population” means any groups that can be identified to form a specific nationality, culture or any additional unique characteristics.²⁸⁸ These findings demonstrate that Al-Shabab is committing the prohibited acts in widespread and systematic attacks. Al-Shabab also targets Christians in Somalia and Kenya.²⁸⁹

2.2.3. What Prohibited Acts of Crimes against Humanity are Al-Shabab Committing in and Around Somalia?

Article 7 of the ICC Statute prohibits the crimes of murder, extermination, torture, rape (and its related acts of sexual slavery, enforced pregnancy and sexual violence), persecution and other inhumane acts of similar character causing great suffering. To what extent has Al-Shabab committed these acts? Regarding murder, Al-Shabab has consistently detonated bombs in civilian-populated areas such as hotels, markets, schools and hospitals and targeted ordinary social events such as graduation ceremonies, weddings and funerals thereby killing scores of civilians.²⁹⁰ It carries out targeted killings of Somalia politicians, elders and students. In its military campaigns, Al-Shabab launches attacks on SNA and AMISOM forces in indiscriminate mortar attacks that result in civilian casualties.²⁹¹ These actions contravene the prohibition against

²⁸⁶ Jason Burke, ‘Al-Shabaab Plundering Starving Somali Villages of Cash and Children’ (The Guardian 21 February 2018) <<https://www.theguardian.com/world/2018/feb/21/al-shabaab-extortion-indoctrination-somalia#:~:text=Al%2DShabaab%20plundering%20starving%20Somali%20villages%20of%20cash%20and%20children,-This%20article%20is&text=Al%2DShabaab%20militants%20in%20Somalia,an%20apparent%20crisis%20of%20morale.>> accessed 4th July 2020

²⁸⁷ Abdi Guled, Tom Odula and Cara Anna, ‘Extremists attack Kenya Military Base, 3 Americans Dead’ (AP 6 January 2020) <<https://apnews.com/article/65926ee82091f779d28d6a9644fb739f>> accessed 16th November 2020

²⁸⁸ ICC Pre-Trial Chamber II, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya’ ICC-01/09-19 Para 81

²⁸⁹ Stig Jarle Hansen, *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group* (Hurst Publishers 2013) p. 57; Aljazeera News, ‘Al-Shabab Massacres 28 Kenyan Bus Passengers’ (AlJazeera 23 November 2014) <<https://www.aljazeera.com/news/africa/2014/11/killed-kenya-bus-attack-201411226446296802.html>> accessed 2nd October 2020

²⁹⁰ Reuters, ‘Death Toll from Somalia Truck Bomb in October now at 512: Probe Committee’ (Reuters 30 November 2017) <<https://www.reuters.com/article/us-somalia-blast-toll/death-toll-from-somalia-truck-bomb-in-october-now-at-512-probe-committee-idUSKBN1DU2IC>> accessed 8 July 2020; Ibid Human Rights Watch p.59;

²⁹¹ Human Rights Watch, ‘So Much to Fear: War Crimes and the Devastation of Somalia’ 2008; AFP, ‘Somalia: 15 People Including Deputy Minister Killed in Al-Shabaab Attack’ (AfricaNews 23rd March 2019) <<https://www.africanews.com/2019/03/23/somali-15-people-wounded-in-mogadishu-al-shabaab-attack/>>

intentional killings of one or more civilians.²⁹² The high number of civilian victims satisfies the requirement of a widespread attack.²⁹³ while the repetitive nature.²⁹⁴ of civilian murders shows that the Al-Shabab attacks are systematic.²⁹⁵ The same characteristics can be identified in Al-Shabab attacks across the border, on Kenyan civilians, foreign-based surgeons, logistic officers and humanitarian aid workers²⁹⁶ which reinforces the finding that Al-Shabab is committing the crime against humanity of murder contrary to Article 7(1)a) of the ICC Statute.

The crime against humanity of extermination has been defined as actions that involve the denial of basic necessities like food, water and medicine on such a large scale that it results in the mass suffering and deaths of civilians.²⁹⁷ It is deemed to have occurred where the perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population. The conduct must have resulted in the mass killing of members of a civilian population.²⁹⁸ Al-Shabab deprives civilians of their access to food, water and

accessed on 23rd March 2020; CNN World, 'Blast Kills 19 at Graduation Ceremony in Somalia' (CNN 4 December 2009) <<http://edition.cnn.com/2009/WORLD/africa/12/03/somalia.attacks/>> accessed 7 July 2021

²⁹² International Criminal Court, 'Elements of Crimes' 2nd November 2000 (ICC-ASP/1/3 (Pt II-B), UN Doc PCNICC/2000/1/Add.2), OXIO 195, Article 7 (1) (a)

²⁹³ *Prosecutor v. Tihomir Blaskic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-95-14-T (3 March 2000); *Prosecutor v Dragoljub Kunarac, Radomir Kivac and Zoran Vukovic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-96-23-T & IT-96-23/1-T (22 February 2001)

²⁹⁴ Human Rights Watch, 'So Much to Fear: War Crimes and the Devastation of Somalia' 2008; Reuters, 'Death Toll from Somalia Truck Bomb in October now at 512: Probe Committee' (Reuters 30 November 2017) <<https://www.reuters.com/article/us-somalia-blast-toll/death-toll-from-somalia-truck-bomb-in-october-now-at-512-probe-committee-idUSKBN1DU2IC>> accessed 8 July 2020; AFP, 'Somalia: 15 People Including Deputy Minister Killed in Al-Shabaab Attack' (AfricaNews 23rd March 2019) <<https://www.africanews.com/2019/03/23/somali-11-people-wounded-in-mogadishu-al-shabaab-attack/>> accessed on 23rd March 2021; CNN World, 'Blast Kills 19 at Graduation Ceremony in Somalia' (CNN 4 December 2009)

<<http://edition.cnn.com/2009/WORLD/africa/12/03/somalia.attacks/>> accessed 7 July 2020

²⁹⁵ *Prosecutor v Dragoljub Kunarac, Radomir Kivac and Zoran Vukovic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-96-23-T & IT-96-23/1-T (22 February 2001)

²⁹⁶ Amnesty International, 'Fatal Insecurity: Attacks on Aid Workers and Rights Defenders in Somalia' 2008; Nyambega Gisesa, 'Belly of the Beast: Inside Shabaab's Gruesome Abduction Syndicate' (Daily Nation 14th April 2019) <<https://mobile.nation.co.ke/news/Inside-Shabaab-s-abduction-syndicate/1950946-5070650-8wtid4z/index.html>> accessed 14 April 2021; Aljazeera News, 'Al-Shabab Massacres 28 Kenyan Bus Passengers' (Aljazeera 23 November 2014) <<https://www.aljazeera.com/news/africa/2014/11/killed-kenya-bus-attack-201411226446296802.html>> accessed 2nd October 2020; Abdi Guled, Tom Odula and Cara Anna, 'Extremists attack Kenya Military Base, 3 Americans Dead' (AP 6 January 2020) <<https://apnews.com/article/65926ee82091f779d28d6a9644fb739f>> accessed 16th November 2020

²⁹⁷ *Prosecutor v Nikolic* (Indictment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Case No. IT-94-2-1 24 (4 November 1994)

²⁹⁸ International Criminal Court, 'Elements of Crimes' 2nd November 2000 (ICC-ASP/1/3 (Pt II-B), UN Doc PCNICC/2000/1/Add.2), OXIO 195, Article 7 (1) (b)

medicine, imposes high taxes on impoverished communities, confiscates farmers' produce and restricts aid agencies from distributing food, water, medicine and other forms of humanitarian aid to starving civilians. This has caused immeasurable suffering to civilians who suffer from high child mortality rates, acute malnutrition, diarrhea and acute starvation. The UN Somalia Monitoring Group has reported that the criminal actions by Al-Shabab cause Somalia's periodic famine and that the famine is not a result of climatic issues.²⁹⁹ Al-Shabab also targets refugees who it claims are failing to undertake their duties of rebuilding the country.³⁰⁰ Similar actions have been determined to amount to the crime against humanity of extermination.³⁰¹ The high number of victims of Al-Shabab actions signified by the huge number of refugees is an indication that Al-Shabab's actions satisfy the requirement of a widespread attack.³⁰² On the other hand, recurring famine attributed to Al-Shabab actions show that the actions of Al-Shabab have a high degree of repetitiveness and are thus systematic.³⁰³ There is therefore a strong case to find that Al-Shabab is committing the crime of extermination.

Torture is the third crime against humanity prohibited under Article 7 of the ICC Statute. It is defined as the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions³⁰⁴. The crime is deemed to have been committed where the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. Further, the victim must have been under the custody or under the control of the perpetrator and the suffering inflicted on the victims must not have been

²⁹⁹ Mat Bryden, 'Somalia's Famine is Not Just a Catastrophe, It's a Crime' 2011

³⁰⁰ Ibid; Jason Burke, 'Al-Shabaab Militants Ban Starving Somalis from Accessing Aid' (The Guardian 27 July 2017) <<https://www.theguardian.com/world/2017/jul/27/al-shabaab-militants-ban-starving-somalis-from-accessing-aid>> accessed 10 July 2020

³⁰¹ Ibid Rome Statute of the International Criminal Court, Article 7(1)(b); *Prosecutor v Nikolic* (Indictment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-94-2-1 24 (4 November 1994); *Prosecutor v Brdanin* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-99-36-T (1 September 2004); Ibid *Co-Prosecutor v. Kaing Guek Eav alias Duch*

³⁰² *Prosecutor v. Tihomir Blaskic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-95-14-T (3 March 2000)

³⁰³ *Prosecutor v Dragoljub Kunarac, Radomir Kivac and Zoran Vukovic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-96-23-T & IT-96-23/1-T (22 February 2001)

³⁰⁴ Ibid Rome Statute of the International Criminal Court, Article 7(2)(e)

legal.³⁰⁵ This Chapter has enumerated in detail the many cases of torture that Al-Shabab is committing against accused persons charged before its courts. Al-Shabab amputates the limbs of persons in their custody or beats them to obtain confessions. In other instances, Al-Shabab has been found to cut off the fingers and toes of abductees causing them immeasurable pain.³⁰⁶ The degree or intensity of the pain and suffering caused during torture is whether torture is prosecuted as a crime against humanity, a war crime or as a stand-alone crime.³⁰⁷ There is therefore a strong case to find that Al-Shabab is committing the crime against humanity of torture.

The next prohibited act is that of rape, sexual slavery, enforced prostitution, forced pregnancy or any other forms of sexual violence of comparable gravity. Al-Shabab has often abducted women and girls in Kenya and Somalia. In Kenya for instance, Al-Shabab uses persons who pose as recruiters for jobs and then leads the unsuspecting abductees to their camps. Rescued women and girls have revealed that at the Al-Shabab camps they found more female abductees and that each abductee would be raped by three to five Al-Shabab fighters per day.³⁰⁸ Most of the returnees have often returned pregnant or with children borne to their rapists.³⁰⁹ These accounts have satisfied the ingredients of rape as a crime against humanity. Al-Shabab perpetrators have been proven to have invaded the bodies of their captors in circumstances involving forced penetration/sexual intercourse by force/coercion or without consent.³¹⁰

There is *prima facie* evidence that Al-Shabab is committing the crime against humanity of sexual slavery. For the scores of women and girls mentioned above, Al-Shabab takes away their liberty

³⁰⁵International Criminal Court, ‘Elements of Crimes’ 2nd November 2000 (ICC-ASP/1/3 (Pt II-B), UN Doc PCNICC/2000/1/Add.2), OXIO 195, Article 7 (1) (f)

³⁰⁶ Harun Maruf, ‘Al-Shabab Kills 18 in Surge of Executions’ (VOA 8 July 2019) <<https://www.voanews.com/africa/al-shabab-kills-18-surge-executions>> accessed 28 January 2021; Ibid Harun Maruf; Stig Jarle Hansen, *Al-Shabab in Somalia: The History and Ideology of a Militant Islamist Group 2005-2012* (Hurst Publishers 2013) p.87

³⁰⁷ *Mejía v. Peru*, Report No. 5/96, Annual Report of the Inter-American Commission on Human Rights 1995, OAS doc. OEA/Ser.L/V/II.9 Doc. rev.7(1996), 157, 185-87, (applying the American Convention on Human Rights (1969), OAS Treaty Series No. 36); *Prosecutor v. Anto Furundzija* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-95-17/1-A (24 March 2000); *Prosecutor v Dragoljub Kunarac, Radomir Kivac and Zoran Vukovic* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-96-23-T & IT-96-23/1-T (22 February 2001)

³⁰⁸ UN Security Council, ‘Report of the Secretary General on Children and Armed Conflict in Somalia’ (13 July 2017) (S/2016/1098); DW, ‘Escape from Al-Shabab: ‘I was Turned into a Sex Slave’ (DW) <<https://www.dw.com/en/escape-from-al-shabab-i-was-turned-into-a-sex-slave/a-42762342>> accessed 28th January 2021

³⁰⁹ *ibid*

³¹⁰ *Ibid* International Criminal Court, ‘Elements of Crimes’, Article 7(1)(g)-1

by threatening them that if they escape they will be killed or their families will be targeted.³¹¹ These actions are consistent with the exercise of the right of ownership and denial of sexual autonomy referred to under the ICC Elements of Crimes. Such actions have been held to constitute the crime against humanity of sexual slavery.³¹² Numerous reports point to a huge number of victims of Al-Shabab acts which is important because as pointed out earlier, the multiplicity of victims has been held to satisfy the requirement of a widespread attack.³¹³ The repeated abductions of young women and girls who are then made victims of the three crimes signifies that the Al-Shabab attacks comprise a systematic attack.³¹⁴ There would be challenges in establishing a strong case for the crime against humanity of sexual violence. The crime constitutes non-penetrative acts that are committed coercively on a person.³¹⁵ Just like the crime of sexual slavery, sexual violence involves the exercise of the rights of ownership over the victim and deprivation of liberty.³¹⁶ When confronted with similar clauses on this crime in its founding Statute, the Special Court for Sierra Leone in *Fofana and Others*³¹⁷ held that other than being non-penetrative, the constitutive acts of the crime of sexual violence should not amount to any of the earlier enumerated sexual crimes. A review of Al-Shabab's actions has not produced a *prima facie* case to find that Al-Shabab is committing the crime against humanity of sexual violence. The same case applies to the crimes against humanity of enforced prostitution and forced pregnancy. To this extent, the Chapter concludes that there is **no strong case** to find that Al-Shabab is committing the crimes against humanity of sexual violence, enforced prostitution and forced pregnancy.

³¹¹ DW, 'Escape from Al-Shabab: 'I was Turned into a Sex Slave' (DW) <<https://www.dw.com/en/escape-from-al-shabab-i-was-turned-into-a-sex-slave/a-42762342>> accessed 28th January 2021; Charlotte Attwood, 'The Sex Slaves of Al-Shabab' (BBC News 24 May 2017) <<https://www.bbc.com/news/magazine-40022953>> accessed 28th January 2021

³¹² Ibid International Criminal Court, 'Elements of Crimes', Article 7(1)(g)-2; *Judgment on the Common Indictment and the Application for Restitution and Reparation* (4 Dec. 2001) (Women's Int'l War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery); *Prosecutor v Dragoljub Kunarac, Radomir Kivac and Zoran Vukovic* (Trial Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Case No. IT-96-23-T & IT-96-23/1-T (22 February 2001); Angela M. Banks, 'Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal's Jurisprudence & the International Criminal Court's Elements of Crimes' (2005) College of William & Mary Law School: William & Mary Law School Scholarship Repository, p.14

³¹³ *Prosecutor v. Tihomir Blaskic* (Judgement) International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber Case No. IT-95-14-T (3 March 2000)

³¹⁴ Ibid *Prosecutor v Dragoljub Kunarac, Radomir Kivac and Zoran Vukovic*

³¹⁵ *Prosecutor v. Miroslav Kvocka, Mlado Radic, Zoran Zigic, Dragoljub Prcac*, (Judgment) ICTR Appeals Chamber Case No. IT-98-30/1-A (28 February 2005)

³¹⁶ Ibid International Criminal Court, 'Elements of Crimes', Article 7 (1) (g)-6

³¹⁷ *Prosecutor v. Norman, Fofana, Kondewa*, (Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence) Case No. SCSL-04-14-PT (May 24, 2005)

Article 7(h) of the Statute criminalizes persecution. It provides that persecution against any identifiable group or collectivity on politics, racial, ethnic, cultural, religious, gender or other grounds universally impermissible grounds under international law is a crime against humanity.³¹⁸ In Kenya Al-Shabab targets buses, quarry sites and towns in the North. During attacks, Al-Shabab distinguishes Christians from Muslims. Muslim civilians are released while Al-Shabab executes Christian civilians (who it terms “apostates”) in cold blood. Beyond this, Al-Shabab kills Christians found to have married Muslims as the group does not allow trans-religious marriages.³¹⁹ The discriminatory element in this crime is a crucial element, inferred from an accused person’s participation in a system or enterprise that discriminates against the victim based on the aforementioned impermissible grounds. As was in *Popovic*³²⁰ where the accused persons targeted Bosnian Muslims, Al-Shaba targets Christians who it terms “apostates”. This is a derogatory term used to refer to non-Muslims used not just among Al-Shabab but worldwide among Islamist terrorists and radical scholars and clerics.³²¹ The crime of persecution must result in the deprivation of a fundamental human right.³²² Al-Shabab killings deprive victims of their fundamental human right to life enshrined under UDHR and other human rights instruments.³²³ Their use of derogatory terms and the evidence of discriminatory intent can be deemed to be a breach of the right to human dignity.³²⁴ Hate speech must be accompanied by the commission of

³¹⁸Ibid Rome Statute of the International Criminal Court, Article 7(h)

³¹⁹ Catrina Stewart, ‘Kenya Buss Attack: Al-Shabab Gunmen Behead and Shoot 36 non-Muslim Labourers at Mandera Quarry’ (Independent 2 December 2014) <<https://www.independent.co.uk/news/world/africa/kenya-bus-attack-gunmen-kill-36-at-mandera-quarry-9896973.html>> accessed 25th April 2020; Manase Otsialo and AbdimalikHajir, ‘At least 28 Killed in Shabaab Attack on Nairobi-Bound Bus in Mandera’ (Daily Nation 22 November 2014) <<https://www.nation.co.ke/counties/28-dead-suspected-Al-Shabaab-attack-in-Mandera-/1107872/2531256/-/ljsywl/-/index.html>> accessed 22nd April 2020; Aljazeera News, ‘Al-Shabab Massacres 28 Kenyan Bus Passengers’ (Aljazeera 23 November 2014) <<https://www.aljazeera.com/news/africa/2014/11/killed-kenya-bus-attack-201411226446296802.html>> accessed 2nd October 2020

³²⁰ *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, Vinko Pandurević*, (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-05-88-A (30 January 2015)

³²¹ Magdi Abdelhadi, ‘What Islam says on religious freedom’ (BBC News 27 March 2006) <http://news.bbc.co.uk/2/hi/south_asia/4850080.stm> accessed 26 February 2021

³²² Ibid n. 245

³²³ Universal Declaration of Human Rights (adopted 10 December 1948. UNGA Res 217 A(III) (UDHR), Article 3; Ibid *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, Vinko Pandurević*, para 713

³²⁴ *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, Vinko Pandurević*, (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-05-88-A (30 January 2015); *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* (Judgment)

the other grave breaches such as killing or injuring as it cannot hurt or kill on itself.³²⁵ However, the ICTY has held that a person who carries out the killings following the use of hate speech by another person can be found liable as they would be operating to implement a common plan³²⁶. This means that many Al-Shabab fighters can be found liable for persecution where they carry out discriminatory killings similar to those enumerated above. Article 7 of the ICC Statute also refers to other inhumane acts of a similar character intentionally causing great suffering or serious injury to the body or mental or physical health. There is no prima facie case that Al-Shabab is committing such atrocities beyond those investigated and established or disqualified in this Chapter. To this extent, the Chapter can make the conclusion of findings.

2.3. CONCLUSION

The objectives of this Chapter were to investigate whether Al-Shabab is committing war crimes and crimes against humanity. The more obvious crime of terrorism was omitted. There are scores of studies addressing Al-Shabab's culpability for the crime. In any event the chapter's approach was prudently intended to ensure that it is not too bulky. This meant that the crimes of piracy, human trafficking, smuggling of small arms etc would have to be left out. The same rationale informed the decision to leave out genocide. Beyond this, it was considered that the prima facie evidence available is not sufficient to support a further inquiry into its possible commission, bearing in mind the gravity and evidential threshold associated with the crime.

An inquiry into the protracted violence in Somalia determined that a non-international armed conflict is occurring. Somalia's use of the military justified the finding that the situation does not present a rebellion or insurgency, which as demonstrated are handled by a State's public order and security apparatus. It is further settled that the Somalia armed conflict is non-international. The ICC, ICTY and ICTR have held that while an international armed conflict involves two or more armed forces of States, a non-international armed conflict involves armed forces of States and the military wings of non-state armed groups. The Somalia non-international conflict pits the Somalia National Army and its allied partners on one side and the Al-Shabab terror group on the

International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. ICTR-99-52-T (3 December 2003)

³²⁵ *Ibid* *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, para 986

³²⁶ *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, Vinko Pandurević*, (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-05-88-A (30 January 2015)

other. Somalia's allied partners consist of Ethiopian forces as well as the forces of AMISOM contributing States who are in Somalia with Somalia's consent. War crimes are prohibited under Article 8(2) paragraphs a-d of the ICC Statute. Paragraphs (a) and (b) deal with international armed conflict and do not, therefore, apply to the Somalia situation. Effectively, an inquiry into whether Al-Shabab is committing the 8 grave breaches of the Geneva Convention listed therein revealed a negative result. An inquiry into whether Al-Shabab has committed crimes prohibited under paragraphs (c) and (d) relating to non-international armed conflict considered the ICC Elements of Crimes which outlines the constituent acts of enumerated crimes. The crimes identified by the ICC Statute are mainly in two forms: Grave breaches of the Geneva Convention and Serious Violations of Common Article 3 of the Geneva Conventions.

For the latter crimes prohibited under the Common Article 3 of the Geneva Conventions, the study has found Al-Shabab liable for all four crimes. First, the study has established that Al-Shabab is committing the war crime of violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. Second, the study has found Al-Shabab liable for the war crime of taking of hostages. Third, the study has found that Al-Shabab is committing the war crimes of outrages upon personal dignity, in particular humiliating and degrading treatment. Fourth, the Chapter has established that Al-Shabab is committing the war crime of passing sentences and executing victims without judgments of regularly constituted courts as well as judicial guarantees recognized as indispensable by civilized peoples. Beyond these, the Chapter has established the war crime of consisting of the 15 prohibited acts that constitute serious violations of the laws and customs applicable in armed conflicts not of an international character.

In relation to crimes against humanity, the Chapter has established that the Al-Shabab group has an organisational policy both within the meaning of the restrictive approach as advanced by Judge Peter Hans Kaul and the liberal approach as upheld by the ICC in several majority decisions. The ICTR decision in *Akayesu*³²⁷ has guided this Chapter to the effect that a widespread and systematic attack principle requires that the attack must be massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The Chapter has demonstrated how this has been the case with Al-Shabab. This Chapter has also demonstrated how Al-Shabab has committed the 11 prohibited acts that constitute crimes

³²⁷*Prosecutor v Akayesu* (Judgment) ICTR Appeal Chamber Case No. IT-96-4-T, T Ch I (2 September 1998)

against humanity. Based on the elements set out in the ICC Elements of Crimes and jurisprudence emanating from the ICC and the international criminal tribunals, this Chapter has determined that Al-Shabab are indeed committing crimes against humanity.

CHAPTER THREE

EXAMINING THE EFFICACY OF ACCOUNTABILITY MECHANISMS APPLIED TO AL-SHABAB CRIMES

3.0. INTRODUCTION

This Chapter investigates to what extent accountability mechanisms applied in Somalia have been efficient in making Al-Shabab answerable for the brutal crimes they have continued to commit. Primarily, the realm of criminal law falls within the jurisdiction of a State in line with the doctrine of state sovereignty. However, as has been established earlier in this Chapter, international crimes like crimes against humanity and war crimes are crimes against the whole of mankind and thus the perpetrator *hostis humanis generis* is a person of interest to the international community. Based on those two premises, this Chapter investigates the efficacy of accountability mechanisms in two dimensions. First, the Chapter examines to what extent Somalia's own judicial framework has brought Al-Shabab to account for crimes against humanity and war crimes. There is sufficient *prima facie* evidence to the extent that Somalia's criminal justice institutions are severely weak and unable to mount credible prosecutions of perpetrators. This takes cognizance of that and examines at greater lengths the specific weaknesses in Somalia's institutions. Second, this Chapter will examine the accountability mechanisms established or proposed by the international community. The history of international criminal law is rich with interventions specifically by the UNSC in armed conflicts in the form of specialised courts and tribunals. This Chapter examines accountability mechanisms implemented by the international community, particularly the UNSC, if any.

It is apparent from the large-scale and systematic manner in which Al-Shabab commits war crimes and crimes against humanity that there is either a lack of accountability mechanisms or a large-scale failure of existing mechanisms. This Chapter examines the problems caused by the lack or failure of accountability mechanisms. There are plenty of lessons to learn from looking at other armed conflicts where the UNSC has intervened. Yugoslavia, Rwanda, Sierra Leone, Lebanon and Cambodia offer some of these lessons. The Chapter then concludes by picking valuable lessons from past armed conflicts to inform what accountability mechanisms could be tried in Somalia to ensure that Al-Shabab perpetrators are held accountable for war crimes and crimes against humanity.

3.1. CURRENT ACCOUNTABILITY MECHANISMS FOR AL-SHABAB CRIMES

It is a norm in customary international law that whenever individuals commit crimes as heinous as war crimes and crimes against humanity, the international community must prosecute them. It is because such persons have committed crimes deemed to be an affront to all of humankind and are therefore *hostis generis humanis* (enemies of mankind). There is no grey area in this because the crimes are often the most grievous and only the most morally deprived individuals commit them. There are universal moral principles understood by all mature human beings immediately with little thought *statim, modica consideratione*.³²⁸ At all times, national and international laws must pursue the ends of according justice to victims of the most heinous crimes. The offender must be punished so that the dignity of the person who was hurt is restored and the humiliation of the offence is undone.³²⁹ There are several mechanisms established to enforce accountability mechanisms in international criminal law. Somalia and the international community have applied a number of them.

3.1.1. Somalia Criminal Justice System

Somalia's Constitution³³⁰ establishes a criminal justice system comprising of the Judiciary³³¹, police³³² and independent commissions³³³ like the Ombudsman.³³⁴ This part will have three sub-sections. This section has three sub-sections. The first sub section analyzes the criminal justice system, looking into the structure, powers and functions of each of these institutions. The second sub-section will examine to what extent these institutions have been effective in bringing Al-Shabab perpetrators of war crimes and crimes against humanity to account. It will also look at aspects in which these institutions have not been effective. The third sub-section will look into what can be done to improve these institutions to achieve the full potential in participating in the objective of bringing Al-Shabab perpetrators to account. There is *prima facie* evidence that these institutions are not fully effective based on the high rate of IHL breaches being committed by the

³²⁸ St. Thomas Aquinas, *Summa Theologica* (Cosimo Inc 1 Jan 2013); Joseph Boyle, 'Natural Law and the Ethics of Traditions' in Robert P. George Ed., *Natural Law Theory: Contemporary Essays* (Oxford 1994) p.11

³²⁹ Hugo Grotius, *On the Law of War and Peace* (Library of Alexandria 2020) p.146

³³⁰ The Federal Republic of Somalia Provisional Constitution, 2012

³³¹ Ibid The Federal Republic of Somalia Provisional Constitution, Article 108

³³² Ibid, Article 126

³³³ Ibid n 335, Chapter 10

³³⁴ Ibid n 335, Article 111J

group's members as highlighted in the previous chapter. This forms the rationale of the third sub-section.

3.1.1.1. The Framework of the Somalia Criminal Justice System

Somalia's Constitution establishes the Judiciary³³⁵ which comprises of three tiers. The first tier is the Constitutional Court which has powers to determine cases relating to constitutional matters, the interpretation of the constitution or matters of public interest³³⁶, determine disputes between the national government and federal state governments³³⁷ and decide disputes between federal government organs.³³⁸ Evidently the absence of any mention of courts with jurisdiction over criminal cases is parallel with the functions of courts to manage disputes between organs and levels of governments. It has therefore been contended that this is a major flaw in that the Constitution avoids a core matter of accountability mechanisms at the expense of an over-emphasis of the power-sharing aspect of national reconciliation and rebuilding.³³⁹ However, perhaps this absence could be as a result of the fact that the Criminal Procedure Code vests criminal jurisdiction on District Courts, Regional Courts, the Court of Appeal and the Supreme Court³⁴⁰ with each court's jurisdiction being pegged on the subject matter (maximum punishment for the charge brought)³⁴¹ or the place or territory where the offence is committed.³⁴² On paper, the independence of the judiciary is ringfenced with the Judicial Service Commission³⁴³ with the powers to appoint, transfer, interdict judges as well as determine their remuneration.³⁴⁴

The Constitution also establishes the federal police force³⁴⁵ as one of the institutions tasked with national security, particularly protecting the lives and property of Somalia citizens and residents³⁴⁶. The federal member states are also empowered to establish their own police forces and such police forces also have powers to protect the lives and property of Somalia citizens and

³³⁵ Ibid n 335, Chapter 9

³³⁶ Ibid The Federal Republic of Somalia Provisional Constitution, 2012, Article 109

³³⁷ Ibid Article 109C (1)d

³³⁸ Ibid

³³⁹ Ibid International Business Publications USA, page 18, 37, 133, 172

³⁴⁰ Criminal Procedure Code, Legislative Decree No. 1 of 1 June 1963

³⁴¹ Ibid Criminal Procedure Code, Article 4

³⁴² Ibid Criminal Procedure Code, Article 5

³⁴³ Ibid n 341, Article 109A

³⁴⁴ Ibid, n 109A(6)

³⁴⁵ Ibid n341, Article 126 (1)c

³⁴⁶ Ibid n. 341, Article 124(4)

residents.³⁴⁷ The Attorney General has powers to investigate the commission of offences as well as commence and undertake criminal proceedings.³⁴⁸

3.1.1.2. Weakness of the Somalia Criminal Justice System

There is no evidence that Somalia's criminal justice system is being utilized to investigate and prosecute war crimes. Somalia is instead hampered by a lack of capacity in investigating such crimes.³⁴⁹ It has been posited that Somalia's challenges with its criminal justice system are rooted in its social-political and legal history.³⁵⁰ Since the 1991 fall of dictator Siad Barre, Somalia has largely failed to establish efficient accountability mechanisms. The prolonged period of armed conflict has also meant that much focus by the Somalia society has been on the power-sharing³⁵¹ aspect of national reconciliation and rebuilding, rather than on accountability for those who have committed the gravest crimes. For instance, following the adoption of a new constitution, the emphasis of reform was on cementing federalism and decentralization while less focus was put on accountability mechanisms.³⁵²

Somalia is also hampered when it comes to crimes against humanity. Primarily, crimes against humanity are prohibited under the ICC Statute. Somalia has neither signed nor ratified the ICC Statute. With the ICC Statute being the only treaty criminalizing crimes against humanity, Somalia is therefore not bound by any treaty provisions to investigate and prosecute crimes against humanity. Nevertheless, as pointed out earlier, all states have an obligation to prosecute core crimes like crimes against humanity.³⁵³ Somalia has however neither enacted laws providing for the prosecution of crimes against humanity nor tried perpetrators. As a result of the prolonged armed conflict, most of Somalia's criminal justice system institutions have been inefficient. The Judiciary is particularly hampered by the lack of judicial training and lack of public confidence

³⁴⁷ Ibid n. 341, Article 126(4)

³⁴⁸ Law on the Organization of the Government, No. 14 of June 3rd, 1962, as amended by Decree-law No. 1 of February 7th, 1965, Article 8(1)

³⁴⁹ United Nations Office on Drugs and Crime, 'UNODC Training Somali Police Trainers on Criminal Investigation' (UNODC February 2020) <<https://www.unodc.org/easternafrika/en/unodc-training-somali-police-trainers-on-criminal-investigation.html>> accessed 14 April 2021

³⁵⁰ International Business Publications USA, *Somalia Recent Economic and Political Developments Handbook Volume 1 Strategic Information and Developments* (Lulu.com 2007)

³⁵¹ Ibid International Business Publications USA, page 18, 37, 133, 172

³⁵² Ibid International Business Publications USA, p.240

³⁵³ *Prosecutor v. Anto Furundzija* (Judgment) International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-95-17/1-A (24 March 2000) at p.238; M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Martinus Nijhoff Publishers 1999)

in the courts.³⁵⁴ There have also been efforts by NSAGs to impose their version of Sharia law in areas where they control³⁵⁵ The weak formal judicial system also faces stiff competition from clan elders who wield unlimited power and who enjoy public trust in determining disputes.³⁵⁶ The international community has been trying to assist Somalia to improve the capacity of its formal justice system. There is concern that Somali judges and judicial staff lack adequate skills to render expeditious and efficient justice in meeting international standards. Somalia also lacks enough prosecutors and the capacity to investigate and prosecute serious crimes which unfortunately has influenced the resort to the informal justice system by members of the public.³⁵⁷ The informal justice system poses great risks because despite the high public confidence it enjoys at the expense of the formal justice system, the informal justice system produces decisions that sometimes result in injustice or a failure to comply with international law standards of justice.³⁵⁸ Efforts to reform the Judiciary at the aforementioned Arta Process resulted in the formation of the Transitional Government which established the Judiciary as a core arm of government with as much authority as other arms.³⁵⁹ However, the non-payment of salaries for the judicial staff proved to be the biggest hindrance to the operationalization of the Judiciary.³⁶⁰ Wrangles between the different arms and institutions of government such as the President ordering the arrest of the Chief Justice

³⁵⁴ IDLO, ‘Enhancing the Capacity of Justice Institutions to Deliver Justice in Somalia’ (IDLO 10 May 2021) <<https://www.idlo.int/what-we-do/initiatives/enhancing-capacity-justice-institutions-deliver-justice-somalia>> accessed 12 June 2021; Andre le Sage, ‘Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives’ (GDSRC 2005) <<https://gsdrc.org/document-library/stateless-justice-in-somalia-formal-and-informal-rule-of-law-initiatives/>> accessed 12 June 2021

³⁵⁵ United States Department of State, ‘Somalia 2020 International Religious Freedom Report’ (US Department of State) <<https://www.state.gov/reports/2020-report-on-international-religious-freedom/somalia/>> accessed 25 January 2021, page 4, page 6, page 9

³⁵⁶ IDLO, ‘Enhancing the Capacity of Justice Institutions to Deliver Justice in Somalia’ (IDLO 10 May 2021) <<https://www.idlo.int/what-we-do/initiatives/enhancing-capacity-justice-institutions-deliver-justice-somalia>> accessed 12 June 2021; Andre le Sage, ‘Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives’ (GDSRC 2005) <<https://gsdrc.org/document-library/stateless-justice-in-somalia-formal-and-informal-rule-of-law-initiatives/>> accessed 12 June 2021

³⁵⁷ IDLO, ‘Enhancing the Capacity of Justice Institutions to Deliver Justice in Somalia’ (IDLO 10 May 2021) <<https://www.idlo.int/what-we-do/initiatives/enhancing-capacity-justice-institutions-deliver-justice-somalia>> accessed 12 June 2021

³⁵⁸ IDLO, ‘Strengthening the Link between Formal Justice and Traditional Dispute Resolution’ (IDLO 11 May 2016) <<https://www.idlo.int/what-we-do/initiatives/strengthening-link-between-formal-justice-and-traditional-dispute-resolution>> accessed 12 June 2021

³⁵⁹ Heritage Institute, ‘Rebuilding Somalia’s Broken Justice System: Fixing the Politics, Policies and Procedures’ (Heritage Institute January 2021) <<http://www.heritageinstitute.org/wp-content/uploads/2021/01/Justice-Report-Jan-6-.pdf>> accessed 4th January 2021

³⁶⁰ Ibid Heritage Institute at page 9

and a subsequent Chief Justice coopting the President's help in disbanding the Judiciary Service Commission³⁶¹ have hampered the operations of the Judiciary.

Somalia's Police Force was for a few years non-existent as a result of the prolonged armed conflict. Before the armed conflict, the Somalia Police Force had been established by a law promulgated by Siad Barre.³⁶² The fall of the Siad Barre government and the eruption of armed conflict completely destroyed the police force. It has been contended that during the Siad Barre regime the police force was well structured with several specialised units but they were completely depleted even before he fell.³⁶³ Stig Jarle Hansen³⁶⁴ has also noted this complete destruction and posits that the reason why the police force revamps has been slow, following the reestablishment of the Federal Government with international support has been that the police have received no pay.³⁶⁵ This led to the police being more corrupt and the citizenry favoring Al-Shabab as more credible because of its perceived rejection of corruption.³⁶⁶ Al-Shabab has also been able to evade arrest because they can easily bribe their way out.³⁶⁷ As a matter of fact it has been posited that Al-Shabab has been a product of insecurity³⁶⁸. Its growth brings a sharper focus on the inability of the Somalia Police Force in curbing insecurity, the growth of the group itself and the entry of foreign fighters into the country. The underfunding of the Somalia Police Force especially after the formation of the Transitional Federal Government was so dire that the Force was rocked with massive defections to Al-Shabab especially because Al-Shabab managed to pay their members handsomely for every attack committed.³⁶⁹ Meanwhile the few members of the Somalia Police Force who remained in the Force plundered State and private resources, and fights between police units over the little funds allocated to them to sustain themselves.³⁷⁰

Somalia's Parliament is yet to enact laws establishing a framework to investigate, try and convict perpetrators of war crimes. This is despite the fact that the Geneva Conventions require Somalia

³⁶¹ Ibid Heritage Institute at page 11

³⁶² Law No. 2 of 23 December 1972

³⁶³ Helen Chapin Metz, *Somalia: A Country Study* (Library of Congress) at page 214

³⁶⁴ Stig Jarle Hansen, *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group* (OUP 2013)

³⁶⁵ Ibid Stig Jarle Hansen page 4-8

³⁶⁶ Ibid Stig Jarle Hansen page 6

³⁶⁷ Ibid n. 358 page 50

³⁶⁸ Ibid n.358

³⁶⁹ Ibid Stig Jarle Hansen at page 55, 59

³⁷⁰ Ibid n. 361

as a Party³⁷¹ to enact legislation criminalizing war crimes and providing for the relevant penalty, to search for perpetrators of war crimes before their courts or to hand over such persons to a State party for trial in line with the maxim *aut dedere aut judicare*. Common Article 3 of the Geneva Conventions is considered to constitute customary international law.³⁷² As a result, Somalia is still bound by the provision. Notably, Somalia has not ratified Additional Protocol II regulating non-international armed conflicts. Nevertheless, the country is bound by its provisions as the provisions effectively address issues referred to in common article 3 and has declared so on its own accord.³⁷³

These weaknesses of the Somalia Criminal Justice are the reasons Somalia is unable to charge and punish Al-Shabab members and has instead opted for military courts to try Al-Shabab.³⁷⁴ Somalia does not have an online case database that would indicate as to whether its criminal justice system tries war crimes or crimes against humanity in its courts and tribunals. Reputable organisations with a presence in Somalia and which have worked with Somali authorities in the pursuit of criminal justice have not put out any evidence of war crimes or crimes against humanity being prosecuted in Somalia³⁷⁵ and there is no evidence traceable through research that shows that the contrary is true. Instead, as earlier stated, Somalia relies on military courts which do not maintain the judicial safeguards recognised universally as paramount to a fair trial.³⁷⁶ Such rights include the right to be represented by a legal representative, to prepare and present a defence, to be accorded a public hearing. Decisions made by the military courts cannot be appealed³⁷⁷.

³⁷¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, Article 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, Article 51; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, Article 130; Geneva Convention Relative to the Protection of Civilian Persons in Times of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Article 147 (All ratified and acceded 12 July 1962)

³⁷² *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgement (27 June 1986) ICJ Reports 1986, p.100

³⁷³ United Nations Human Rights Council, ‘Somalia: Report to the Human Rights Council’ (11 April 2011) UN Doc HRC/WG.6/11/SOM/1, Para 75

³⁷⁴ Human Rights Watch, ‘Events of 2020’ (Human Rights Watch) <<https://www.hrw.org/world-report/2021/country-chapters/somalia#>> accessed 13 March 2020

³⁷⁵ Human Rights Watch, ‘Somalia: Events of 2020’ (HRW 2020) <<https://www.hrw.org/world-report/2021/country-chapters/somalia>> accessed 3rd January 2021

³⁷⁶ Human Rights Watch, ‘The Courts of Absolute Power: Fair Trial Violations by Somalia’s Military Court’ (HRW 21 May 2014) <<https://www.hrw.org/report/2014/05/21/courts-absolute-power/fair-trial-violations-somalias-military-court>> accessed 12 January 2021

³⁷⁷ Ibid Human Rights Watch

Overall, Al-Shabab has continued to commit grave human rights abuses without much accountability³⁷⁸ because Somalia's criminal justice system is just not efficient enough to prosecute perpetrators of IHL violations.

3.1.1.3. How the Somalia Criminal Justice is being improved and/or can be Improved

The International Development Law Organisation, which is an international organisation with Observer Status in the United Nations and works to strengthen justice institutions in countries, is working in Somalia. The organisation is working to train Somalia's judges, prosecutors and other players in its criminal justice system, on how to investigate, prosecute sophisticated offences³⁷⁹ The training ranges from case file organization, how to handle evidence, high profile investigations, as well as criminal procedures.³⁸⁰ Unfortunately, Somalia is not doing all it has been advised to do. For instance, the country still fails to try Al-Shabab before civilian courts, instead opting for the military courts which as aforementioned, fail to accord judicial safeguards to suspects.³⁸¹ The country has also failed to reform its obsolete laws like the Penal Code which does not address present atrocities.³⁸² Observations on what can be improved have not only been made by foreign actors but also by Somalia institutions and leadership. A national justice reform consultative meeting convened by the President recommended several reform measures. The meeting resolved that the Judiciary and independent institutions to comply with the Provisional Constitution. The thesis has shown how failure to do so continues to cause problems to the justice sector.³⁸³ Second, it was recommended that judicial independence be entrenched and that judicial staff be sufficiently remunerated.³⁸⁴

There are recommendations that other legal system institutions in Somalia require reforms. For instance, it has been recommended that Somalia needs to establish an anti-corruption commission

³⁷⁸ UN Security Council, 'Report of the Secretary General on Children and Armed Conflict in Somalia' (13 July 2017) (S/2016/1098) page 19-20

³⁷⁹IDLO, 'Strengthening the Response to Complex Crimes in Somalia' (IDLO 29 April 2019) <<https://www.idlo.int/fr/news/highlights/strengthening-response-complex-crimes-somalia>> accessed 9 February 2020

³⁸⁰ Ibid IDLO

³⁸¹Human Rights Watch, 'World Report 2021: Events of 2020' (Human Rights Watch) <https://www.hrw.org/sites/default/files/media_2021/01/2021_hrw_world_report.pdf> accessed 12 December 2020 at page 594

³⁸²Ibid Human Rights Watch

³⁸³ The Communique of the National Dialogue Justice Reform Conference Mogadishu Somalia 1st April 2013 to 5th April 2013, page 3

³⁸⁴ Ibid

to deal with cases of corruption that continue to inhibit various sectors of the country.³⁸⁵ The Police need to be reformed to incorporate modern fact-finding mechanisms including technology as well as training them to understand and incorporate human rights standards in their practice.³⁸⁶ In addition, it has been recommended that the police require civilian oversight to detect human rights abuses.³⁸⁷ International partners like the United Nations Office on Drugs and Crime³⁸⁸ and the USA³⁸⁹ are supporting reform measures by training prosecutors³⁹⁰ on investigations and the trial process. The reforms also include the creation of a new Somalia Police curriculum, support, particularly in technical aspects and police training.³⁹¹

3.1.2. United Nations Security Council

The UNSC may not be a court but as a UN organ acts to bring about criminal responsibility while discharging its cardinal responsibility of maintaining international peace and security.³⁹² The philosophical underpinnings of this framework are that persons who attack universal human principles and values are enemies of mankind. This is because they are an affront to human happiness. They must therefore suffer the harshest penalties.³⁹³ The UN is a representative entity that bears the legitimacy in taking actions to safeguard the interests of all men. The UNSC as its organ is seen as credible, efficient and insulated from local and regional interests and pursues persons who are *hostis generis humanis* through several avenues.

First, Article 29 of the UN Charter empowers the UNSC to establish any subsidiary organs necessary to achieve its aforementioned mandate. Second. Under Article 41 the UNSC is empowered to take measures that result in the partial or complete disruption of economic activities. Such measures have often included economic sanctions. Third, under the same Article

³⁸⁵ Ibid, page 6

³⁸⁶ Ibid, page 7

³⁸⁷ Ibid

³⁸⁸ UNODC, Pillar IV: 'Crime Prevention and Criminal Justice' (UNODC)

<https://www.unodc.org/documents/easternafrika/Criminal%20Justice%20Compendium%20in%20Somaliland/ROEA_Website-Justice_-_Updated.docx> accessed 17 February 2021

³⁸⁹ US Department of State, 'Bureau of International Narcotics and Law Enforcement Affairs: Somalia Summary' (US Department of State) <<https://www.state.gov/bureau-of-international-narcotics-and-law-enforcement-affairs-work-by-country/somalia-summary/>> accessed 17 February 2021

³⁹⁰ Ibid UNODC, page 4

³⁹¹ Ibid UNODC, page 6

³⁹² Charter of the United Nations, 1 UNTS XVI 24 October 1945, Article 24

³⁹³ Marcus Tullius Cicero, *The Republic and the Laws* (Oxford University Press 14 August 2008)

42 the UNSC is empowered to authorize the use of force to restore international peace and security. The sufficiency of military actions as accountability mechanisms within the realm of international criminal law will be conversed hereinafter. Fourth, Article 13(b) of the ICC Charter allows the UNSC to refer to the ICC any situations where crimes committed amount to a threat or breach of peace (otherwise referred to Chapter VII functions). This part examines how the UNSC has utilized the four tools and to what extent the UNSC has been successful. It does so by characterizing the actions in two broad categories.

3.1.2.1. The UNSC's use of Sanctions on the Somalia Armed Conflict

Chapter VII of the UN Charter requires the UN to always engage non-military means as the first mode of response to any breach or threat to peace. Under Article 41 the UN Charter empowers the UNSC to impose sanctions. The UNSC has done so using several resolutions. The UNSC has passed several resolutions calling for AMISOM to assist Somalia to establish a functional police force and urging Somalia and all UN Member States to take all necessary measures to halt the direct and indirect trade in Somalia charcoal³⁹⁴ as well as to inhibit Al-Shabab's trade in illicit sugar and livestock.³⁹⁵ This is prompted by credible reports such as that from the UN Sanctions Committee on Somalia, that Al-Shabab has been earning a huge amount of revenue from charcoal sales. Al-Shabab revenue increased to \$21 million in just the past year. This revenue is raised through taxes (zakat) levied at the ports of Kisimayu and Mogadishu as well as checkpoints set up on roads in areas Al-Shabab controls³⁹⁶. The sanctions have not been effective in bringing perpetrators of war crimes and crimes against humanity in Somalia.

While the sanctions have often been intended to complement efforts to improve Somalia's monetary and financial institutions and increase their ability to detect proceeds of crime, Al-Shabab is operating without detection by Somalia's monetary and financial institutions. Despite numerous sanctions, being in place, the Sanctions Committee recently reported for instance that Al-Shabab has been running two bank accounts at Salam Somali Bank in which one account has been found to be holding \$ 1.1 million raised through levies at the Mogadishu port in just four

³⁹⁴ UNSC Res 2036 (22 February 2012) S/RES/2036, para 22

³⁹⁵ UNSC Res 2444 (14 November 2018) S/RES/2444, para 33

³⁹⁶ UNSC, 'Letter Dated 28 September 2020 from the Chair of the Security Council Committee pursuant to Resolution 751 (1992) concerning Somalia Addressed to the President of the Security Council' S/2020/949 (28 September 2020)

months. Fictitious persons made deposits to the account with little documentation. For instance, a person named “ABC” was said to have deposited \$25,000 supposedly without detection by the bank or Somali authorities.³⁹⁷ Besides Somalia’s internal problems, a UN report has attributed the failure of the UNSC sanctions to actions by States that undermine the efforts to curtail Al-Shabab actions.³⁹⁸ The report showed that despite a UNSC ban on Somali charcoal Iran continued to act as a transit point for illicit charcoal originating from Somalia thereby enabling Al-Shabab to generate significant revenue to purchase weapons and maintain their terrorist activities.³⁹⁹ The charcoal was transported to Iran where it was packed in white bags labeled ‘product of Iran’ and later transported to other countries (including Comoros, United Arab Emirates, Ivory Coast and Ghana) with Iranian flagged boats using fake certificates of origin falsely indicating Iran as the country of manufacture. The report mentioned Oman and the United Arab Emirates as countries complicit in the trade.⁴⁰⁰ Evidently, UNSC sanctions have failed to curb Al-Shabab’s fast-rising ability to fund its activities. This explains why the group is still able to commit war crimes and crimes against humanity on a larger scale.

3.1.2.2. The UNSC’s Sanctioned AMISOM

In Article 42 of the UN Charter the UNSC may use force using the forces of Members of the UN as much as is necessary to maintain or restore international peace and security. Reacting to the Somalia armed conflict the UNSC passed Resolution 1744(2007) authorizing the African Mission on Somalia (AMISOM) to take all necessary measures to effectively act as a peacekeeping force, maintaining a conducive environment for the provision of humanitarian assistance⁴⁰¹. In 2017 the UNSC revised this stance and opted to enhance AMISOM’s mandate by authorizing AMISOM

³⁹⁷ Ibid UNSC, p.11

³⁹⁸ UNSC, ‘Letter dated 7 November 2018 from the Chair of the Security Council Committee Pursuant to Resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council’ 9 November 2018 S/2018/1002 <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2018_1002.pdf> accessed 22nd November 2020

³⁹⁹ Ibid

⁴⁰⁰ UNSC, ‘Letter dated 7 November 2018 from the Chair of the Security Council Committee Pursuant to Resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council’ 9 November 2018 S/2018/1002 <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2018_1002.pdf> accessed 22nd November 2020; Michelle Nichols, ‘Iran is New Transit Point for Somali Charcoal in Illicit Trade Taxed by Militants: U.N Report’ (Reuters 9 October 2018) <<https://www.reuters.com/article/us-somalia-sanctions-un/iran-is-new-transit-point-for-somali-charcoal-in-illicit-trade-taxed-by-militants-u-n-report-idUSKCN1MJ158>> accessed 2nd November 2020

⁴⁰¹ UNSC Res 1744 (21 February 2007) S/RES/1744

to reduce the threat of Al-Shabab by conducting offensive operations against Al-Shabab.⁴⁰² By so doing, the UNSC acknowledged the killing of Al-Shabab fighters as a viable mechanism to reduce the threat of terror.

Article 51 of the United Nations Charter allows member countries to intervene on an individual or collective basis to maintain or restore international peace and security. AMISOM has liberated numerous towns from Al-Shabab's hold such key to Al-Shabab's operations such as Somalia's capital Mogadishu where the terrorist group dislodged the government and the port city of Kisimayu which was central to Al-Shabab's main source of revenue of charcoal trade. Other cities where the group had maintained a firm grip such as Baidoa, Beletweyne, Alfamadow and Afgoye have also been liberated. AMISOM troops have killed scores of Al-Shabab fighters and commanders and weakened the group's numerical strength. The military campaigns have resulted in scores of Al-Shabab fighters defecting and opting to join government troops.⁴⁰³ Others have been rehabilitated and reintegrated into society.⁴⁰⁴

There are however serious questions relating to whether AMISOM is indeed effective in combating Al-Shabab. Al-Shabab was significantly diminished by AMISOM's campaign especially between 2012 and 2015. Following that period, Somali forces were unable to maintain the gains and hold on to liberated areas by AMISOM as they remained corrupt, undertrained and underequipped. Al-Shabab remains potent and has become ever more daring even 11 years since the AMISOM military campaign began. In January 2020 Al-Shabab fighters attacked and overrun a U.S military base in Kenya thereby destroying aircraft and vehicles. The U.S claimed that 3 personnel were killed while Al-Shabab claimed to have killed 17 U.S personnel and 9 Kenyan soldiers.⁴⁰⁵ Al-Shabab is also shoring up its membership numbers, capitalizing on public rage against civilian deaths caused by AMISOM, and religious fanaticism, to recruit youths susceptible to misinformation.

⁴⁰² UNSC Res 2372 (30 August 2017) S/RES/2372

⁴⁰³ Harun Maruf, 'Al-Shabab Defectors Being Rehabilitated to Re-enter Somali Society' (VOA News 29 August 2017) <<https://www.voanews.com/africa/al-shabab-defectors-being-rehabilitated-re-enter-somali-society>> accessed 23rd April 2021

⁴⁰⁴ Ibid Harun Maruf

⁴⁰⁵ Abdi Guled, Tom Odula and Cara Anna, 'Extremists attack Kenya Military Base, 3 Americans Dead' (AP 6 January 2020) <<https://apnews.com/article/65926ee82091f779d28d6a9644fb739f>> accessed 16th November 2020

The killing of offenders is an important aspect of international criminal law especially as a part of retribution, which itself is a mode of punishment in international criminal law. H.L.A Hart opined that where an offender has hurt the society by diminishing the authority of its laws or hurting members of the society, the society must punish such person.⁴⁰⁶ In a state of nature, individuals held a right to hurt those who hurt them. In the contemporary world the State exercises that right to retribution as an agent or proxy of the victim.⁴⁰⁷ It can be argued that military attacks provide some level of accountability albeit indirect. Al-Shabab fighters are aware that it is their grave actions that have warranted a military response. As a matter of fact, those defecting Al-Shabab ranks as a result of the sustained military pressure have often denounced the grave acts in attempts to negotiate for amnesty.

It is apparent that the AMISOM military campaign has not been successful. First, it is not efficient in achieving retribution because not every perpetrator is brought to justice. Al-Shabab is still in control of large swaths of territory and their fighters are often out of reach of AMISOM's military campaign. Even where AMISOM military campaigns have been sustained, fighters who are granted amnesty after surrendering cannot be said to have been brought to account notwithstanding the value of amnesty in international criminal law. Second, the mechanism can be faulted for not bearing a specific focus on war crimes and crimes against humanity. None of the UNSC resolutions mandating AMISOM, increasing its mandate and term particularly address accountability for the two crimes. Third, even as AMISOM's mandate expires by the end of December 2021⁴⁰⁸ Al-Shabab still controls a lot of territory where it is committing war crimes and crimes against humanity. This study has demonstrated how the group has instead increased its revenue and membership.

⁴⁰⁶ H.L.A Hart, *H.L.A Hart, Prolegomenon to Punishment* (OUP 6 March 2008)

⁴⁰⁷ Daniel N. Robinson, *Praise and Blame: Moral Realism and Its Applications* (Princeton University Press 2002)

⁴⁰⁸ UNSC Res2520 (29 May 2020) UN Doc S/RES/2520(2020); Vincent Achuka, 'East Africa: Tough Times Ahead for Somalia as Troops Start Pulling Out' (AllAfrica 22 December 2020) <<https://allafrica.com/stories/202012220086.html>> accessed 22 December 2020

3.2. THE PROBLEM CAUSED BY THE INABILITY OF ACCOUNTABILITY MECHANISMS IN SOMALIA

The failure of accountability mechanisms in Somalia has had an adverse effect on Somalia and neighboring countries, especially Kenya. This study has established that there is a strong case to find that Al-Shabab is committing the war crime of murder contrary to common Article 3 of the Geneva conventions as well as Article 8(2)(c) of the ICC Statute. Al-Shabab has brutally killed civilians, humanitarian workers and medical personnel. Numerous cases have been enumerated by this study. The study has also established that there are strong cases to find Al-Shabab liable for the war crime of torture, the war crime of inhuman treatment among other war crimes. The human cost borne at least as documented by the United Nations High Commissioner for Refugees has been the internal displacement of 2.1 million men, women and children from Somalia and over half a million refugees in Yemen, Kenya and the Horn of Africa. The UN has blamed Al-Shabab for 60% of the deaths owing to its hindrance of humanitarian aid to starving and sick populations as well as gruesome killings.⁴⁰⁹ The existence of this humanitarian catastrophe illuminates why the failure of accountability mechanisms needs to be addressed.

The almost complete failure of accountability mechanisms in Somalia is alarming. Lessons from other conflict areas such as Yugoslavia, Rwanda, DRC, Kenya, Sudan, Lebanon, Sierra Leone, Liberia, Cote d'Ivoire among others show that perpetrators of crimes against humanity and war crimes must always be brought to account. The basis for this is two-fold. First, there is the philosophical basis that perpetrators of heinous crimes must be punished. There are several reasons why offenders of war crimes and crimes against humanity must always be punished. There must be retribution for victims. Natural law theorists like Hugo Grotius⁴¹⁰ and Pufendorf⁴¹¹ believed that a person who commits the gravest crimes must be punished in order to restore the dignity of the person who was hurt and to avenge the humiliation brought with the offence. H.L.A Hart⁴¹² posited that an offender who hurts members of the society and breaches its laws must be

⁴⁰⁹ United Nations Assistance Mission in Somalia, 'Protection of Civilians: Building the Foundation for Peace, Security and Human Rights in Somalia' (UNSOM December 2017); United Nations Mission on Somalia, 'Statement of the Special Representative of the UN Security General for Somalia Mr. Nicholas Haysom to the UN Security Council on 3 January 2019' (UNSOM 3 January 2019) <<https://unsom.unmissions.org/statement-special-representative-un-secretary-general-somalia-mr-nicholas-haysom-un-security-council>> accessed 14 January 2021

⁴¹⁰ Hugo Grotius, *The Freedom of the Seas or the Right which Belongs in the Dutch to take Part in the East Indian Trade* (The Lawbook Exchange Ltd 1916)

⁴¹¹ Samuel Freiherr von Pufendorf, *Of the Law of Nature and Nations: Eight Books* (J. and J. Knapton 1728)

⁴¹² H.L.A Hart, *H.L.A Hart, Prolegomenon to Punishment* (OUP 6 March 2008)

punished to preserve that society.⁴¹³ These views are cognizant of the expectations that society needs laws to be observed to avoid anarchy. The State exercises the right to retribution as an agent or proxy of the victim.⁴¹⁴ Immanuel Kant⁴¹⁵ also believes that punishment serves to retaliate wrongful actions and that even upon the dissolution of a society the last remaining murderers must be would have to be executed.⁴¹⁶ This position has been shared in contemporary international criminal jurisprudence such as in *Krajisnik*⁴¹⁷ and *Rutaganira*⁴¹⁸ where the ICTY and the ICTR respectively, held that retribution is an important aspect of international criminal justice because it fulfills a plea for revenge and expresses the outrage of the international community against the perpetrator committing heinous crimes. The failure of accountability mechanisms in Somalia denies victims of Al-Shabab this valuable aspect of criminal justice. **John Rawls**⁴¹⁹ argued that societies are founded on justice and that the law creates institutions with authority to uphold individual rights and freedoms, bequeath duties and enforce prohibitions.⁴²⁰ The failure of Somalia institutions to attain justice for the victims of war crimes and crimes against humanity indicates the absence of justice. This is because justice is dependent on the protection and enforcement of rights and duties of individuals in a society and the bringing to account of any institutions or individuals that deny an individual or collectivity of individuals, their rights and freedoms.⁴²¹ There is a need to examine how current institutions can be enhanced to achieve this. Accountability mechanisms also serve to deter. Such deterrence could be individual, by inflicting rational punishment which deters the perpetrator from ever committing the prohibited act again.⁴²² It can also seek to discourage others from committing such acts, thereby serving the aim of providing general deterrence.

There is concern that where persons commit offences prohibited clearly by law they must be punished. John Austin's concept of legality and Paul Feuerbach's maxim of *nullum poena sine*

⁴¹³Ibid H.L.A Hart at page 72, 81, 159

⁴¹⁴ Daniel N. Robinson, *Praise and Blame: Moral Realism and Its Applications* (Princeton University Press 2002)

⁴¹⁵ Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press 1996)

⁴¹⁶ Ibid Immanuel Kant para 6:332 – para 6:333

⁴¹⁷ *Prosecutor v. Momcilo Krajisnik* (Appeal Judgment) ICTY-IT-00-39-A (26 April 2021)

⁴¹⁸ *The Prosecutor v. Vincent Rutaganira* (Trial Judgment) ICTR-95-1C-T (14 March 2005)

⁴¹⁹ John Rawls, *A Theory of Justice* (Harvard University Press 2009)

⁴²⁰ John Rawls, *Justice as Fairness: Original Edition* (Harvard University Press 2009) p.164

⁴²¹ Ibid John Rawls, p. 150 - 180

⁴²² Plato, *Protagoras*, in Works of Plato 1993, 211-12 (I. Edman ed. 1956)

lege provide insight into this.⁴²³ Effectively, the fact that Al-Shabab is committing war crimes and crimes against humanity contrary to the Geneva Conventions, ICC Statute and customary international law presents the international community a challenge to ensure that such acts are held accountable. Under the legality principle, where a law is adequately clear, a person who commits an act prohibited by such law must be punished. These were the lessons of the International Military Tribunal when it held that persons who had committed the most horrendous crimes could not be set free, but had to be punished to avoid an injustice. In order to punish Al-Shabab for the grave acts they are committing, to accord justice to millions of victims and to safeguard the international rule of law, an examination into possible solutions for their accountability is crucial. It defeats the ends of natural justice to fail to bring perpetrators of war crimes and crimes against humanity to account. Socrates propagated the ideas of justice which exist in two forms: natural justice and legal justice. Socrates argued that natural justice is derived from natural law and its rules are applicable across the world regardless of time.⁴²⁴ Legal justice is derived from the laws of a nation. Socrates' student Aristotle also recognised natural justice which he opined was derived from natural law which is the foundation of natural justice which is valid everywhere and bears the same binding force irrespective of peoples' perspectives.⁴²⁵ These teachings inform the argument that for Somalia's armed conflict, Somalia and the international community must pursue the ends of justice. Where Somalia is unable to accord justice to victims of Al-Shabab, the international community should intervene and assist the country. The United Nations Charter represents the current world order consensus on this issue. In Article 1 it states that the United Nations shall remove all threats to peace in line with the principles of justice⁴²⁶ and achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.⁴²⁷ The need for collaboration between national and international law in achieving criminal responsibility in places like Somalia cannot be understated. Its failure can lead to results in what

⁴²³ John Austin, *The Province of Jurisprudence Determined* (J. Murray 1832); Ludwig Feuerbach, *Thoughts on Death and Immortality: From the Papers of a Thinker, along with an Appendix of Theological Satirical Epigrams* (University of California Press 25 February 1981)

⁴²⁴ Paul A. Vander Waerdt, *The Socratic Movement* (Cornell University Press 1994) p.18

⁴²⁵ Aristotle, *The Politics* (University of Chicago Press 1984)

⁴²⁶ United Nations Charter (Signed 24 October 1945) 1 UNTS XVI, Article 1(1)

⁴²⁷ *Ibid* Article 1(3)

Plato⁴²⁸ termed as anarchy where the more ruthless and strong prey on the less strong. These principles do not require a lot of deliberations and as St. Thomas Aquinas stated, they should be apparent to human beings with little thought, *statim, modica consideratione*.⁴²⁹

Beyond this, there is a greater initiative for African countries, particularly the neighboring countries, in supporting accountability mechanisms for Al-Shabab perpetrators of war crimes and crimes against humanity. The Somalia armed conflict threatens regional and international peace and security.⁴³⁰ Ken Menkhaus posits that as a result of the state collapse which is itself catalyzed by the long-drawn-out absence of a central government prolonged armed conflict and a general state of lawlessness,⁴³¹ Somalia has become a transit zone for terrorist groups from the Middle East and a breeding ground for African home-grown terrorists. This has exposed regional countries to insecurity resulting from terrorist attacks that threaten the security of their citizens⁴³², their enjoyment of their rights⁴³³ and the safety of private and public property⁴³⁴. The situation has further adversely affected tourism⁴³⁵ for those countries. Ken Menkhaus has examined the use of mechanisms geared towards rebuilding the Somalia State and State rebuilding, particularly mediation.⁴³⁶ However mediation has been argued to have been a complete failure in Somalia. There have been reviews of the efforts by the international community to broker peace among rival factions in Somalia. The most prominent is the peace process fronted by the United Nations Political Office for Somalia managed to bring together the country's transitional government and NSAGs to negotiations in Djibouti.⁴³⁷ The process achieved a transitional government but this success was short-lived as some factions rejected the peace agreements and criticised the

⁴²⁸ Plato, *Symposium* (Hackett Publishing 1976) p.15

⁴²⁹ Joseph Boyle, 'Natural Law and the Ethics of Traditions' in Robert P. George Ed., *Natural Law Theory: Contemporary Essays* (Oxford 1994) p.11; Ibid St. Thomas Aquinas;

⁴³⁰ Ken Menkhaus, *Somalia: State Collapse and the Threat of Terrorism* (Taylor & Francis Group Routledge 2017)

⁴³¹ Ibid Ken Menkhaus, p.10, p.71-73

⁴³² Centre for Human Rights and Policy Studies, 'Trends of Violent Extremist Attacks and Arrests in Kenya, January – December 2020' (CHRIPS February 2021) <https://www.cve-kenya.org/media/documents/CHRIPS_Observatory-Report-January-December-2020-.pdf> accessed February 2021, page 3

⁴³³ Government of the Republic of Kenya Ministry of Interior and Coordination of National Government, 'Negative Effects of Terrorism on the Enjoyment of Human Rights and Fundamental Freedoms' (OCHR

⁴³⁴ Ibid Centre for Human Rights and Policy Studies, page 4

⁴³⁵ United Kingdom Government, 'Foreign Travel Advice Kenya' (Gov.UK) <<https://www.gov.uk/foreign-travel-advice/kenya/terrorism>> accessed 26 January 2021;

⁴³⁶ Ibid Ken Menkhaus, p.77

⁴³⁷ Ibid Justice Bankole Thompson, p.13-34

transitional president as a puppet of the previous Siad Barre regime.⁴³⁸ While the peace deals had been seen as progressive in terms of seeking accountability for war crimes and offering compensation to victims, the success of the deals was hampered by the disagreements between the warring factions.⁴³⁹ Moreover, the UNSC has cited Al-Shabab as one of the actors that undermined the Djibouti Agreement⁴⁴⁰

Building on the premise that there should be efforts to seek accountability for Al-Shabab actions, the next part examines measures that can be taken to improve the current mechanisms. It also suggests new measures that may bear great utility in bringing Al-Shabab to account for war crimes and crimes against humanity.

3.3. ACCOUNTABILITY MECHANISMS THAT CAN BE TESTED IN SOMALIA

This part examines what accountability mechanisms can be utilized to bring Al-Shabab perpetrators to account for the commission of war crimes and crimes against humanity.

3.3.1. The International Criminal Court

The ICC is one of the most robust mechanisms that can be tested in Somalia. Notably, there is no other treaty besides the ICC Statute that prohibits or sets down an accountability mechanism for crimes against humanity. Somalia is not a state party to the Statute and has not signed it but there are two instances where the court may exercise jurisdiction over crimes committed in States that are not parties. The first one is under Article 13 of the ICC Statute. The provision allows the UNSC to refer any matters that threaten international peace and security under Chapter VII of the UN Charter. The second exception is that the ICC prosecutor is allowed in the ICC Statute to commence investigations in non-member States where he obtains authorisation from the ICC Pre-Trial Chamber.⁴⁴¹ The two exceptions provide an avenue for the exercise of jurisdiction by the ICC over war crimes and crimes against humanity committed in Somalia.

⁴³⁸ Ibid Justice Bankole Thompson p.15

⁴³⁹ Ibid Justice Bankole Thompson p.22

⁴⁴⁰ UNSC Res 1844 (20 November 2008) UN Doc S/RES/1844, para 14; United Nations Security Council, 'Al-Shabab: Additional Information to Paragraph 14 of UNSC Res 1844 (2008)' (UNSC) <<https://www.un.org/securitycouncil/sanctions/751/materials/summaries/entity/al-shabaab>> accessed 12 January 2020

⁴⁴¹ Ibid Rome Statute of the International Criminal Court, Article 13

In exercise of the above two provisions over non-State parties, the UNSC previously referred the situation in Sudan to the ICC.⁴⁴² Sudan is not a state party to the ICC Statute. The UNSC based its reasons for the referral on considerations of preserving international peace and security and the need to combat impunity in Darfur⁴⁴³ where the ICC Prosecutor had earlier warned UNSC that war crimes and crimes against humanity were being committed against helpless civilians.⁴⁴⁴ The ICC submitted to the UNSC that the referral was the only option because Sudan had failed to cooperate and actually actively frustrated ICC Prosecutors trying to collect evidence in Darfur. In addition, several member states of the ICC had failed to arrest and surrender Sudan's ICC indicted President Omar al Bashir when he visited their countries.⁴⁴⁵

The UNSC also referred the case of Libya to the ICC⁴⁴⁶ based on similar reasons *inter alia* that despite gross and systematic abuse of human rights suggesting the possibility of the commission of crimes against humanity, perpetrators had not been brought to account. Further Libya was not a state party to the ICC and was not interested in cooperating with the court. One of the suspects identified by the ICC was a relative of the then Libyan leader while others were senior government officials. The UNSC's referral was based on its role of maintaining world peace and security.⁴⁴⁷ There may be questions regarding the success of the UNSC referrals. In the UNSC Sudan referral, one of the core suspects was Omar al Bashir, the then President of Sudan. Sudan is yet to hand him over to the ICC. Similarly, the main suspect in the Libya situation has not been handed over by Libya or Tunisia where he fled to after the overthrow of his father's government. Saif al Islam remains unaccountable for charges brought against him.

Nevertheless, there is a strong case that a UNSC referral should be exercised on Somalia. It would serve the ends of justice if senior commanders of Al-Shabab were to be investigated and charged before the court. It would be unfair to the victims of war crimes and crimes against humanity in Somalia to conclude that the ICC would suffer the same challenges as with the Libya and Sudan situations or that consequently the UNSC need not bother to refer the Somalia situation to the

⁴⁴² UNSC Res 1593 (31 March 2005) S/RES/1593

⁴⁴³ Ibid UNSC Res 1593

⁴⁴⁴ International Criminal Court, 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)' (14 December 2018) <<https://www.icc-cpi.int/Pages/item.aspx?name=181214-stat-otp-UNSC-1593>> accessed 23rd April 2021

⁴⁴⁵ Ibid International Criminal Court

⁴⁴⁶ UNSC Res 1970 (26 February 2011) S/RES/1970

⁴⁴⁷ Ibid UNSC Res 1970

ICC. This is because first, the UNSC would be discharging its mandate under the UN Charter and the ICC Statute. Second, it would send a message that across the world, uniformly, the UNSC is ready to enforce the international rule of law and the special place the ICC has in international criminal justice. If any challenges are to be encountered in handing over Al-Shabab suspects, those challenges could be dealt with as they arise.

3.3.2. UNSC Criminal Accountability Initiatives

The UNSC has been consistent in establishing mechanisms intended to bring about accountability for international crimes. This is viewed as one of its methods of carrying out its obligation to safeguard international peace and security. The UNSC has in most cases established specialised courts and tribunals of an international character either in terms of their composition or their location. The international character of such tribunals and courts aids to shield the judicial process from domestic politics and alliances and gives the resultant decisions legitimacy bereft of perceptions that the decisions are guided by alliances. Specialised courts and tribunals have played a huge role in the development of international criminal justice. The ICTR and the ICTY amplified the international community's condemnation of war crimes and crimes against humanity and acted as efficient mechanisms of achieving the aims of criminal justice. However, they only present one face of specialised criminal courts and tribunals. There are two types of such tribunals: those of international character and those of national character.

International specialised courts and tribunals are formed with international support and outside a country's judicial framework mostly by the UN alone or in partnership with the affected State. Making them external protects the institutions from the baggage of such country's inefficiency, corruption, undue influence or external pressures brought by tribal, clan, religious or racial interests. For instance, the Statute establishing the Iraq High Tribunal was categorical in providing that the tribunal would be an independent entity with no nexus whatsoever with any Iraqi government institutions.⁴⁴⁸ They are however established with the cooperation of the affected State. Examples include the aforementioned ICTR and ICTY, the Extraordinary African Chambers in the Courts of Senegal and the Special Court for Sierra Leone. These institutions enjoy financial and logistical support from the international community, particularly the UN as

⁴⁴⁸ Law of the Supreme Iraqi Criminal Tribunal 2005, Article 37

well as judges and court staff from more robust jurisdictions. This model would be a good option for Somalia because Somalia has an extremely weak judiciary. Although AMISOM, the EU, individual UN members and international organisations like the UNDP have been involved in providing financial and technical support to build Somalia's institutions, the country still has a long way to go.

It is expected that there may be opposition to such institutions on the premise that they would have been established to try crimes committed before their existence. However, this discussion has taken place several times in the past. The principle of legality is not defined by the time in which the institutions existed rather by the existence of the law itself. The principle of legality holds that a person should only be punished if he does something prohibited by a sufficiently clear law. That law must have been in place before the alleged act was committed and must apply to that specific person hence the maxims *nullum poena sine lege* (no penalty without law) and *nullum crimen sine lege* (no crime without law).⁴⁴⁹ The position that the principle of legality is constrained to the law and not the institution has been held in the Nuremberg Tribunal⁴⁵⁰, the Jerusalem Court that tried Adolf Eichmann⁴⁵¹ and affirmed by the establishment of latter year institutions, the ICTY, ICTR and others. The ICTY for instance has held that the right to a fair trial under the International Covenant for Civil and Political Rights did not mean that the accused has to be tried before a court or tribunal pre-established by law but that an accused person may enjoy those rights before that tribunal.⁴⁵²

Local or national specialised criminal courts and tribunals are in contrast established within the affected country's judicial framework. Such institutions are formed within the affected country's judicial framework, in line with a country's national laws to try persons for crimes against humanity, war crimes and other international crimes. The Special War Crimes Chamber (SWCC) for Serbia was formed as a court within Serbia's court system and in line with Serbian national laws. Most of these courts are formed to try international crimes through universal jurisdiction.

⁴⁴⁹ Markus Dirk Dubber, *Foundational Texts in Modern Criminal Law* (Oxford University Press 2014) p. 119

⁴⁵⁰ *Judgment of the Nuremberg International Military Tribunal* 1946 (1947) 41 AJIL

⁴⁵¹ *Ibid Judgment of the Nuremberg International Military Tribunal*

⁴⁵² *Prosecutor v Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No. IT-94-I-T (2nd October 1995); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 14, Article 16

Their judges and staff are local. Somalia does not have such a court and is inhibited by the lack of financial, institutional and legal inadequacies which means that the establishment of such a court within Somalia's judicial system would take long. Even when established, would face serious challenges in efficiently prosecuting Al-Shabab perpetrators while affording them all the judicial guarantees of a free and fair trial.

3.4. CONCLUSION

Chapter three sought to examine accountability mechanisms being applied in Somalia on Al-Shabab perpetrators of war crimes and crimes against humanity. Its starting point was in Somalia where the Chapter investigated Somalia's capacity to investigate and prosecute war crimes and crimes against humanity by Al-Shabab perpetrators. Somalia has a major problem with institutions. Following decades of armed conflict, Somalia has a weak police force and government institutions are guarded by AMISOM soldiers. Vast parts of Somalia are under the control of Al-Shabab and Somalia's control over AMISOM liberated areas hangs on the balance with the withdrawal of AMISOM fast approaching.

The Chapter discovered another problem. The UNSC has intervened in Somalia through two main approaches: sanctions and AMISOM. While sanctions have always proved effective to curtail the operations of armed groups, UNSC sanctions curtailing trade in Somalia charcoal, sugar and livestock have not been very effective. Al-Shabab's revenue from *zakat* (taxes) levied on such commodities has risen extraordinarily and the group, with its capability to finance its operations, is increasingly lethal. This chapter has discovered that UN member states are behind the failure of these sanctions. Reports by UN agencies and Monitoring Groups have implicated certain countries in circumventing the UNSC sanctions. Then there is AMISOM. The UNSC resolutions granting AMISOM legitimacy or expanding its mandate hardly mentioned accountability for Al-Shabab. AMISOM is mostly in Somalia to reduce Al-Shabab's hold over territory through military combat. It has been successful in creating a conducive environment for the establishment of national institutions in Somalia. However, there is still a problem of impunity for Al-Shabab's war crimes and crimes against humanity.

Finally, the chapter examined the problems caused by the lack of inefficient accountability mechanisms in Somalia. In sharp contrast to other armed conflicts, the victims of Somalia's armed

conflict are denied justice by this problem. Lessons from Yugoslavia and Rwanda show that where accountability mechanisms are working it is easier to create deterrence for individuals and groups. The lack of accountability mechanisms denies victims of horrendous crimes the benefits of retribution, an important remedy in criminal justice. To address this missing link, the Chapter has examined several mechanisms that could be efficient for Somalia's armed conflict. First, the UNSC can refer the Somalia situation to the ICC. This would circumvent the fact that Somalia is not a State party to the ICC. The ICC has been efficient in bringing perpetrators of crimes against humanity and war crimes in other areas and this can be applied in Somalia.

CHAPTER FOUR

CONCLUSION

5.1. SUMMARY OF THE FINDINGS

This thesis sought to investigate which accountability mechanisms can be efficient in bringing Al-Shabab to book for war crimes and crimes against humanity committed in Somalia. The Study noted *prima facie* evidence that Al-Shabab is committing the most brutal crimes without any form of accountability. Multiple reputable resources that include the United Nations Security Council, United Nations High Commission for Refugees and other reputable organisations have documented scores of murder and torture victims and millions displaced by the armed conflict. The widespread nature of the Al-Shabab atrocities points to a possible commission of war crimes and crimes against humanity. The study thus hypothesized that that Al-Shabab are committing war crimes and crimes against humanity with little or no accountability. The study sought to investigate this further. Chapter Two of the thesis started by examining to what extent Al-Shabab are committing war crimes. The Chapter determined that based on Common Article 3 of the Geneva Conventions, APII, the ICC Statute and jurisprudence from the ICC and the ICTY, the tests had satisfied that there was a non-international armed conflict in Somalia. Within the conflict, the study determined that Al-Shabab are committing serious violations of Article 3 common to the Geneva Conventions committed in a non-international armed conflict. The Chapter identified four serious violations: The first violation is violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. The second violation is that of taking of hostages. The third violation is that of outrages upon personal dignity, in particular humiliating and degrading treatment. The fourth violation that the Chapter noted is that of passing sentences and carrying out executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Part 2.2 of the Study examined whether Al-Shabab is committing crimes against humanity. Somalia is neither a State party nor a signatory to the Rome Statute. The study determined that the elements outlined by the Rome Statute as constituting the crime are settled and internationally accepted mainly because they are the same elements that have been identified by Statutes of specialised courts and tribunals elsewhere. Part 2.3.1 of Chapter 2 looked into the requirement of

an organisational policy, which has been an essential element as held by the enumerated jurisprudence. It particularly looked at both the restrictive approach and liberal approaches to the policy and found that Al-Shabab possesses an organisational policy that has been instrumental in their commission of crimes against humanity in a widespread and systematic manner. A strong case has been established to find that Al-Shabab is committing crimes against humanity of murder, torture, extermination and rape. There was no sufficient evidence to find that Al-Shabab are committing the crime against humanity of persecution, sexual violence and forced pregnancy.

Chapter Three of the study examined whether there are efficient accountability mechanisms for war crimes and crimes against humanity committed by Al-Shabab. Generally, the study posits that the lack of an efficient accountability mechanism for such egregious crimes denies the victims justice in the form of retribution and misses the value of general and individual deterrence. This position is backed by international criminal jurisprudence. In Part 3.2 of the Study, it was posited that the lack of efficient mechanisms also goes against the long-held principle that those who commit such crimes must be punished. Chapter 3 of the Study utilized a variety of jurisprudential theories to reinforce the importance of efficient accountability mechanisms. The study utilized insights from the Natural Law school of thought that mainly emphasize on the natural law's aims of justice, the protection of human rights and punishment of perpetrators of the most heinous crimes. These perspectives were used to reinforce the need for efficient mechanisms for Al-Shabab's war crimes and crimes against humanity. The study also utilized perspectives from proponents of the positivist school of thought, legal realists and fairness theory. Part 3.2 of the thesis utilized arguments from the Legal Realism school of thought to hold that law addresses the interests of the public. Based on the widespread nature of Al-Shabab's atrocities covered in Part 2.1 and Part 2.2 of the Thesis, the Study argued in Part 3.2 of the Thesis that the huge number of victims and the extent of atrocities created a public interest in institutions particularly in Somalia prosecuting war crimes and crimes against humanity committed by Al-Shabab. The next paragraph presents findings from the inquiry on how Somalia's institutions were found to have fared in that objective. Chapter 3 also used the fairness theory mainly arguments that societies are founded on justice and their aims are to uphold individual rights and freedoms. All these arguments were brought in to reinforce the major argument that there should be accountability for war crimes and crimes against humanity and the starting point must be from the Somalia State before any international actions are considered.

Chapter Three undertook a thorough examination of Somalia's legislative, policy and institutional framework. It examined to what extent the criminal justice system and its constituent actors have been successful in prosecuting war crimes and crimes against humanity. The inquiry found that Somalia has managed to build institutions established by its Provisional Constitution, such as the Judiciary, Police and independent commissions such as the Judicial Service Commission and the Ombudsman. There are also enabling laws for penal law such as the Criminal Procedure Code. The Study investigated whether Somalia has laws or institutions that have addressed war crimes and crimes against humanity. The inquiry did not find evidence that Somalia has tried any war crimes and crimes against humanity. Instead, as Part 3.1.1.2 reported, Somalia tries Al-Shabab's crimes before military courts which have been criticised because they do not offer judicial safeguards of a fair trial as internationally recognised. The inquiry did not find any laws for punishing the aforementioned crimes hence the reliance by military courts on the Criminal Procedure Code. The country has not ratified the ICC Statute or APII on NIACs. A further analysis on its institutions revealed that the judiciary is hampered by lack of training and also faces legitimacy challenges in areas controlled by Al-Shabab. There, Al-Shabab courts are in operation. In other parts of Somalia, the Study found that elders have immense authority to decide disputes over matters that would constitute war crimes and crimes against humanity. The police are not paid and are thus highly hindered by bribes and desertions.

Part 3.1.2 of the Study turned its attention to international mechanisms that have been applied on Al-Shabab. It examined the use of sanctions by the UNSC, and efforts by the international community to aid Somalia to detect financing of Al-Shabab activities and to apprehend them. It found that internally, Somalia institutions are unable to detect illicit financial flows. This is based on UNSC reports. Internationally, the UNSC has found that countries are engaging in illicit charcoal trade which finances Al-Shabab, in contravention of UNSC resolutions prohibiting the international sale of Somalia charcoal. Chapter 3 also found that UNSC's AMISOM mechanism has captured huge swath's of territory from Al-Shabab, killed numerous fighters and freed many victims from Al-Shabab. This section found that the mechanism has largely failed because it is not efficient in achieving retribution because not every perpetrator is brought to justice. Further Al-Shabab is still in control of large swaths of territory and their fighters are often out of reach of AMISOM's military campaign. Even where AMISOM military campaigns have been sustained, fighters who are granted amnesty after surrendering cannot be said to have been brought to

account notwithstanding the value of amnesty in international criminal law. In addition, the mechanism lacks a specific focus on war crimes and crimes against humanity. None of the UNSC resolutions mandating AMISOM, increasing its mandate and term particularly address accountability for the two crimes. Finally, AMISOM's mandate is coming to an end yet Al-Shabab seems only to be strengthening, still controls a lot of territory where it is committing war crimes and crimes against humanity. This study has demonstrated how the group has instead increased its revenue and membership. In addition, the Chapter looked at accountability mechanisms that can be tried in Somalia. The Part 3.3.1. of the Thesis determined that the UNSC while discharging its mandate under the UN Charter and the ICC Statute can refer the Somalia situation to the ICC and enforce the international rule of law and the special place the ICC has in international criminal justice. If any challenges are to be encountered in handing over Al-Shabab suspects, those challenges could be dealt with as they arise. Second, the Chapter suggested that as the UNSC has done in other places, it can establish a special court or tribunal of international character like the ICTR and the ICTY or one with national foundation like the Iraq High Tribunal, Extraordinary African Chambers in the Courts of Senegal, Special Court for Sierra Leone or the Special War Crimes Chamber (SWCC) for Serbia.

The following section now looks at the recommendations of the thesis.

5.2. RECOMMENDATIONS

This study sought to examine efficient accountability mechanisms for war crimes and crimes against humanity in Somalia. The recommendations herein are based on the conclusive and evidence-based finding that Al-Shabab is committing war crimes and crimes against humanity in Somalia. The available accountability mechanisms have not been efficient in bringing the perpetrators to account or according justice to the millions of victims of its grave actions, which explains why the conflict has continued for more than a decade. The looming withdrawal of AMISOM which has hitherto protected vulnerable civilians makes the need for efficient accountability mechanisms even direr. The following recommendations could improve the current mechanisms to work more efficiently. There is also the recommendation of a new mechanism yet to be tested but that bears great potential.

5.2.1. Improve Somalia's capacity to investigate, prosecute and punish complex crimes

The challenges facing Somalia are legislative, financial and institutional. Chapter three (Part 3.1.1) established that the lack of adequate laws criminalizing crimes against humanity and war crimes limits Somalia's capacity to investigate, prosecute and punish such crimes. The Geneva Conventions for instance leave it to State Parties like Somalia to determine through legislation, the relevant penalty for perpetrators of war crimes. Part 3.1.1 further noted that Somalia is inhibited by severe institutional and financial challenges resulting from years of conflict. As a result, Somalia lacks the ability to establish crucial infrastructure like courtrooms, witness protection safehouses, ICT infrastructure, registries etc. It is recommended that Somalia enacts legislation prohibiting war crimes and crimes against humanity. Such legislation could set out the constitutive elements of the prohibited crimes, the rules of procedure of the court bearing jurisdiction to try the prohibited crimes, the penalties for such crimes etc. Such legislation can be guided by international best practices but also factor in the home-grown realities of the Somalia society. To this extent national reconciliation may be considered as an overriding principle.

There are success stories that can act as a template for Somalia. For instance, Uganda has a legal⁴⁵³ framework to try crimes such as war crimes. The country has established the International Criminal Division, a specialised Court under the High Court to try war crimes. The court was established in response to the armed conflict between Uganda and the Lords Resistance Army. The mandate of such a court can also be extended to other crimes like crimes against humanity which this study has established are occurring in Somalia. Such a legislative and institutional framework is beneficial especially because Somalia is not a State party to the International Criminal Court. The many African States with legislation dealing with crimes against humanity and war crimes have enacted such legislation in a bid to operationalize the ICC Statute. By enacting such legislation guided by the Geneva Conventions and the success stories of countries like Uganda, Somalia would still benefit by establishing an efficient accountability mechanism for Al-Shabab's war crimes and crimes against humanity.

To make this a success, it would require Somalia as the principal stakeholder to enact the necessary law in the exercise of its prescriptive jurisdiction. There is always an opportunity for

⁴⁵³ Constitution of Uganda 1995, Article 141; The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, section 6

collaboration with international partners. Somalia can get assistance (if necessary) from countries that have successfully set up their legislative and institutional frameworks. Such countries can include Kenya, Uganda and South Africa. Others include the United Kingdom, EU countries and the USA. Organisations like the United Nations Development Programme (UNDP) have also assisted numerous countries in capacity building such as providing funds and/or the necessary training to legislators. Other organisations like USAID have also helped countries in the field of legislation. Support in acquiring physical facilities such as filing cabinets for storage, court buildings and ICT infrastructure can also be sourced with the help of donor partners such as the African Union, IGAD, USAID and the EU.

5.2.2. Investigation and prosecution by the International Criminal Court

As established by Chapter three (Part 3.3.1) noted that Somalia is not a State Party to the International Criminal Court. Notably, as one of the most robust and experienced international criminal justice institutions, it can be of great utility in bringing Al-Shabab perpetrators of war crimes and crimes against humanity to account. Since Somalia is not a State Party to the ICC Statute, the UNSC while exercising its functions under Chapter VII of the UN Charter can refer the Somalia situation to the ICC. This is under Article 13(b) of the ICC Statute. Under Article 13(c) and Article 15 of the ICC Statute, the Prosecutor of the ICC can request the ICC Pre-Trial Chamber for authorisation to initiate an investigation into the Somalia situation. It is important that if explored, this option needs to be implemented bearing in mind the lessons learned from other crises in the continent. Africa presents varying attitudes towards the ICC. For instance, the Sudan and Kenyan cases were often criticised as western machinations. In contrast, Uganda referred the case of the Lords Resistance Army in an act of endorsement of the court. Consequently, a referral of the Somalia situation should involve Somalia for it to succeed. It is clear from the Libya and Sudan cases that where a State does not cooperate, it becomes difficult for the ICC to apprehend the suspects. The ICC approach should emphasize on it being an African solution to African problems. It is important to note that in a majority of cases the ICC has dispensed justice to African victims of crimes against humanity and war crimes. The ICC enjoys the endorsement of a majority of African States because more than half (33 out of 54) of its countries have ratified the ICC Statute. Involving Somalia and African States could result in success for the ICC in bringing Al-Shabab perpetrators of war crimes and crimes against humanity to account.

5.2.3. The creation of an international special criminal court or tribunal for Somalia

A UNSC mandated international criminal tribunal or specialised court for Somalia would have a lot of benefits. It would manage to bring Al-Shabab perpetrators of war crimes and crimes against humanity to account and bring justice to victims in a manner that inspires confidence in the Somali public. There are two main types of institutions that would be viable to Somalia's situation. The first type is the external criminal justice institution that has no nexus to a country's national institutions. An example is the ICTY, ICTR or even the Iraq High Tribunal. Such an institution would inspire confidence in the Somali public because it would not be subject to corruption, clannism, nepotism and inefficiency which have been endemic in Somali public service. It is however important that Somalia is involved in this initiative before the formation and during the operations of such institutions. Somalis have been central to many international institutions including the ICJ. It is possible to co-opt Somali jurists as judges in such an institution to make the process Somali owned and cement its success.

The other kind of institution is that of a local specialised tribunal or criminal court. Such an institution is created within the Somalia justice system. Such an institution can be created with international assistance but by dint of it being formed within the framework of Somalia judiciary, it would be more locally owned than the previous model. The advantages it would leave behind are numerous. It would build Somali jurisprudence and transfer a lot of experience to Somali professionals. The jurisprudence created will be of assistance to Somalia's criminal justice system for many years to come. This is not forgetting the numerous job opportunities to communities through jobs created for Somalia's trained and untrained workforce. The establishment of either kind of institution can be achieved with the support of the UNSC, EU, IGAD, AU and organisations like UNDP.

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