

# Enhancing legal empowerment

Working with Customary Justice Systems: Post-Conflict and Fragile States

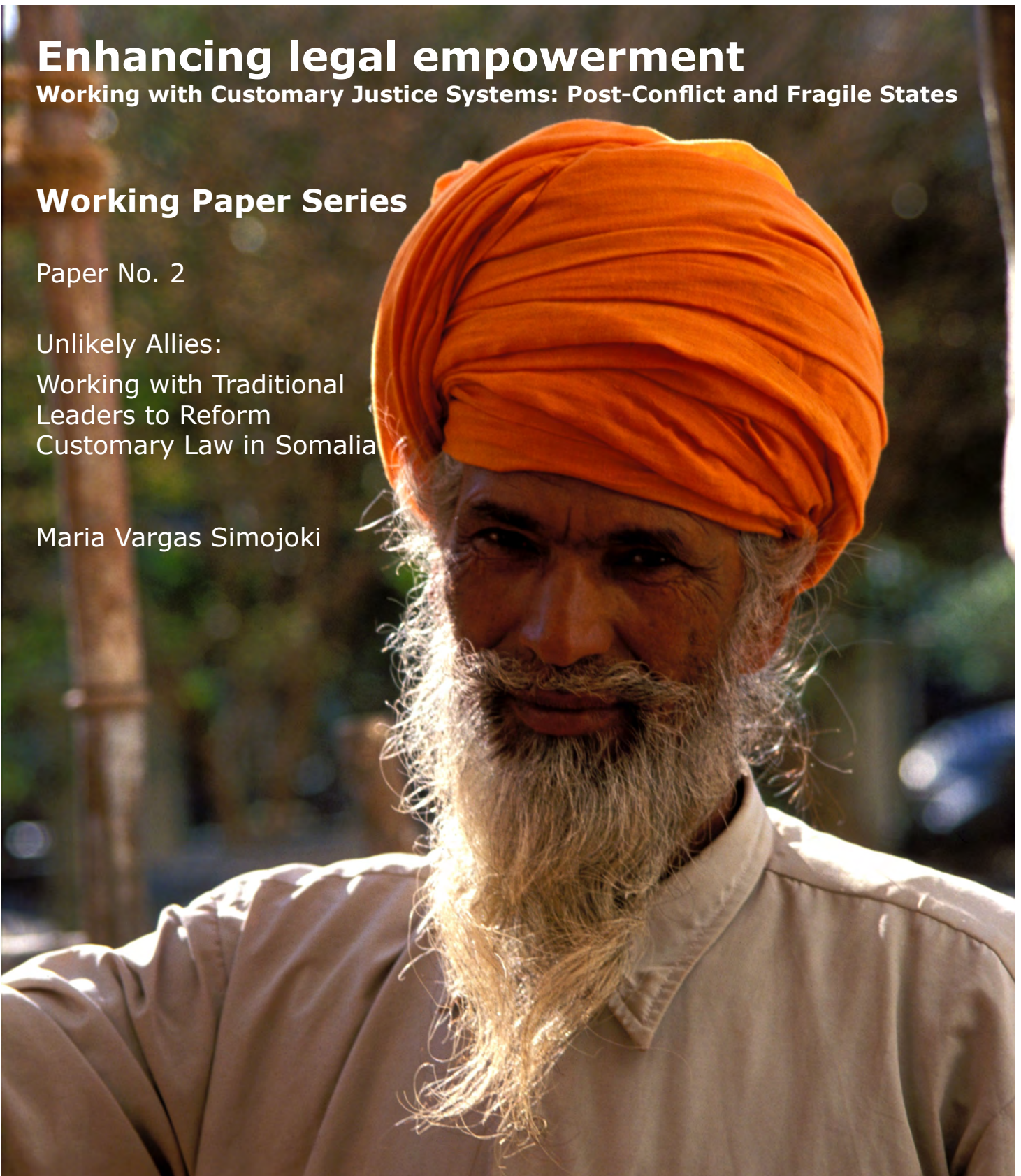
## Working Paper Series

Paper No. 2

Unlikely Allies:

Working with Traditional  
Leaders to Reform  
Customary Law in Somalia

Maria Vargas Simojoki



International Development Law Organization  
Organisation Internationale de Droit du Développement

## IDLO CUSTOMARY JUSTICE WORKING PAPER SERIES

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Author: Maria Vargas Simojoki

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### **International Development Law Organization**

Viale Vaticano, 106  
00165 Rome, Italy  
Tel: +39 06 4040 3200  
Fax: +39 06 4040 3232  
Email: [idlo@idlo.int](mailto:idlo@idlo.int)  
[www.idlo.int](http://www.idlo.int)



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This online series showcases research conducted under the IDLO Legal Empowerment and Customary Law Research Grants Program. Through this program, seven bursaries were awarded to scholar-practitioners to evaluate the impact of an empowerment-based initiative involving customary justice. In each case, an outcome mapping methodology, using quantitative data collection methods, was employed to answer the basic question: how have justice outcomes changed as a result of the intervention? This approach reflects a move away from traditional evaluation methodologies that focus on proxy data such as numbers of persons trained or numbers of information resources disseminated, towards a direct examination of behavioral changes and outcomes. The program will culminate in the publication of an edited volume which aims to assist readers develop a better understanding of the relationship between customary justice and the legal empowerment of users and identify possible entry points for engaging with customary justice systems. It features articles on initiatives implemented in Namibia, Rwanda, Somalia, Tanzania, Mozambique, Papua New Guinea, Liberia and Uganda. The series forms part of a broader research program implemented in partnership with the Van Vollenhoven Institute for Law, Governance and Development of Leiden University designed to expand the knowledge base regarding the relationship between the operation of customary justice systems and the legal empowerment of poor and marginalized populations.

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This program is being implemented by IDLO in partnership with the Van Vollenhoven Institute for Law, Governance and development, Leiden University (<http://www.law.leiden.edu/organization/metajuridica/vvi/>) and the United Nations Development Programme (UNDP), Somalia.

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## DONOR SUPPORT

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# Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia

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Maria Vargas Simojoki

## EXECUTIVE SUMMARY

In recent years, the idea of promoting legal empowerment as a means of increasing access to justice has sparked growing interest in donor circles. At the same time, recognition that non-state justice is the reality for many of the world's poor has led to greater acceptance of the need to include customary justice systems within the scope of legal reform and development efforts. Indeed, the question is now becoming how, rather than if, efforts should be made to promote greater access to justice through engagement with customary justice systems. However, a second dilemma arises once the decision to engage is made: how to do so in a way that has local legitimacy, that maintains the positive aspects of customary law that make it popular with justice seekers, and that also promotes the modification of the rules and practices that do not comply with international human rights standards or that disadvantage vulnerable sections of the community. To shed light on the issue, this chapter examines the short- and medium-term impact of attempts by traditional elders in Somaliland and Puntland to revise elements of Somali customary law (*xeer*) with the aim of bringing it into greater alignment with both Islamic law (*shari'a*) and international human rights standards. Supported by the Danish Refugee Council, the elders initiated a process of dialogue culminating in Regional and National Declarations in the two *de facto* autonomous regions, which contain revisions to *xeer* in a number of key areas. Six years after the first dialogues commenced, the research on which this chapter is based indicates that the Declarations can be linked to certain positive changes in customary justice, including the abolition of harmful practices such as 'widow inheritance', advancements in women's inheritance rights, and a shift towards individual and away from collective responsibility for serious crimes. Other objectives, however, particularly in relation to enhancing access to justice for vulnerable groups such as displaced populations, minorities and victims of gender crimes, do not seem to have met with the same level of success.

# 1. Introduction

In 2003, a small group of traditional elders from the region of Togdheer in Somaliland approached the Danish Refugee Council (DRC) for support in revising their customary law (*xeer*) and bringing it into greater alignment with Islamic law (*shari'a*) and international human rights standards. Following a series of dialogues, a Regional Declaration was signed, which committed elders to curbing the main causes of inter-clan conflicts, expanding access to justice, and enhancing the security and protection of vulnerable groups. In particular, the Declaration aimed to promote a transition from communal to individual criminal responsibility by encouraging the payment of compensation directly to the family of a victim (as opposed to it being shared by the larger clan) and by the elders ceding their jurisdiction over serious crimes, including rape and murder, to the formal justice system. The Declaration also sought to promote the protection of widows' rights to inherit according to *shari'a* principles and to marry men of their choice, as well as to establish stronger legal protections for internally displaced persons (IDPs) and minority groups.

Interest in the intervention led to parallel dialogue processes in other regions of Somaliland including Awdal, Maroodi Jeex, Sahel, Sool and Sanag. Once all regions had their own declarations on *xeer*, it was decided that it would be desirable to unite them under a single National Declaration, which was made in 2006.<sup>1</sup> The success of the program in Somaliland led to its expansion into Puntland, where similar Regional Declarations were produced, and subsequently a National Declaration on *xeer* was made in early 2009. In both Somaliland and Puntland, the elders are still seeking ratification of their National Declarations by the government.

These interventions are of particular relevance to the growing focus on legal empowerment programming because of their attempts to enhance access to justice by reforming customary law from within, in contrast to orthodox, top-down approaches that centre on reforming state legal institutions. The underlying hypothesis was that an approach focusing on the locus of conflict resolution for the majority of the rural poor was more likely to yield an impact than an approach focusing on either non-existent or remote state justice institutions. In fact, the early results of the intervention have been mixed. Initial evaluations of the project conducted by the DRC revealed a significant reduction in the number of murder cases, as well as anecdotal evidence of widows permitted to re-marry according to their wishes, and suspected murderers handed to state authorities for investigation. However, other evaluations indicated that there had been negligible improvements in access to justice for vulnerable groups as customary leaders continued to mediate serious cases such as rape rather than referring them to the formal justice system.

In order to examine the medium-term impact of this initiative, field research was conducted in Garowe and Hargeisa between February and March 2010, six years after the commencement of the intervention in Somaliland and one year after the signing of the National Declaration in Puntland. The aim of the research was to generate new knowledge concerning both the possibilities and limitations of using legal empowerment techniques as a means of facilitating reform in customary systems and bringing them into greater alignment with international human rights standards. The approach was predominantly qualitative and was structured around a mix of 40 semi-structured interviews and eight focus group discussions. Twenty interviews were conducted with implementing partners, ten with government authorities, and ten with law associations and legal aid clinics, divided evenly between Garowe and Hargeisa. Focus group discussions targeted four separate groups in each location, namely women, minorities, IDPs and the elders.

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<sup>1</sup> It should be noted here that the Declaration is referred to as a 'National Declaration' by its proponents because Somaliland is a *de facto* (albeit not *de jure*) independent state from the Republic of Somalia.

This chapter is based on the research described above, and begins with a brief overview of social structures in Somalia, Somalia's pluralistic legal framework, and the principal obstacles to accessing justice, particularly through customary legal fora. It then describes the DRC intervention and presents an analysis of the research findings in three key areas: general community awareness of the provisions of the Regional and National Declarations; the referral of serious criminal cases to the formal justice system; and whether access to justice and legal protections for vulnerable groups have improved as a result of the interventions. In light of this analysis, consideration is given to the effectiveness of the interventions and the lessons that can be learned from their implementation, some of which can be linked to their genesis and others from the structural limitations of the poorly functioning formal justice system. Finally, the chapter addresses the question of whether the interventions should be classified as falling within the scope of "legal empowerment", and if so, their relevance for both continuing efforts to reform the Somali justice sector and as a legal empowerment approach that might be suitable for adaptation in other locations.

## 1.1 The Somali context

In 1991, Somalia descended into civil war and began to fragment along regional and clan-based lines. In May 1991, clans in the north-west of the country declared independence and formed the Republic of Somaliland, and in 1998, the north-eastern state of Puntland became semi-autonomous and self-governing.<sup>2</sup> Despite the formation of a Transitional Federal Government in October 2004, the formal justice system in Somalia remains weak and dysfunctional, and most people rely on local modes of conflict resolution including *xeer*, *shari'a* and ad hoc mechanisms established by militia factions. Of these, *xeer* is the most widely used and influential; it functions in parallel to state law, making the legal framework in Somalia pluralistic.<sup>3</sup>

### 1.1.1 The clan structure and its impact on daily life

Despite differences in modalities of governance, Somalis share a common language, religion and ancestry. The population is grouped into clans that follow agnatic (patrilineal) descent, with all Somalis claiming relation to the State's founding fathers.<sup>4</sup> While there is some disagreement within the literature regarding the influence of the clan structure on modern daily life, particularly with respect to the growth of new social networks, the clan remains the principal ordering structure and source of collective protection and security.<sup>5</sup>

In each geographic area, clans are divided into "majority" and "minority" units based on their size and social status.<sup>6</sup> Minority clans can also be labeled as such due to the dominant trade practiced by their members. The Gaboye clan, for example, is classified as a minority clan not only due to its size, but also because its members are mainly

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<sup>2</sup> The State of Somaliland is a *de facto* independent state but without international recognition. For all international actors, Somaliland remains a region of Somalia, yet for all practical purposes, Somaliland functions as a state and provides basic security and other services to its citizens. As the current government was elected democratically and in their self-understanding of Somaliland as a state, it will be referred to as such throughout this paper. The region of Puntland functions under a *de facto* separate administration from the rest of Somalia. The Government held peaceful elections in 2008, and in practical terms, is independent; however, since it has stated a preference to remain part of greater Somalia, it is not considered a separate state. A Le Sage, *Stateless Justice in Somalia – Formal and Informal Rule of Law Initiatives* (2005) 13-26.

<sup>3</sup> J Gundel, *The predicament of the Oday: The Role of Traditional Structures in Security, Rights, Law and Development in Somalia*, (2006) ii-iii; see generally Academy for Peace and Development, *The Judicial System in Somaliland* (2002) Academy for Peace and Development <<http://www.apd-somaliland.org/docs/judiciaryreport.pdf>> at 20 April 2011.

<sup>4</sup> See generally I M Lewis, *A Pastoral Democracy: A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa* (1961).

<sup>5</sup> *Ibid* 242; see further M Bradbury, *Becoming Somaliland* (2008).

<sup>6</sup> *Ibid*.

leatherworkers and blacksmiths.<sup>7</sup> Clan families are then sub-divided into smaller groups as depicted in the diagram below:<sup>8</sup>

Figure 1. Subdivisions of the clan family



The basic functional unit of social organization is the “*diya*-paying” or blood compensation group. This group is composed of several lineages that share a common ancestor and may vary in size from a few hundred to a few thousand men. The *raison d’être* uniting the *diya*-paying group is collective security and social insurance.<sup>9</sup> Group members are obliged to support each other in their political and juridical responsibilities, including through compensation payments for illegal acts committed by other members. In this regard, *diya*-paying groups need to be a specific size in order to be capable of paying (or exacting) compensation payments and defending themselves in the event of conflict. According to Gundel, “the most overriding rule for the unity of [*diya*-paying] groups is that all other conditions usually are subordinate to the need to maintain solidarity in the face of an external threat.”<sup>10</sup> Within a *diya*-paying group, the importance of the role played by the elders (*aqil*) in inter-clan governance cannot be overstated; elders simultaneously act as legislators, executive officers and judges of their clan units. Moreover, these traditional authorities are seen as the creators and guarantors of relative peace in a context of political instability, communal insecurity and lawlessness.<sup>11</sup>

#### 1.1.2 Somali customary law: *xeer*

*Xeer* is comprised of unwritten agreements or contracts, entered into bilaterally between clans, sub-clans and *diya*-paying groups that denote specifically agreed upon rights, obligations and duties (*xeer dhiig*).<sup>12</sup> *Xeer* can regulate issues ranging from inter-clan relations, to levels of compensation for different illegal acts, to the management of disputes.<sup>13</sup> Each *diya*-paying group has its own body of law embodied in an unwritten *xeer* code, formalized and entered into by the assembly of clan elders (*shir*).<sup>14</sup> *Xeer* is dynamic, flexibly applied in accordance to changing needs and circumstances, and varies considerably between different lineage groups.

More generally, *xeer* also serves as basic prescriptions for behavior that apply to all Somalis (*xeer dhagan*). These principles include: the collective payment of blood compensation (*diya*) for certain crimes such as murder, assault, theft and rape; the promotion of inter-clan harmony through the protection of certain social groups including women, children, the elderly and guests; and the payment of dowry obligations.<sup>15</sup>

It is important to highlight that *xeer* is not a moral code in the same manner as certain aspects of religious laws, such as the *shari’a*. Its norms do, however, impact on elements of social structuring such as whom widows are permitted to marry, how cases of rape should be resolved, and other prescriptions that set out boundaries for acceptable behavior. Importantly, *xeer* is a collective system that places responsibility for actions on the group rather than the individual. This allocation of responsibility operates to protect

<sup>7</sup> Lewis, above n 4.

<sup>8</sup> Ibid.

<sup>9</sup> Gundel, above n 3, 6.

<sup>10</sup> Ibid 7.

<sup>11</sup> Ibid iv-vi.

<sup>12</sup> Ibid 6.

<sup>13</sup> Ibid 10-11; Le Sage, above n 2, 32-33.

<sup>14</sup> V Justiniani, *Xeer procedure in Somaliland*, final report for UNDP Somalia (2007).

<sup>15</sup> Le Sage, above n 2, 32-33.

the group and its collective strength — in harsh and unstable environments it is deemed more beneficial for the group to collectively assume responsibility for compensation payments rather than lose one of its members. In this way, *xeer* has functioned as an effective tool for promoting social cohesion and for the regulation of inter-clan affairs.<sup>16</sup>

The importance of *xeer* is widely recognized: it represents an integral component of the Somali way of life and continues to be the preferred and most used legal system in all Somali regions, applied in up to 80–90 percent of disputes and criminal cases.<sup>17</sup> *Xeer* is also regarded as fundamental to maintaining social relations within clans. During the conflict and its aftermath, traditional structures (*xeer* and the elders who regulate it) gained elevated importance due to their ability to provide some level of security.<sup>18</sup> Today, the elders are regarded as the guarantors of peace and stability, and *xeer* “the glue that prevents a collapse into anarchy”.<sup>19</sup>

### 1.1.3 *Xeer* in practice

*Xeer* cases are adjudicated at the lowest appropriate genealogical level of the clan, commencing with the nuclear family, followed by the extended family, through to the sub-clan and clan levels.<sup>20</sup> Outcomes are determined by a jury of elders (*xeer beegti*) in reference to *xeer* rules and driven by what is deemed to be in the best interests of the group as opposed to the best interests of the individuals involved. It is important to highlight, however, that while *xeer* plays a pivotal role in decision-making, a clan, sub-clan or *diya*-paying group’s size and military strength are always factors in reaching an enforceable consensus. If one party is dissatisfied with an outcome, the dispute can be referred to a higher level of the clan structure for adjudication.<sup>21</sup>

*Xeer* adjudication is generally open to the public, and participation is open to all with the exception of women, relations of the disputants, persons with a personal grievance against either disputant, and persons who have previously sat in judgment over the case. Neither party is represented by a lawyer; however, other trial techniques, such as the use of witnesses and cross-examination, are commonly employed.<sup>22</sup>

The *xeer* system is compensation-based, with penalties ranging from an apology to monetized assessments of damages payable in livestock or, more commonly, cash. The only exception to this is homicide, where the family of the victim is able to choose between compensation and the execution of the perpetrator.<sup>23</sup> It is important to highlight that the rationale of compensation is to provide a social and financial safety net for the victim or the victim’s family, by replacing the earning value of a deceased or injured member or, in cases of rape, allowing the family to recover some funds that would have otherwise been received if the victim had received a dowry.<sup>24</sup> It is the responsibility of the elders of the *diya*-paying group to ensure that the terms of *xeer* agreements are abided by.<sup>25</sup>

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<sup>16</sup> Gundle, above n 3, 9.

<sup>17</sup> Ibid 51.

<sup>18</sup> Ibid iv-vi. See generally K Menkhaus, *Local Security Systems in Somali East Africa*, in L Andersen (ed.), *Fragile States and Insecure People? Violence, Security and Statehood in the Twenty-First Century* (2007).

<sup>19</sup> Gundle, above n 3, vi.

<sup>20</sup> Ibid 12.

<sup>21</sup> Ibid 8-9, 12; D J Gerstle, *Under the Acacia Tree: Solving Legal Dilemmas for Children in Somalia* (2007) 40-41.

<sup>22</sup> Le Sage, above n 2, 35-36; Gerstle, above n 21, 40-41.

<sup>23</sup> Gerstle, above n 21, 31.

<sup>24</sup> This, of course, presupposes that the woman raped will not marry. Although this is not strictly the rule, most respondents pointed out that rape victims have very few opportunities to marry another person.

<sup>25</sup> Gundle, above n 3, 6.

## 2. Access to justice in Somalia

The justice options in Somalia comprise the state justice system, *shari'a* and customary law. While legislation recognizes the supremacy of the state justice system and there has been significant effort in strengthening the capacity of courts at the national, regional and district levels, such fora are physically inaccessible to the majority of the rural poor. *Shari'a* deals principally with family issues such as divorce and inheritance, and again, courts do not exist in most rural areas.<sup>26</sup> In practice, *xeer* is the most accessible, used and preferred system for resolving disputes.<sup>27</sup>

This primacy of *xeer* is accepted, and in some ways perpetuated by the state justice system, with courts routinely registering or confirming decisions made by traditional leaders.<sup>28</sup> However, while *xeer* is an efficient mechanism for regulating inter-clan affairs and maintaining stability, it fails to provide adequate protection for vulnerable groups such as women and children, and tolerates harmful customary practices in abrogation of both international human rights standards and *shari'a*. This places limitations on the ability of marginalized groups to access justice both in physical and procedural terms.<sup>29</sup> Moreover, because the level of protection enjoyed by individuals under *xeer* depends on the strength and alliances of one's clan, vulnerable groups such as minorities and IDPs are at great disadvantage when accessing remedies.

### 2.1 A plural legal framework

As noted above, the legal framework of Somaliland and Puntland is pluralist, comprising state law (a *melange* of inherited British and Italian common law), *shari'a* and *xeer*.<sup>30</sup> In practice, this pluralism has given rise to a state of lawlessness due to a lack of parameters for determining when and where a particular system of law applies.<sup>31</sup>

Multiple, overlapping and often contradictory sources of law have led to determination of jurisdiction being a highly confusing and contentious process. This is compounded by the lack of formal training of many judges and lawyers, widespread public ignorance and distrust of the state justice system (particularly in rural areas), and efforts by some Islamic court leaders to impose fundamentalist beliefs through *shari'a*. Amidst this confusion, the choice of applicable law in a given case is largely driven by two factors: first, where the self-interest of the stronger party to the dispute is served; and second, how a decision that will preserve security and peaceful inter-clan relations can be reached. These factors have limited the equality of all Somalia citizens before the law, as well as the degree of protection that the legal system can offer on a personal basis, particularly when powerful clans, politicians or businessmen exercise direct influence over how cases are decided.<sup>32</sup>

In contrast, the current system of legal pluralism restricts access to justice for vulnerable groups who are less informed about their rights and less able to negotiate the different options. Women are in a particularly vulnerable position since, although their rights are, in many cases, better protected under statutory law and *shari'a*, their capacity to access the courts is highly restricted.<sup>33</sup> Elders place pressure on women to settle crimes

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<sup>26</sup> Gundle, above n 3, 21.

<sup>27</sup> Ibid iii; see further H M Kyed, *Traditional authority and localization of state law*, in A Jefferson and J Steffen (eds), *State Violence and Human Rights: State Officials in the South* (2009).

<sup>28</sup> Gundle, above n 3, 21; see further Danish Refugee Council, *Harmonization of Somali legal systems* (2009) 78-79.

<sup>29</sup> Gundle, above n 3, 55.

<sup>30</sup> Le Sage, above n 2, 7, 14-5.

<sup>31</sup> Academy for Peace and Development, above n 3.

<sup>32</sup> Le Sage, above n 2, 53.

<sup>33</sup> Gerstle, above n 21, 32-33.

committed against them through *xeer* and, as will be explained below, where women do commence litigation, elders routinely petition judges to have such cases withdrawn and returned to the customary level.<sup>34</sup>

The strength of *xeer* (and the elders) *vis-à-vis* the courts (and judges) is closely linked to the role played by the customary system during the civil conflict. Throughout this period, in both Somaliland and Puntland, *xeer* was seen as a mechanism that promoted stability and facilitated initial peace negotiations. Its strength and durability elevated its status within a wider judicial framework, with the result that when the elders seek to assert their jurisdiction over a matter, judges generally facilitate this in the belief that the elders best understand how to maintain peace and avoid further inter-clan conflict.<sup>35</sup>

## 2.2 Collective responsibility

Since *xeer* is based on a doctrine of collective responsibility, there are no provisions for the punishment of individual perpetrators. Instead, when a crime is committed, *xeer* holds the entire *diya*-paying group collectively responsible.<sup>36</sup> The rationale for collective responsibility is that:

[n]omadic individuals have too few personal resources to pay for a given obligation. Hence, if mag is not paid, the aggrieved clan may opt to kill the criminal, or members of that person's clan. The unfortunate result is that the clan will lose a valued (economically and militarily) member, setting off a cycle of revenge killings and persistent insecurity. Moreover ... the number of men must be protected and sustained because the perceived strength and wealth of the clan depends on the size of the clan. Hence the very notion of private property has to be subordinate to the clan interests, and becomes part of the "collective property" of the clan ...<sup>37</sup>

However, the practice of not allocating individual responsibility for crimes removes guilt from the individual and furthers contributes to a culture of impunity, with the result that the rights of individual clan members are secondary to the interests of maintaining clan strength and unity.<sup>38</sup> Moreover, the compensatory nature of the system denies the rights to justice and equality before the law because outcomes are determined, not based on the nature of the crime, but on the gender and status of the victim. For example, for identical crimes, the level of compensation payable is highest where the victim is a married woman, followed by a single woman, and then a widow. Similarly, the compensation payable when the victim is a man will always be higher than that for a woman.<sup>39</sup> Compensation-based systems also give rise to impunity in cases such as honor killings and intra-family crimes, where the compensation-paying group and the compensation-receiving group are one and the same.<sup>40</sup>

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<sup>34</sup> Academy for Peace and Development, above n 3; Gerstle, above n 21, 82-83. The Director of the Women Lawyers' Association in Somaliland estimated that 80 percent of all rape cases that begin in the courts are transferred by male relatives of the victims on the ground that they have requested the elders to resolve them through *xeer*; interview with Executive Director for the Somaliland Women's Law Association, Somaliland Lawyers Association Office, Hargeisa, Somaliland (9 March 2010).

<sup>35</sup> Gundel, above n 3, v-vi; Academy for Peace and Development, above n 3; Danish Refugee Council, above n 28.

<sup>36</sup> In the case of a homicide, for example, irrespective of the presence of *mens rea*, it will be common for the clans to negotiate a settlement in the form of compensation paid by the *diya*-paying group of the perpetrator to the *diya*-paying group of the victim.

<sup>37</sup> Gundel, above n 3, 9.

<sup>38</sup> *Ibid* iii.

<sup>39</sup> *Ibid* 55-56; Gerstle, above n 21, 43.

<sup>40</sup> Gerstle, above n 21, 31.

## 2.3 Representation and participation in *xeer*

*Xeer* and the rulings of *xeer* are not based on an equal representation of all groups. Traditionally, *xeer* is entered into by the elders of the *diya*-paying group.<sup>41</sup> Although in theory, all men can participate in negotiations and mediation, access is generally restricted to adult men from majority clans, and no access is provided to women. Women can only be represented by male relatives as participants, decision-makers, witnesses or victims.<sup>42</sup> Minorities, due to their status in the Somali clan lineage system, are similarly denied representation or inclusion in *xeer* negotiations.

Until quite recently, access to justice for minority groups through customary fora was preconditioned by their being sponsored or 'adopted' by the elders of majority groups. This situation has now been marginally improved, and minorities can also gain access to customary processes through their own elders, although their level of protection and the quality of justice meted out remains limited. This is because minority elders do not enjoy the same status as majority elders, violations committed against minority individuals are rarely viewed as priorities, and the enforcement of decisions can be problematic.<sup>43</sup>

The situation of IDPs is even more troubling, especially in Somaliland and Puntland where conflict- and drought-displaced populations are growing rapidly. IDPs have little access to land or employment, and are exposed to high levels of criminality. They cannot, however, enter into *xeer* agreements with host communities either because they have been separated from their elders, or because their elders are not respected by — or do not have strong ties to — the majority clan.<sup>44</sup> Without such clan representation, their opportunities for accessing justice are severely limited.

## 2.4 The protection of women and children under *xeer*

A number of *xeer* practices contravene basic human rights and standards of gender equality, including *dumaal* (where a widow is forced to marry a male relative of her deceased husband), *higsiiian* (where a widower is given the right to marry his deceased wife's sister) and *godobtir* (the forced marriage of a girl into another clan as part of a compensation payment or inter-clan peace settlement). Crimes of rape are commonly resolved through the marriage of the victim and the perpetrator. Although the *xeer* of many groups protects the right of a victim to refuse marriage in case of rape, the victims face enormous societal pressure to do so; marriage is widely deemed the best option in such situations to protect the victim from a life of shame and as a means of stemming future retaliatory violence.<sup>45</sup> *Xeer* also tolerates revenge and honor killings, denies women inheritance rights, and views domestic violence as a personal rather than a legal matter.<sup>46</sup> Children, in addition to their vulnerability to the above-mentioned rights violations, are also denied basic legal protections under *xeer*, in large part because it protects parents' right to raise them without interference and because the age of majority is set at 15 years.<sup>47</sup>

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<sup>41</sup> Gundle, above n 3, 6-9, see generally Lewis, above n 4; I M Lewis, *Understanding Somalia and Somaliland* (2008).

<sup>42</sup> Gerstle, above n 21, 41; DRC, above n 28, 72; Interview with members of the Sexual Assault Referral Centre (SARC), SARC offices, Hargeisa Group Hospital, Hargeisa, Somaliland (7 March 2010).

<sup>43</sup> Gundel, above n 3, 56-57.

<sup>44</sup> *Ibid* 57.

<sup>45</sup> Gerstle, above n 21, 32-33, 40-41.

<sup>46</sup> *Ibid* 41; Gundle, above n 3, 55-56; Le Sage, above n 2, 37-38; DRC, above n 28, 16-17.

<sup>47</sup> Gerstle, above n 21, 41, 59.

### 3. The National Declarations: working with elders to revise and reform *xeer*

In 2003, a small group of elders from the Somaliland region of Toghdeer approached the DRC seeking support for their attempts to gain better insight into how *xeer* might be revised to align it more closely with both *shari'a* and human rights standards. In the ensuing discussions, weaknesses were identified within the operation of the *xeer* system, in particular the phenomenon of revenge killing, which was deemed a threat to inter-clan peace and stability. Recognizing the importance of *xeer* as the dominant method of conflict resolution, the DRC decided to support a pilot project aimed at strengthening the customary *xeer* system in order to enhance the security and protection of vulnerable groups.<sup>48</sup>

The first step was to facilitate a series of dialogues that brought together over 100 elders from five clans in Toghdeer. This resulted in the Declaration of the Togdheer House of Aquils, which the elders signed in September 2003, committing themselves to curbing the main causes of inter-clan conflicts and addressing specific aspects of *xeer* that violated *shari'a* and human rights. An awareness campaign followed, led by 54 elders and reaching over 100 villages in Toghdeer.<sup>49</sup> A further conference, attended by 92 elders, was held in Burao, Toghdeer Province, from 28 December 2003 to 1 January 2004. This conference produced a final resolution, the key feature of which was to limit communal responsibility in cases of intentional and revenge killings. Specifically, in the event of a revenge or intentional killing, the clan membership committed to refrain from immediate execution of the alleged perpetrator and instead to hand him or her over to the state authorities. In such cases, the compensation payment would be limited to 100 camels and would be paid directly to the family of the deceased, as opposed to being shared by the membership of the clan. Other points of agreement included, *inter alia*:

- the protection of the right of widows to inherit according to *shari'a* principles;
- the protection of the right of widows to marry men of their choice (eliminating the practice of *dumaal*);
- increased protection for vulnerable groups such as orphans, street-children, persons with disabilities and IDPs; and
- the formation of committees to resolve conflicts that were deemed threats to ongoing peace and security.<sup>50</sup>

Interest in the intervention led to parallel dialogue processes in other regions of Somaliland including Awdal, Maroodi Jeex, Sahel, Sool and Sanag. With support from the DRC, the United Nations Development Programme (UNDP) and the Office of the United Nations High Commissioner for Refugees (UNHCR), a further conference was held in 2006, where a National Declaration (a composite of smaller Regional Declarations) was signed, followed by a dissemination process that continued into 2009.<sup>51</sup> At the conference, specific elders were tasked with lobbying the Parliament to ratify the National Declaration, however, this is still pending.

The success of the project in Somaliland generated interest in extending its scope of operation to include Puntland. Accordingly, traditional leaders there followed a similar process and came together in regional meetings to discuss revisions of *xeer*. This culminated in the signing of a National Declaration in February 2009, followed by a

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<sup>48</sup> V Justiniani, *The Toghdeer Experience*, Final Report, DRC (2006).

<sup>49</sup> Ibid 14-16, 23-5.

<sup>50</sup> Ibid 21-22, 28-32; Gundle, above n 3, 22-23.

<sup>51</sup> Danish Refugee Council, above n 28. Dissemination was conducted jointly by the local NGO Horn Peace and the elders from each region; Danish Refugee Council, *Follow up and Dissemination of the National Declaration*.

process of dissemination and awareness-raising.<sup>52</sup> Importantly, the National Declarations in both Somaliland and Puntland contain the key points from the final Declaration of the Togdheer House of Aquils set out above.

The process of revising *xeer* through National Declarations prompted thinking about how customary law might be used to promote enhanced access to justice for marginalized and vulnerable groups. Attention focused on the problems associated with legal pluralism and the need to harmonize the different legal systems operating in the Somali regions. One initiative focused on the elders' commitment in the National Declarations to relinquish their customary jurisdiction over serious crimes to the formal legal system, specifically those involving intentional/revenge killings and rape. Interventions included providing the elders with a visiting lawyer to advise on legal matters, supporting the creation of "Elder Houses" across Somaliland, and creating an Elders Network in Puntland. It was reasoned that linking the elders through a network and facilitating inter-clan contact would be critical to successfully implementing the revised *xeer*.

## 4. Assessing the impact of the National Declarations

Five months after the signing and dissemination of the Declaration of the Togdheer House of Aquils, the DRC conducted a monitoring study comprising 560 interviews covering 16 villages. The evaluation revealed a 90 percent reduction in murder cases, and in the two murder cases that did take place, the perpetrators were quickly turned over to authorities.<sup>53</sup> The Mayor of Burao reported that 250 inter-clan land conflicts had been resolved, and five cases where widows had freely married men of their choice were identified. According to a DRC report, community members stated that they had received clear messages from the elders regarding the National Declaration and expressed their "full support in the *aquils'* drive for keeping peace, stopping revenge, upholding women's rights, [and] protecting their grazing land and environment."<sup>54</sup> Data from monitoring visits conducted by the DRC during 2009 showed that within the IDP settlements of Hargeisa, 91 percent of respondents were supportive of the changes to the *xeer*.<sup>55</sup>

Other evaluations, however, indicate that while there has been a decrease in revenge killings, vulnerable have difficulty accessing justice as traditional leaders continue to mediate serious cases such as rape rather than referring them to the formal justice system.

In order to provide further insight into the medium-term impact of the intervention, the remainder of this chapter presents the results of field research conducted in Garowe and Hargeisa in February and March 2010. The critical areas of investigation were: general awareness of the provisions of the National Declarations; the extent of referral of serious criminal cases to the formal justice system; and whether there had been any improvement in access to justice and the legal protection of vulnerable groups.

### 4.1 Community awareness of the national declarations

In Somaliland and Puntland, four years and one year respectively after the commencement of dissemination activities, awareness of the National Declarations among the general population was found to be minimal. Out of eight focus group discussions (with approximately 12 participants each), the only group that expressed knowledge of the Declaration was minority women in the settlement of Daami in Hargeisa. This is consistent with other interviews conducted during the course of the research, which revealed that only the elders and direct implementing partners, such as

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<sup>52</sup> Horn Peace, *State Conference for the Traditional Leaders of Puntland*, final report of implementation (2009).

<sup>53</sup> Le Sage, above n 2, 52.

<sup>54</sup> Justiniani, above n 48, 4, 33-34.

<sup>55</sup> It should be highlighted that the sample size for this study is unknown. DRC, *Satisfaction and Awareness Survey on the Dissemination of the Elders Declaration* (2009).

NGO Horn Peace and UNDP, were aware of the Declaration. It is also consistent with research conducted by the DRC in 2009, which found that only 21 percent of residents in Hargeisa were aware of the Declaration.<sup>56</sup>

The greater awareness of the National Declaration in Hargeisa compared to Garowe can be at least partially explained by the fact that dissemination activities began earlier (in 2004 in Hargeisa and in 2009 in Garowe). Yet, even in Hargeisa, only respondents who had been directly targeted in the dissemination campaign in the IDP settlements had retained knowledge of the provisions of the National Declarations; focus group discussions with other community members suggested that awareness among targeted groups had not been carried over to the broader population. Some respondents noted that while they were aware that the elders had met, they had not been informed as to the outcome of the meeting. As one stated, "we heard that the elders were meeting in the Ambassador Hotel but we never heard what it was that they met about ..."<sup>57</sup>

The 10 elders interviewed during this research stated that they had disseminated the Declarations and were trying to apply their provisions in dispute resolution. However, they noted that a key constraint was the length of time required before the population would accept such changes in practice. Moreover, the research revealed widespread confusion, among both the elders and the users of the *xeer* system, regarding the functioning of the state justice system. In many cases, parties taking cases to the courts were not sure which law would be applied (*shari'a* or statutory law) or what the outcome might be. As noted by the Chief Justice of Puntland, "it depends on the judge and whether he knows *shari'a* or the formal laws; a judge trained in *shari'a* will only apply *shari'a*, as he doesn't feel comfortable judging with formal laws."<sup>58</sup>

#### 4.2 Referral of serious crimes to the state justice system

Under the National Declarations, the elders committed to refer serious criminal cases, including murder and rape, to the formal legal system for resolution. Encouragingly, there has been a notable increase in the number of cases being processed by the courts since the Declaration in Somaliland was made. According to UNDP, in 2006 the caseload across Somaliland was 1,852 cases; in 2007, this had increased to 3,293, and in 2008, to 3,833.<sup>59</sup> Given that overall levels of criminality over the period decreased rather than increased, there is reason to believe that this change may be at least partially linked to the National Declaration.

In this regard, the data collected indicates that elders are referring cases to the courts, particularly those involving murder. In Somaliland, there has also been a significant decrease in the practice of clans shielding alleged perpetrators from the courts.<sup>60</sup> Representatives from the Ministries of the Interior and of Justice reported that such shielding is no longer common practice, and that even the elders now regard this as improper.<sup>61</sup> Improvements were also observed in Puntland, although to a lesser extent.

The same improvements were not observed in the handling of rape cases, but for different reasons. The research found that while the elders are prepared in principle to refer such cases to court, and are no longer likely to petition judges to discontinue proceedings, victims remain under significant social pressure to resolve these cases through *xeer*. In most situations therefore, rape cases will either not be reported to the

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<sup>56</sup> Ibid.

<sup>57</sup> Focus group discussion with IDPs and minorities, Legal Aid Clinic, Hargeisa University, Hargeisa, Somaliland (9 March 2010).

<sup>58</sup> Interview with Puntland Chief Justice, Garowe Court House, Garowe, Puntland (28 February 2010).

<sup>59</sup> UNDP, Access to Justice Division, *Annual Report* (2009) 5.

<sup>60</sup> Interview with Haqsoor Representatives, Haqsoor Office, Hargeisa, Somaliland (6 March 2010); interview with Mohammed Ali, Hornpeace Representative, Horn Peace Office, Hargeisa, Somaliland (6 March 2010).

<sup>61</sup> Interview with Minister of Justice, Ministry of Justice, Hargeisa, Somaliland (7 March 2010); interview with the Director General of Minister of Interior, Ministry of Interior, Hargeisa, Somaliland (7 March 2010).

state justice system in the first instance (and leaders will not actively encourage a referral), or victims will elect to discontinue proceedings.

It is important to highlight that although there is some evidence of change in the willingness of the elders to refer serious criminal cases to the formal justice system, security concerns continue to dictate the modality of conflict resolution in Somaliland, and even more so in Puntland. Both the elders and the Chief Justice of Puntland noted that the maintenance of peace and stability are the chief factors influencing the resolution of criminal cases. As such, conflicts that might lead to inter-clan clashes will be resolved according to *xeer* because this is perceived to be the most effective means of preventing armed conflict.<sup>62</sup> Moreover, the research revealed a high level of confusion on the part of the elders as to whether they should refer cases to the courts or report cases to the police. In Somaliland, the elders argued that they were strictly reporting all serious cases to the police, but understood that once this had occurred, they were under no further obligation to ensure that cases were adjudicated by the courts.<sup>63</sup>

In contrast, minority clan members and IDPs routinely refer serious cases (both murder and rape) to the state justice system. Once referred, the elders rarely petition courts for the cases to be returned to the *xeer* level or take action to have perpetrators released from prison. However, this trend appeared to be independent from the existence of the National Declarations. For example, although minority clans now have representation through their elders, the latter do not have sufficient power to negotiate fair *xeer* with majority clans or to exact compensation in the event of a dispute.

Moreover, discriminatory practices within *xeer* serve to prevent equitable solutions for minority clan members and IDPs. In the case of rape, for example, minority victims may have no access to customary justice because, when the perpetrator is from a majority clan, the traditional *xeer* resolution (whereby the victim is married to the perpetrator) is not permitted. In the case of IDPs, access is even more problematic since they find it difficult to enter into *xeer* with neighboring clans. IDPs often have no other option, therefore, than to refer matters to the state justice system. It is also important to highlight that although these groups show a preference for the formal justice system (perhaps largely through necessity), once at court, they still feel discriminated against and believe that their cases are not taken seriously.

### 4.3 Heightened protection for vulnerable groups

Under the National Declarations, elders committed to the better protection and enhanced access to justice of certain marginalized groups including women, IDPs, minorities and children. However, the elders did not articulate or set specific benchmarks for how this would be achieved. Research conducted on the effectiveness of this aspect of the National Declarations was therefore anecdotal to some extent.

#### 4.3.1 Victims of gender crimes

As discussed above, with the exception of cases involving IDPs and minorities, rape cases are likely to be resolved according to *xeer*. In most cases, victims are reportedly pressured by families to settle their complaint outside the courts. In other cases, lack of evidence prevents judges from delivering a verdict and the matter is referred back for resolution under *xeer*. Both the Chief Justice of Puntland and regional court judges in

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<sup>62</sup> Interview with the Chief Justice of Puntland, Garowe Court House, Garowe, Puntland (28 February 2010); Focus group discussion with elders, United Nations Conference Centre (UNCC) Compound, Garowe, Puntland (27 February 2010).

<sup>63</sup> Focus group discussion with the elders, Horn Peace Office, Hargeisa, Somaliland (8 March 2010).

Somaliland reiterated that in Somali culture, such cases cannot be left unresolved, and that a *xeer* resolution was preferable to no resolution at all.<sup>64</sup>

Under *xeer*, the outcome of rape cases is determined by the victim's male relatives and/or the elders through negotiation on the level of compensation payable, the amount of which is a function of the relative size of the clans, the relationship between the clans, and the age and status of the victim. Such compensation is typically distributed among the members of the *diya*-paying group, and rarely delivered to the family of the victim as required under the National Declarations. The women interviewed considered their non-receipt of compensation to be highly unjust.<sup>65</sup> Moreover, the traditional practice of marrying the victim to the perpetrator continues to be seen as a legitimate means of resolving gender crimes because marriage offers both economic and social protection to the victim.<sup>66</sup>

#### 4.3.2 Children

*Xeer* continues to offer little protection to minors. *Xeer* protects a parent's right of absolute authority over their children within the home, and as the following extract from the National Declaration in Somaliland confirms, the resolution of crimes involving children should occur at the customary level:

The traditional leaders see that the traditional system is best suited to deal with juvenile justices. They call the police and all concerned parties to settle all cases that involve children through the customary law before passing them to the police stations and public prisons.<sup>67</sup>

As a result, where the family of the minor victim decides not to take a case to court or withdraws a case from the court (a common occurrence), the state justice system is unable to provide adequate protection to the victim.<sup>68</sup>

#### 4.3.3 Minority and IDP groups

The legal protection afforded to IDP and minority victims of gender-based crimes remains extremely limited. As set out above, for crimes of rape perpetrated by majority clan members on minority or IDP victims, there is often no access to justice. If referred to court, cases will often be withdrawn by the majority clan elder; however, the solutions offered at *xeer* are unattractive because marriage between a majority and minority member is not permitted, and the power of a minority clan to exact fair compensation from a majority clan is weak. Respondents stated that victims in such situations, unable to marry and socially 'tainted', often commit suicide or leave (or are forced to leave) their communities.<sup>69</sup>

Where cases do reach court, outcomes are inconsistent. If trials are completed, acquittals on the basis of lack of evidence are common, although where the evidentiary requirements are fulfilled, sentences of between 10–15 years (as provided for in statute) are imposed.<sup>70</sup> According to a Regional Court judge in Hargeisa, 44 cases of rape were

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<sup>64</sup> Interview with Chief Justice for Puntland, Garowe Court House, Garowe, Puntland (28 February 2010); statement by Regional Court Judge of Hargeisa during prosecutor workshop, Mansoor Hotel, Hargeisa, Somaliland (7 March 2010).

<sup>65</sup> Interview with Sexual Assault Referral Centre employees, Hargeisa Group Hospital (7 March 2010); interview with Minister of Justice (Somaliland), Ministry of Justice (7 March 2003).

<sup>66</sup> Interview with Gaashan NGO, Ambassador Hotel, Hargeisa, Somaliland (6 March 2010).

<sup>67</sup> Excerpt from National Declaration of Somaliland Traditional Leaders, Hargeisa, Somaliland (4-10 December 2010).

<sup>68</sup> Information provided by the Regional Judge of Hargeisa, Prosecutor Workshop, Mansoor Hotel, Hargeisa, Somaliland (7 March 2010).

<sup>69</sup> Focus group discussions with minority groups, UNCC Compound, Garowe, Puntland (7 February 2010); interview with representatives of Haqsoor, Haqsoor Office, Hargeisa, Somaliland, (6 March 2010).

<sup>70</sup> Information provided at the Prosecutor Workshop, Mansoor Hotel, Hargeisa, Somaliland (7 March 2010); interview with Chief Justice of Puntland, Garowe Court House, Garowe, Puntland (28 February 2010).

prosecuted in court in 2009. Of these, only eight convictions were obtained, while the other cases were either dismissed due to lack of evidence or withdrawn from court.<sup>71</sup>

#### 4.4 Evaluation of impact

The research indicates that the impact of the National Declarations has already reached its peak in terms of enhanced access to justice and the legal protection of vulnerable groups. It also seems unlikely that the goodwill of the elders alone will facilitate any further progress under the current conditions. However, this is not to say that no improvements have occurred. There is now increased and more consistent referral of intentional and revenge killings to the state justice system, harmful practices such as *dumaal* have been abolished, and women's access to inheritance has been increased. There have also been improvements in how criminal behavior is perceived and how to deal with criminals; the elders are more aware that the clan should not protect them and that serious criminal offences should be referred to the courts.

On the other hand, there has been more limited progress in resolving gender-based crimes through the courts, or in achieving enhanced protection of vulnerable groups (for example, by paying compensation directly to victims and stemming the practice of marrying the perpetrator of a rape to the victim). In terms of the protection offered to minority clans and IDPs, their situation remains grave, with little notable change as a result of the intervention. Although their access to the state justice system has improved marginally, it appears that this is less the result of the National Declarations than other civil society activities.

In terms of associated or spinoff effects, the goodwill on which the interventions were premised remains, and members of the judiciary and the elders are slowly working towards better collaboration and linkages. For example, the elders and the Chief Justice in Garowe are in discussions on the introduction of a mobile court targeting rural areas. Similarly, in an attempt to respond to the sparse law enforcement presence in rural areas, the judiciary has asked the elders to assist with apprehending suspects, maintaining the peace during trials, and collaborating with the courts to ensure that sentences are enforced.<sup>72</sup>

## 5. Lessons learned from evaluating the impact of the Declarations

The interventions described above represent an innovative approach to enhancing access to justice by reforming customary law from within its leadership. The DRC project was neither established under an orthodox rule of law framework nor with a strict legal empowerment focus. It was deemed that in the context of strong customary law and emerging but nonetheless weak state judicial structures, a creative middle-ground approach was required. Given all that was 'right' about the project's genesis, understanding the limitations of the intervention and what might have been done to promote enhanced impact deserves further examination. This is true both in light of continuing efforts to reform the Somali justice sector, and from the perspective that this is an approach to legal empowerment that might be suitable for adaptation in other country contexts.

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<sup>71</sup> Regional Court Judge of Hargeisa, Prosecutor Workshop, Mansoor Hotel, Hargeisa, Somaliland (7 March 2010).

<sup>72</sup> Interview with UNDP staff Garowe, UNCC Compound, Garowe, Puntland (3 March 2010); interview with Chief Justice of Puntland, Garowe Court Houses, Garowe, Puntland (28 February 2010).

## 5.1 Ineffective dissemination

Widespread lack of awareness regarding the National Declarations was a key limiting factor in enhancing the legal protection of vulnerable groups, since ignorance of one's rights restricts one's ability to assert them, or to hold duty-bearers accountable for guaranteeing them. This low level of awareness raises concerns about the effectiveness of dissemination activities carried out in both locations. In Somaliland, in particular, this is surprising given that the outreach component of the project appeared to have been carefully implemented and monitored by the donor partner. A possible explanation is that when the project expanded beyond its pilot phase (and beyond the initial group of elders who spearheaded the initiative), it did not integrate accountability mechanisms or tools to ensure that the elders disseminated the National Declaration effectively. Further, assigning responsibility to the elders alone may have been overly optimistic given their lack of experience in advocacy, their limited skills in managing the logistics of such an ambitious exercise, and their lack of resources to facilitate dissemination.

## 5.2 Accountability

The intervention relied strongly on the goodwill of the elders to deliver on their commitments under the National Declarations without establishing any accountability mechanisms or systems to support implementation. A key issue is that the elders did not bind themselves to any tangible goals at the National Summit where the Declarations were signed. In some cases, the revised *xeer* contained vague language that committed the elders to an improved situation for vulnerable groups more generally without articulating how this would occur or addressing any specific rights. For example, on the rights of minorities, the National Declaration of Somaliland states:

The traditional leaders acknowledge that little progress has been made so far on the free inter-marriage with the minority groups. They call for the social reintegration of the minority groups in all aspects of their daily life.<sup>73</sup>

One factor here may have been the challenges inherent in attempting to bring *xeer* into alignment with statutory law, *shari'a*, and international criminal justice standards. *Xeer* is an oral, flexible and dynamic system that applies differently to different groups, whereas the other sources of law are based on static, written codes that are universally applicable. Not only was it problematic to standardize *xeer* in a way that applied to all groups, but there was no governing authority to oversee or enforce these changes. It is thus likely that, irrespective of intent, the elders did not understand how, or were not equipped, to implement increased protection by designating specific rights and practices.

While accountability mechanisms and more specificity in the rights afforded may have aided effectiveness, it must be highlighted that the strength of this initiative was that it was conceived and developed by the elders themselves. Imposing external pressure in terms of targets and accountability controls may have irrevocably tainted an otherwise genuinely bottom-up movement for reform. The question is therefore how to encourage a level of accountability that facilitates action, but in such a way that preserves local ownership.

One such form of 'soft' accountability might have been the greater involvement of civil society. The unilateral focus on the elders as agents of change in their communities, and consequent lack of engagement with the users of *xeer*, might be seen as a missed opportunity in terms of bottom-up accountability. Even if Somali civil society lacked the strength to hold their elders accountable, their involvement might have manifested itself in some level of upward pressure for the elders to abide by the agreements, or served as a reference point in the deliberation of certain disputes.

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<sup>73</sup> Excerpt from National Declaration of Traditional Leaders, Hargeisa, Somaliland (4-10 December 2010).

### 5.3 Broader problems of discrimination

The program rested on the assumption that the goodwill of the elders would be sufficient to overcome broader issues of gender and social discrimination deeply entrenched in Somali norms and culture. Intention alone, it turned out, was not sufficient to modify such belief patterns, and correspondingly, the structure of the *xeer* system, which failed to provide equal access to minority and IDP groups. For example, social attitudes preventing women who have pre-marital sex (whether consensually or through rape) from marrying could not change overnight, nor be disassociated from a longer process of social and economic change. While such attitudes remain, the practice of marrying victims to perpetrators in such cases and exacting compensation under *xeer* will continue (as opposed to referring such cases to court), because this represents the only societal and financial protection available to the women involved.

Similarly, the intervention did not respond to the underlying factors that prompted the elders to remove cases from the state justice system. Given the prevailing security and governance conditions, the clan continues to be the fundamental provider of security and protection,<sup>74</sup> with the result that preserving clan strength is viewed as paramount by clan elders. As long as this remains the case, the elders will continue to organize the release of perpetrators from prison, and the transition from a collective to an individual-based system of justice will prove difficult.

### 5.4 Flaws in the state justice system

The intervention sought to create a bridge between formal and customary judicial fora, without responding to the inherent problems that made the courts unattractive in the first place. First, the courts remain weak *vis-a-vis* the elders and are unable to protect victims who may receive little or no justice under *xeer*. Very rarely will decisions taken by the elders not be ratified or be challenged by the courts, even when complainants actively assert a preference for formal adjudication.<sup>75</sup> Further, since the elders are not accountable to the courts, they cannot be penalized if they withdraw a criminal case, and there are no legal mechanisms to protect victims whose cases are removed from the courts against their will.<sup>76</sup>

A second problem relates to the formal laws in place. Unrealistic evidentiary requirements that discriminate against rape victims make the prosecution of such cases extremely difficult. Such restrictions mean that enhanced access to the state justice system has not translated into more equitable outcomes. Where such requirements cannot be fulfilled, returning the case to *xeer* can be a victim's only means of obtaining some measure of financial and social protection. In the case of IDPs and minorities, however, access to any form of justice may remain beyond reach.

## 6. Reforming *xeer* as legal empowerment

The intervention in Somalia represents an innovative approach to legal empowerment tailored to complex local conditions. In both Somaliland and Puntland, the barriers to accessing justice are many. The state justice system lacks authority and legitimacy, and until quite recently, did not have a presence in rural areas. In contrast, the customary *xeer* system, while more accessible, deviates from internationally recognized human

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<sup>74</sup> Gundle, above n 3, iii.

<sup>75</sup> Information presented at a Prosecutor Workshop, Mansoor Hotel, Hargeisa, Somaliland (7 March 2010). The director of the legal clinic in Hargeisa recalled one case taken to court that involved the rape of a woman by two men. The alleged perpetrators escaped from custody, but were later apprehended by their clans and the case resolved by *xeer*. The elders submitted the decision to the court to be ratified, however, the regional court judge refused to accept the outcome as the case was pending before the court. On appeal, the Supreme Court ratified the elders' decision: Interview with Mohammed Jama, Director of Legal Clinic, Human Rights section, Legal Clinic, University of Hargeisa (9 May 2010).

<sup>76</sup> Prosecutor workshop, Mansoor Hotel, Hargeisa, Somaliland (7 March 2010).

rights standards and denies access to many marginalized groups. Compounding the situation are ongoing unstable security conditions, weak governance, and endemic gender and social discrimination. In this environment, orthodox, top-down approaches that focus on the reform of and access to state courts and other justice sector institutions are unlikely to yield effective results.

On the other hand, a purely grassroots approach has equally little to offer given the authority of the clan system and its role in maintaining the barriers to justice already in place. In this context, efforts to empower civil society to bypass traditional leaders or hold them to account may have been ineffective at best and counterproductive at worst, particularly in the absence of social, economic and security reforms. This is because such efforts may have encouraged the elders to further tighten their grip on power and increase the divide between the already disparate elements of the Somali justice system.

A middle-ground approach was therefore developed, structured around the notion of the elders as agents of change within their communities. These elders — who represented both the interface with the state justice system and the gatekeepers of access to justice at the customary level — were supported and empowered with the hope of improving the operations of *xeer* and offering better protection to vulnerable groups. Through this process, the elders committed themselves to referring serious criminal acts to the courts, thus breaking the cycle of impunity inherent in the functioning of *xeer* and group compensation mechanisms. Critically, the impetus for revising customary law came from within the *xeer* membership rather from external actors. Consequently, it was argued, the process of revision was more likely to be regarded as legitimate and hence sustainable.

While the longer-term impact of the intervention appears to be patchy, it is noteworthy because it opens up new pathways within the context of legal empowerment programming. Although some progress was made, particularly in terms of the elders ceding elements of their jurisdiction to the courts, there is still much to be learned in terms of continuing reform of the Somali justice system, and for other developing countries. It also brings to the fore important questions in legal empowerment theory, including how far down the formal-grassroots hierarchy must an intervention sit before it can be classified as “legal empowerment”. An argument might run that the type of intervention presented here is not legal empowerment at all, because it did not motivate users to demand change within a normative framework.<sup>77</sup> Some might even go so far as to label the intervention “orthodox” because it targeted the elites of the customary system, who in practical terms, sit at the helm of the justice hierarchy.

The alternate position is that legal empowerment must be approached flexibly to suit country-specific circumstances and that strict definitions are unhelpful. As Wojkowska and Cunningham state, “legal empowerment of the individual and the community is fundamentally about access and power.”<sup>78</sup> Within this framework, the interventions can be seen as contributing to legal empowerment by enhancing access to justice at both the customary level (by aligning procedures and remedies with human rights standards) and the formal level (through better access to the courts in cases of serious crime). Further, although they ultimately proved relatively ineffective, the interventions did include dissemination components aimed at promoting awareness of the revisions among users of *xeer* and hence creating an upwards accountability mechanism. While the idea that *xeer* users could hold elders to account was not realistic, either at the customary or court level, the notion of elders committing themselves publicly to heightened standards is a social experiment with enormous empowerment potential.

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<sup>77</sup> See generally S Golub, *Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Rule of Law Series, Carnegie Endowment Working Paper No. 41 (2003).

<sup>78</sup> E Wojkowska, and J Cunningham, *Justice Reform’s New Frontier: Engaging with Customary Systems to Legally Empower the Poor*, IDLO Legal Empowerment Working Paper No. 7 (2009).

## 7. Conclusion

Rule of law reform in the Somali context presents formidable challenges. Somalia is a country that has been fragmented by civil war, with weak governance and formal legal structures that the population has little confidence in. Three legal systems operate concurrently, often in competition and contradiction, while the most accessible and most frequently used of these, *xeer*, fails to uphold some of the most basic human rights of users. In such contexts, interventions that seek to engage with and reform the customary legal system clearly have much to offer. But while the situation of Somalia is a particular one, it does not stand alone. The intervention examined in this chapter provides valuable lessons learned when trying to engage with customary systems through a legal empowerment lens. It provides a platform that can be used to further promote access to justice for vulnerable groups in the country or that can be adjusted in order to adapt to other country-specific circumstances.

First, there is something very captivating and promising about interventions that evolve from the grassroots. How best to support them without slowing down their natural momentum is a fine balance that is not well understood. While it is clear that preserving local ownership is imperative, this does not mean that stakeholders do not need support in certain areas. As was seen in the Somali example, customary leaders are not likely to have skills in advocacy, logistics or strategic networking. Similarly, autonomy of process must be balanced against measures to enhance effectiveness, including monitoring and/or accountability mechanisms. This may consist of both top-down interventions, such as complaints mechanisms covering both customary and formal justice processes, and bottom-up interventions, such as raising awareness, facilitating dialogue between different stakeholder groups, or establishing links between civil society, the courts and/or customary actors. The rationale is that complementary interventions that create both upwards and downwards pressure reach a “tipping point” whereby certain conditions are created that allow users to more realistically demand change and hold their leaders accountable.

Second, interventions aimed at enhancing access to justice cannot overlook underlying structural issues, such as deeply entrenched attitudes that operate to discriminate against or marginalize vulnerable groups, security and economic realities that obstruct normative change, and legislation that prevents courts from presenting viable alternatives to customary justice. Where such impediments cannot be removed or will take time to do so, new pathways should be explored. In Somalia, bridging the gaps between minority and majority clans proved far more complicated than empowering the elders alone. While the elders are still struggling with deeply embedded beliefs that status and the right to justice are inherently intertwined, IDP and minority groups are bypassing *xeer* and relying on legal aid clinics and paralegal programs to access tangible solutions at the courts.<sup>79</sup>

Third, exercises in codification and harmonization of legal systems present particular challenges, especially revising customary law to bring it into alignment with formal legislation or international standards. Although it is difficult to generalize, most customary systems are flexible and dynamic with high local variation, whereas legislation is based on static written codes that are universally applicable. Without careful planning, wide consultation and effective controls, exercises in codification can easily result in a set of rules that lack legitimacy, are too weak to be enforced, or are too vague to offer any real protection.

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<sup>79</sup> Focus group discussions with IDPs and minorities, Legal Aid Clinic, Hargeisa Universitt, Hargeisa, Somaliland (9 March 2010); focus group discussions with IDP women, Legal Aid Clinic, Garowe, Puntland (2 March 2010); focus group discussions with young women, UNCC Compound, Garowe, Puntland (1 March 2010).

Finally, in pluralistic contexts, access to justice might best be seen as creating a more even playing field where all users have viable and realistic pathways to suitable outcomes. When viewed this way, a holistic approach to enhancing access to justice that targets all stakeholder groups and components of the justice system is most likely to yield results. Reform to the customary justice system should therefore be complemented by strengthening formal courts, particularly by extending their reach into rural areas such as through awareness-raising, free legal aid and paralegal support. Programs that 'bundle' legal assistance into existing community services have particular potential in contexts where groups least likely to access suitable outcomes face exclusion on multiple grounds, such as gender discrimination, poverty, and/or minority status.<sup>80</sup> Similarly, programs that overemphasize one change agent (such as customary leaders) to the detriment of civil society groups, users of customary justice, or formal and religious representatives, have fewer prospects for success.

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<sup>80</sup> A prime example is the Sexual Assault Referral Centre (SARC), attached to the Hargeisa Group Hospital, which provides basic health care, psychosocial support as well as legal assistance to rape victims. Rape cases received by the SARC were most consistently found to be referred to and resolved by courts, and the principal users of this system — IDPs and minority women — are among the most vulnerable of all Somalis.