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# Using International Law in Somalia's Post- Conflict Reconstruction

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# Using International Law in Somalia's Post-Conflict Reconstruction

CHIARA GIORGETTI\*

*For the first time since 1991, Somalia has an internationally-recognized government. Established in August 2012, the Somali Federal Government (SFG) has been officially recognized by many nations and international organizations. The process of bringing Somalia fully back into the international community, however, remains long and complex. This Article argues that, in order to be successful, Somalia's reconstruction must include a robust international law component. By mandating frameworks for action and establishing best practices, international law should guide and strengthen reconstruction efforts.*

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\*Assistant Professor of Law, Richmond Law School. I would like to thank the University of Richmond for its generous support and for awarding me a Weinstein Summer Grant, which allowed me to travel to Nairobi, Kenya to conduct interviews with many Somalia experts. A draft version of this paper was presented at the World Bank, the Georgia International Law Colloquium, MSU Junior Faculty Colloquium, and the Summer Colloquium at Richmond University School of Law. I am grateful for comments received there. I am particularly grateful for comments by Dianne Marie Amann, Harlan Cohen, Timothy Feighery, Jim Gibson, Bernard Harborne, Corinna Lain, Andre Le Sage, Tim Meyer, Vikram Raghavan, and Jeremy Sharpe.

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## INTRODUCTION

For the first time since 1991 and after twenty years of lawlessness, signs of normalcy have begun to appear in Somalia. In August 2012, the Somali Federal Government (SFG) was established. The United States recognized the SFG on January 17, 2013, and normalized its relationship with the country.<sup>1</sup> Many other governments and international organizations also normalized relations with Somalia in the belief that the seemingly unresolvable civil war was finally over.

However, the supposed new beginning may just be wishful thinking. Its international recognition notwithstanding, the SFG has little effective or direct control over the majority of the country. Its existence is ensured largely by a military mission under the aegis of international bodies, namely, the African Union and the United Nations. Civilians continue to suffer from conflict-related abuses, and the presence of the al-Qaida affiliated terrorist group al-Shabaab remains strong.<sup>2</sup> Tellingly, Somalia continues to top the lists of “most failed” and “most corrupt” countries in the world.<sup>3</sup>

The challenges and contradictions faced by Somalia therefore make it the perfect case study to assess the use and effectiveness of international law in post-conflict regions. Indeed, state failure, which so distinctively characterizes Somalia, does not result in the application of any distinct international legal framework. It is considered a non-event in international law, which still lacks both a definition of state failure and an agreed legal framework to deal with its causes and consequences.<sup>4</sup> This means that, under international law, no special set of rules applies or is triggered by state failure.<sup>5</sup>

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1. See *U.S. Relations With Somalia*, U.S. DEP'T OF STATE BUREAU OF AFRICAN AFFAIRS (Aug. 16, 2013), <http://www.state.gov/r/pa/ei/bgn/2863.htm>.

2. Matt Bryden, *Somalia Redux? Assessing the New Somali Federal Government*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (2013), available at [http://csis.org/files/publication/130819\\_Bryden\\_SomaliaRedux\\_WEB.pdf](http://csis.org/files/publication/130819_Bryden_SomaliaRedux_WEB.pdf); see *infra* Part I.B.

3. *The Failed State Index 2013*, FUND FOR PEACE (Nov. 10, 2013), <http://ffp.statesindex.org/rankings-2013-sortable>; *Corruption Perceptions Index 2012*, TRANSPARENCY INT'L (Nov. 10, 2013), <http://cpi.transparency.org/cpi2012/results/>.

4. Chiara Giorgetti, *Why Should International Law Be Concerned About State Failure?*, 16 ILSA J. INT'L & COMP. L. 469 (2010).

5. Additionally, international law obligations continue to exist and continue to be binding, irrespective of the situation of state failure—and thus the inability to fulfill those obligations. See generally CHIARA GIORGETTI, A PRINCIPLED APPROACH TO STATE FAILURE:

Thus, important questions need to be answered: How can Somalia regain its place as a member of the U.N. and other international organizations? How can it reengage with donors and in the diplomatic arena? More urgently, how can the new government deal with border security, piracy, and terrorism, all of which pose international threats? How can it guarantee territorial and maritime borders that became porous and undefined during the civil war? What basic international legal framework is needed to attract private investments?

This Article demonstrates that international law is an appropriate, logical source to answer such questions. Globalization has made state action necessarily have inter-state ramifications, in such a way that implicates international law. Post-conflict reconstruction, too, is inter-state dependent and should formally include an explicit international law component.

Part I of this Article explains the present situation in Somalia and the main challenges facing the SFG. Part II assesses the current role that international law plays in Somali reconstruction, both inside and outside of Somalia. Finally, Part III argues that international law can strengthen post-conflict reconstruction efforts and further demonstrates, based on specific examples, that international law can play at least three fundamental roles in post-conflict situations: it can mandate a framework for action, offer guidance by indicating core issues, and provide examples of best practices.

## I. RECONSTRUCTION OF SOMALIA: PROCESS AND PRIORITIES

In August 2012, Somalia completed a long process of political transition, which resulted in the National Constituent Assembly's adoption of a provisional constitution, the election of a new president, federal parliament, and speaker, and the naming of a new prime minister and cabinet.

For the first time since 1991, when Siad Barre fled Mogadishu and left a long-lasting power vacuum, Somalia has an internationally-recognized government, the SFG. The new President, Hassan Sheikh Mohamud, was elected on September 10, 2012. He is a respected figure who was a civil society activist and researcher.<sup>6</sup>

As the following sections demonstrate, signs of normalcy

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INTERNATIONAL COMMUNITY ACTIONS IN EMERGENCY SITUATIONS (2010).

6. BRYDEN, *supra* note 2, at 4.

have appeared throughout Somalia. However, in many instances, such positive progress is countered by equally strong deteriorations. After assessing the positive and negative trends that have emerged from Somalia's new reality, this section highlights several key issues that the new government must address in its post-conflict transition.

*A. The New Somali Federal Government: An Ongoing Process*

Following the ouster of Mohamed Siad Barre in 1991, Somalia was engulfed in protracted civil war. Clan-affiliated warlords and militants battled for control. Somalia soon became the emblematic symbol of state failure.<sup>7</sup>

During that period, Somalia lacked a functioning government capable of providing for the basic needs of its people, including security, physical and legal infrastructures, education, health services, administrative and political systems, and environmental and emergency protection. As a failed state, Somalia was no longer able "to perform the job of a nation-State in the modern world."<sup>8</sup> Somalia also became the center of arms, drugs and human smuggling, the host of Islamic extremist terrorist groups, and the focus of piracy activities; thus, it also became a problem for the international community.<sup>9</sup>

Numerous efforts at mediation and reconciliation were attempted over the years, and a transitional government was finally established in 2004. Somalia's political transition included the election of a new federal parliament and speaker, the adoption of a provisional constitution, the election of Hassan Sheikh Mohamud as President, and the naming of a new prime minister and cabinet.<sup>10</sup> General elec-

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7. See GIORGETTI, A PRINCIPLED APPROACH, *supra* note 5.

8. Robert I. Rotberg, *The New Nature of Nation-State Failure*, 25 WASH. Q. 85, 87 (2002). Zartman usefully defines the consequences of state failure as follows: "As the decision-making center of the government, the State is paralyzed and inoperative: laws are not made, order is not preserved, and societal cohesion is not enhanced . . . . As a territory, it no longer assures security and provisionment by a central sovereign organization. As the authoritative political institution, it has lost its legitimacy, which is therefore up for grabs, and so has lost its right to command and conduct public affairs. . . . [n]o longer functioning, with neither traditional nor charismatic nor institutional sources of legitimacy, it has lost the right to rule." William Zartman, *Introduction: Posing the Problem of State Collapse*, in COLLAPSED STATES: THE DISINTEGRATION OF LEGITIMATE AUTHORITY 1, 5 (I. William Zartman ed., 1995).

9. See KEN MENKHAUS, SOMALIA: STATE COLLAPSE AND THE THREAT OF TERRORISM 17 (2004) (calling Somalia "a failure among failed States").

10. James Fergusson, *Somalia: A Failed State is Back From the Dead*, THE INDEPENDENT (Jan. 13, 2013), <http://www.independent.co.uk/news/world/africa/somalia-a->

tions are now scheduled for 2016.<sup>11</sup> Eventually, several governments and international organizations officially or *de facto* recognized the new government.

### 1. The First Step: International Recognition by Governments and International Organizations

The United States recognized the new government of Somalia on January 17, 2013 and subsequently normalized its relationship.<sup>12</sup> Then-Secretary of State Hillary Clinton made the announcement at a joint press conference with Somali President Hassan Sheikh Mohamud. Secretary Clinton congratulated the President and said that, though “there [was] still a long way to go and many challenges to confront,” one could already see “a new foundation for the better future being laid.”<sup>13</sup> The United States has also welcomed the African Union Mission in Somalia’s (AMISOM) success in driving the al-Shabaab terrorist organization out of strategically important population centers, and has underscored the continued U.S. commitment to support AMISOM and the Somali national forces in their responsibility of ensuring security throughout Somalia.<sup>14</sup> U.S. recognition opened up new foreign assistance programs, including military train-

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failed-state-is-back-from-the-dead-8449310.html.

11. Farhia Ali Abdi, *Somalia: 2016 Election: Optimism, Misgivings, and Leadership Analysis*, HORN TRIBUNE, <http://horntribune.com/somalia-2016-election-optimism-misgivings-and-leadership-analysis-2/> (last visited Oct. 30, 2014); see AFRICAN UNION MISSION IN SOMALIA (AMISOM), CONSULTATIVE MEETING ON ENDING THE TRANSITION IN SOMALIA: STATEMENT ON ADOPTION OF THE ROADMAP (2011), available at <http://amisom-au.org/2011/09/signed-statement-and-roadmap/>.

12. Tom Watkins, *After More than 2 Decades, U.S. Recognizes Somalia*, CNN (Jan. 17, 2013, 5:31 PM), <http://www.cnn.com/2013/01/17/us/somalia-recognition/> (reporting that Secretary Clinton declared “we have moved into a normal sovereign-nation-to-sovereign nation position and we have moved into an era where we are going to be a good partner, a steadfast partner, to Somalia as Somalia makes the decisions for its own future”). For an interesting analysis of the pros and cons of recognition for Somalia, see THE HERITAGE INSTITUTE FOR POLICY STUDIES, THE U.S. RECOGNITION OF SOMALIA: IMPLICATIONS AND THE WAY FORWARD, HIPS POLICY BRIEFING 1 (2013), available at [http://www.heritageinstitute.org/wp-content/uploads/2013/06/HIPS\\_Policy\\_Brief\\_001-2013\\_ENGLISH.pdf](http://www.heritageinstitute.org/wp-content/uploads/2013/06/HIPS_Policy_Brief_001-2013_ENGLISH.pdf) (warning that “in the past, Somali politicians never missed an opportunity to miss an opportunity,” and that “[w]hat Somali politicians and citizens should have been euphoric about is not the recognition itself—as the case has been—but the fact that in the eyes of United States, Somalia’s fortunes have improved so well that the U.S. wants to recognize it”).

13. Watkins, *supra* note 12.

14. See *U.S. Relations*, *supra* note 1.

ing and financing programs.<sup>15</sup>

Other governments, such as Italy and the United Kingdom, followed suit.<sup>16</sup> In October 2012, the Foreign Minister of Italy, Giulio Terzi, visited Somalia, the first such high-level visit by an Italian government official in two decades.<sup>17</sup> Twenty-two years after it closed, a new British embassy was opened by Foreign Secretary William Hague in Mogadishu on April 25, 2013.<sup>18</sup> On February 2, 2012, Matt Baugh was accredited as the first British Ambassador to Somalia in twenty-one years.<sup>19</sup> Neil Wigan succeeded him in June 2013.<sup>20</sup> British embassy staffers are stationed in a compound at the international airport in Mogadishu until the construction of the new British embassy is completed.<sup>21</sup> Other countries that have officially or *de facto* recognized Somalia and have established relations with the SFG include Turkey, Norway, Sweden, the Netherlands, Kenya, and Ethiopia.<sup>22</sup>

Several international organizations have also officially recognized the new Somali government. Importantly, for instance, the International Monetary Fund (IMF) has officially recognized the new

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15. See Watkins, *supra* note 12.

16. The United Kingdom opened the core office within the new British embassy at Mogadishu International Airport on April 25, 2013. See *Foreign Secretary Opens New British Embassy in Mogadishu*, FOREIGN & COMMONWEALTH OFFICE (Apr. 25, 2013), <https://www.gov.uk/government/news/foreign-secretary-opens-new-british-embassy-in-mogadishu>.

17. *Italian FM in Surprise Visit to Somalia*, ALJAZEERA (Oct. 24, 2012, 12:31 PM), <http://www.aljazeera.com/news/africa/2012/10/2012102493628246538.html>.

18. *Foreign Secretary Opens New British Embassy in Mogadishu*, *supra* note 16.

19. *About Matt*, FOREIGN & COMMONWEALTH OFFICE BLOG, <http://blogs.fco.gov.uk/mattbaugh/about-matt/> (last visited Oct. 30, 2014).

20. *British Ambassador to Somalia Neil Wigan: Biography*, FOREIGN & COMMONWEALTH OFFICE, <https://www.gov.uk/government/people/neil-wigan> (last visited Oct. 30, 2014).

21. *Foreign Secretary Opens New British Embassy in Mogadishu*, *supra* note 16.

22. See REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFFAIRS, RELATIONS BETWEEN TURKEY AND SOMALIA, <http://www.mfa.gov.tr/relations-between-turkey-and-somalia.en.mfa> (last visited Oct. 30, 2014); NORWAY: THE OFFICIAL SITE IN KENYA, NORWAY AND SOMALIA, (June 9, 2013), [http://www.norway.or.ke/News\\_and\\_events/Somalia/#.UoPg2JHnlSU](http://www.norway.or.ke/News_and_events/Somalia/#.UoPg2JHnlSU); EMBASSY OF SWEDEN: NAIROBI, SWEDISH AMBASSADOR ACCREDITED TO SOMALIA (Apr. 17, 2013), <http://www.swedenabroad.com/Pages/StandardPage.aspx?id=55539&epslanguage=en-GB>; NETHERLANDS EMBASSY IN NAIROBI, KENYA, SOMALIA, <http://kenia.nlembassy.org/organization/departments/somalia.html> (last visited Oct. 30, 2014); Mahmoud Mohamed, *Presidential Inauguration Ushers in New Era for Somalia*, SABAH (Sept. 17, 2012), [http://sabahonline.com/en\\_GB/articles/hoa/articles/features/2012/09/17/feature-01](http://sabahonline.com/en_GB/articles/hoa/articles/features/2012/09/17/feature-01).



government.<sup>23</sup> The World Bank, the U.N., and the European Union have established relations with the SFG.<sup>24</sup> One of the immediate consequences of recognition was that the European Union accepted the request from Somalia to accede to the ACP-EU Partnership Agreement (the “Cotonou Agreement”), allowing Somalia to access development finance cooperation.<sup>25</sup>

The election of the SFG has also prompted the return of some basic services. Turkish Airlines started a bi-weekly direct flight linking Ankara to Mogadishu.<sup>26</sup> Several other airlines also now fly regularly to Somalia’s capital and other major towns.<sup>27</sup> Additionally, Somalis may soon get international mail for the first time in twenty-two years.<sup>28</sup>

At the same time, several donor conferences were organized in 2013 to assist and coordinate activities in Somalia. On May 7, 2013, for instance, the British Government hosted a conference aimed at providing international support to Somalia. A special conference on Somalia, addressing the socio-economic development agenda, was also held on the margins of the fifth Tokyo International Conference on African Development in May 2013.<sup>29</sup> Importantly,

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23. Press Release, International Monetary Fund, IMF Recognizes the Federal Government of Somalia After 22-Year Interval (Apr. 12, 2013), *available at* <http://www.imf.org/external/np/sec/pr/2013/pr13119.htm> (stating that “[t]he International Monetary Fund (IMF) today recognized the Federal Government of Somalia, headed by President Hassan Sheikh Mohamud, paving the way for the resumption of relations after a 22-year interval. The decision is consistent with broad international support and recognition of the Federal Government. Recognition of the government allows the IMF to offer Somalia technical assistance and policy advice”).

24. Press Release, Council of the European Union, 3245th Council Meeting 14 (July 22, 2013) [hereinafter CEU Press Release], *available at* [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/138317.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/138317.pdf) (welcoming the progress made in Somalia and reconfirming “its support for the Federal Government”).

25. *Somalia Joins the Cotonou Agreement*, SABAHI (June 9, 2013), [http://sabahionline.com/en\\_GB/articles/hoa/articles/newsbriefs/2013/06/09/newsbrief-05](http://sabahionline.com/en_GB/articles/hoa/articles/newsbriefs/2013/06/09/newsbrief-05); *see* CEU Press Release, *supra* note 24, at 15 (welcoming “the recent decision of the Joint EU-ACP Council of Ministers on Somalia’s accession to the Cotonou Agreement”).

26. *Somalia: Turkish Airlines Begins Flights to Mogadishu*, BBC NEWS (Mar. 6, 2012, 11:55 AM), <http://www.bbc.co.uk/news/world-africa-17269620>.

27. Daisy Carrington, *Flying into Hostile Territory: Somalia Experiences Boom in Air Travel*, CNN (Aug. 26, 2013, 10:20 AM), <http://www.cnn.com/2013/08/21/world/africa/somalia-aviation-boom/>.

28. Tom Miles, *Return to Sender? Maybe Not as Somalia to Restart Mail 22 Years on*, REUTERS, Apr. 26, 2013, <http://www.reuters.com/article/2013/04/26/us-somalia-postal-idUSBRE93P0QF20130426>.

29. Eric Johnston, *Somalia Seeks Return to Global Fold*, THE JAPAN TIMES (June 1,

the European Union and Somalia co-hosted a major donor meeting in September 2013 in Brussels, which developed a New Deal Compact: a soft-law agreement that proposes to work in partnership with the SFG.<sup>30</sup> At the conference, Somali President Hassan Sheikh Mohamud identified four goals for his government: security, meeting basic human needs, good governance, and foreign investment. The New Deal Conference saw the participation of representatives of many governments and international organizations, including the African Development Bank, the African Union, the U.N., and the World Bank.<sup>31</sup> High-ranking participants included the British Secretary of State for International Development, the Italian Minister of Foreign Affairs, and the French and Norwegian Ministers of International Development.<sup>32</sup>

The U.N. Security Council adopted two important resolutions relating to Somalia in 2013. Resolutions 2093 and 2102 extended the AMISOM mandate for another year and established the U.N. Assistance Mission in Somalia (UNSOM) as a new U.N. presence to assist with the stabilization and peacebuilding activities of the SFG.<sup>33</sup> The “Somalia End of Transition Roadmap,” approved by the government and key international partners in 2011, calls for holding a constitutional referendum in 2015 and a political election in Somalia in 2016.<sup>34</sup>

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2013), <http://www.japantimes.co.jp/news/2013/06/01/national/abe-africa-leaders-hope-somalia-can-return-to-the-global-fold/#.UcM0sxYYLjQ/>.

30. *Somalia Conference: What Next*, FOREIGN & COMMONWEALTH OFFICE (May 13, 2013), <https://www.gov.uk/government/news/somalia-conference-what-next/>.

31. A New Deal for Somalia: Brussels Conference, Sept. 16, 2013, *List of Heads of Delegation*, <http://eeas.europa.eu/somalia/new-deal-conference/participants.html>.

32. *Id.*

33. *Special Conference on Somalia on the Margins of TICAD V: Co-Chairs' Summary*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (June 1, 2013), [http://www.mofa.go.jp/region/page5e\\_000011.html](http://www.mofa.go.jp/region/page5e_000011.html) (reporting that “[t]he Special Conference on Somalia was held in Yokohama, Japan on May 31, 2013, on the margins of the Fifth Tokyo International Conference on African Development (TICAD V). The Conference was co-organized by the Government of Japan, the Government of the Federal Republic of Somalia and the African Union Commission, and was attended by Heads of State and Government, Ministers and high-level representatives from 35 countries and organizations”).

34. *Briefing: Somalia's Political Roadmap*, INTEGRATED REGIONAL INFORMATION NETWORKS (Feb. 22, 2012), <http://www.irinnews.org/fr/report/94926/briefing-somalia-s-political-roadmap> (detailing tasks needed to develop more permanent political institutions and greater national security and stability in Somalia). The tasks relate to security issues, the drafting of a new constitution, political outreach and reconciliation, and ensuring good governance. The Roadmap also details measures to counter piracy and local militia groups,

Selecting a new government is a breakthrough for Somalia. Returning to its place as a fully functioning actor in the international community, however, will take much time and effort.

## 2. The Second Step: Addressing the Other Side of the Coin

The positive response to the new government may, however, just obscure a tale of two cities. Indeed, the newly-established government has little effective control over important parts of the country. Its existence is ensured by a military mission conducted by the African Union and ongoing assistance by the U.N. and other donors. Civilians continue to suffer from conflict-related abuses, including killings, displacement, and the diversion or confiscation of humanitarian assistance by armed groups, principally al-Shabaab.<sup>35</sup>

Like its predecessors, the SFG has little effective control over most of the country. The self-declared Republic of Somaliland in the northwest and Puntland State in the northeast are powerful regional authorities and their relations with the SFG remain unclear.<sup>36</sup> According to the U.N., as of January 2014, there were more than 1.13 million internally displaced persons (IDPs) in the country, and many Somalis have left Somalia and established residence in other countries, including the United States, Sweden, Italy, and the Netherlands.<sup>37</sup>

The vast majority of Somalis still lives in a humanitarian crisis.<sup>38</sup> Serious human rights abuses continue. These include killings, discrimination and violence against women and girls, rape and female genital mutilation, violence against journalists, and restrictions

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prevent the recruitment of children into armed groups, plan for elections, develop peacebuilding initiatives, and tackle corruption.

35. *Security and Governance in Somalia: Consolidating Gains, Confronting Challenges, and Charting the Path Forward Before the Subcomm. on African Affairs of the Senate Foreign Relations Comm.*, 113th Cong. (2013) (statement of Andre Le Sage, Senior Research Fellow at the Center for Strategic Research, Institute for National Strategic Studies, National Defense University); *id.* (statement of Amanda J. Dory, Deputy Assistant Secretary of Defense, African Affairs); *id.* (statement of E.J. Hogendoorn, Deputy Africa Program Director, International Crisis Group).

36. Statement of Andre Le Sage, *supra* note 35.

37. *2014 UNHCR Country Operations Profile—Somalia*, UNHCR (Oct. 15, 2014), <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e483ad6&submit=GO>.

38. Humanitarian Bulletin: Somalia, U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (Sept. 19, 2014), <http://reliefweb.int/sites/reliefweb.int/files/resources/OCHA%20Somalia%20Humanitarian%20Bulletin%20August%202014.pdf>.

on freedom of the press.<sup>39</sup> Other major human rights abuses include harsh and life-threatening prison conditions, arbitrary and politically motivated arrests and detentions, denial of fair trials, corruption, trafficking in persons, abuse of and discrimination against minority clans, restrictions on workers' rights, forced labor, and child labor.<sup>40</sup> Most of the abuses remain unpunished, and impunity remains the norm.<sup>41</sup>

These dual images of Somalia—a resurrected nation and a heavily-burdened one—coexist, and they vividly demonstrate how much needs to be done. The creation of the new government has nonetheless made it possible to discuss and identify specific post-conflict priorities, which I discuss below.

### *B. Post-Conflict Priorities*

International recognition is an important first step for Somalia in regaining its place as a full member of the international community.<sup>42</sup> However, to truly regain its domestic and international status, the SFG needs to address at least three key challenges pertaining to security, economic, and human rights issues.

#### 1. Security Issues

Despite external recognition, security remains the main concern in Somalia. Security threats are multifaceted and include terrorism, piracy, and disputed maritime and territorial borders. These threats have been acknowledged by the international community. For example, on April 4, 2013, U.S. President Barack Obama renewed the national emergency with respect to Somalia declared by Executive Order 13536 of April 12, 2010.<sup>43</sup>

At least three security issues are imperative and need to be

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39. U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, SOMALIA 2012 HUMAN RIGHTS REPORT (2013), available at <http://www.state.gov/documents/organization/204377.pdf>.

40. *Id.* at 1.

41. *Id.* at 29.

42. In general, recognition is for states, not governments. The case of Somalia blurs that difference and calls for a rethinking of these norms. See STEFAN SALOMON, THE RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW (Vaughan Lowe et al. eds., 1998).

43. Letter from President Barack Obama, President of the United States, to John Boehner, Speaker of the United States House of Representatives and Joseph Biden, President of the U.S. Senate (Apr. 3, 2014) (on file with the COLUMBIA J. TRANSNAT'L L.).

addressed for Somalia to exit state failure and become an effective member of the international community.<sup>44</sup> First, Somalia's territorial and maritime boundaries remain undefined and contested. Due to the long conflict, Somalia's international territorial borders have become porous. The delimitation of the borders with Ethiopia to the west and with Kenya to the south and west are not clear. Moreover, internally, Somalia remains a fragmented country. Though the provisional Constitution provides for a federal system, it does not identify the constituent federal states.<sup>45</sup> During the civil war, Somaliland, a former British colony located at the northeast region of the country, declared independence and has been able to create a relatively peaceful administration. Somaliland is not recognized as an independent state by the international community, however. In turn, Somaliland does not itself recognize the new federal government.<sup>46</sup> Discussions on how to address the impasse are ongoing, including a recent meeting mediated by Turkey between Somalia and Somaliland, which resulted in the signing of the "Ankara Accords."<sup>47</sup> Other regions, including Puntland and Jubaland, enjoy varying degrees of autonomy. Yet the provisional Constitution provides no indication of the power sharing structure to be adopted.<sup>48</sup>

Similarly, maritime boundaries remain unclear. Somalia enjoys the longest coastline in Africa, affording it substantial fishing resources and navigation routes. More recently, several companies have expressed an interest in beginning oil exploration in these wa-

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44. GIORGETTI, A PRINCIPLED APPROACH, *supra* note 5.

45. PROVISIONAL CONSTITUTION art. 7 (Som.) (stating at (1) that "the sovereignty of the Federal Republic of Somalia extends over all the territory of the Federal Republic of Somalia, which includes the land, territorial sea, the island, the subsoil, the airspace, and the continental shelf, and any land and waters that join the Federal Republic of Somalia in accordance with a law that shall be passed by the Federal Parliament," and at (4) that "[t]he boundaries of the Federal Republic of Somalia shall be those described in the 1960 Constitution of Somalia."); *see id.* art. 49(1) (providing that "the number and boundaries of the Federal Member States shall be determined by the House of the People of the Federal Parliament"); *id.* art. 49(2) ("The House of the People of the Federal Parliament, before determining the number and boundaries of the Federal Member States, shall nominate a national commission which shall study the issue, and submit a report of its finding with recommendations to the House of the People of the Federal Parliament.").

46. *See* THE FEDERAL REPUBLIC OF SOMALIA, THE SOMALI COMPACT (2013), available at <http://www.pbsdialogue.org/The%20Somali%20Compact.pdf>.

47. *Somaliland and Somalia Sign Seven Point "Ankara Accords" During Tripartite Meeting in Turkey*, SOMALILAND SUN (Apr. 13, 2013, 11:25 PM), <http://somalilandsun.com/index.php/politics/2666-somaliland-and-somalia-sign-seven-point-ankara-accords-during-tripartite-meeting-in-turkey>.

48. PROVISIONAL CONSTITUTION art. 54 (Som.).

ters.<sup>49</sup> The location of the maritime boundaries between Kenya and Somalia, however, is disputed.<sup>50</sup> There are overlapping claims for a portion of the maritime region, and the boundaries have not been officially delimited. These unclear boundaries create conflict and destabilize the region.

A second security issue is terrorism. Somali-born al-Qaida affiliate al-Shabaab remains a paramount concern.<sup>51</sup> The attack in the Westgate Mall in Nairobi, Kenya in September 2013 vividly demonstrated the ability of the group to launch deadly attacks even outside of Somalia.<sup>52</sup> Al-Shabaab training camps and safe havens exist in Somalia, and the group's influence in Somalia remains a concern.<sup>53</sup> These well-founded terrorism fears make it impossible to fully transition to normalcy.

A third security concern is piracy. Piracy off the coast of Somalia has been rampant. Commercial ships are routinely attacked and held for ransom.<sup>54</sup> Pirates have been mostly active in Puntland, but have covered a large maritime area.<sup>55</sup> Swift actions by the international community—chiefly thanks to a U.N. Security Council resolution that allowed foreign military ships to enter Somali waters to repress piracy—have significantly reduced pirate attacks since 2012, when the number of attacks dropped by nearly 70% from the previous year.<sup>56</sup> However, piracy continues to be an important security

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49. See, e.g., Mark Townsend & Tariq Abdinisir, *Britain Leads Dash to Explore for Oil in War-torn Somalia*, THE GUARDIAN, Feb. 25, 2012, available at <http://www.theguardian.com/world/2012/feb/25/britain-oil-dash-somalia>; Kelly Gilblom, *Turkish Oil Firm Genel to Explore Somalia from 2013*, SOMALILAND PRESS (Oct. 31, 2012), <http://somalilandpress.com/turkish-oil-firm-genel-to-explore-in-somalia-from-2013-36900>.

50. *Somalia Sues Kenya at Top UN Court over Maritime Border*, AGENCE FRANCE-PRESSE (Aug. 28, 2014), <http://news.yahoo.com/somalia-sues-kenya-top-un-court-over-maritime-225946278.html>.

51. Statement of Andre Le Sage, *supra* note 35, at 2.

52. *Id.* at 8.

53. *Somali al-Shabab Training Base in Lanta-Buro 'Captured'*, BBC NEWS (Jul. 11, 2012, 10:56 AM), <http://www.bbc.com/news/world-africa-18800452>.

54. Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, 13 AM. SOC'Y INT'L L. INSIGHTS (2009), <http://www.asil.org/insights/volume/13/issue/2/international-legal-responses-piracy-coast-somalia>.

55. Jillian Keenan, *Puntland is for Pirates: Why are Convicted High-Seas Bandits Being Sent to the Somali Region that Profits from Their Crimes?*, FOREIGN POLICY, Mar. 20, 2014, available at [http://www.foreignpolicy.com/articles/2014/03/20/puntland\\_is\\_for\\_pirates\\_somalia](http://www.foreignpolicy.com/articles/2014/03/20/puntland_is_for_pirates_somalia).

56. S.C. Res. 1816, U.N. Doc. S/Res/1816 (June 2, 2008); Monitoring Group on Somalia and Eritrea, Report, transmitted by letter dated July 12, 2013 from the Chairman of

concern.

## 2. Economic Issues

There can be no reconstruction of Somalia into a viable new state without the development of a sophisticated economic system. Such a system must be able to sustain a financial flow that can support the structure of the new state, support a vibrant private sector, and provide essential goods to all Somalis. Yet Somalia has no banking system and the only remaining international bank, Barclays, which channels most remittances to Somalia from abroad, has threatened to close the accounts Somali remittance companies use to transmit money.<sup>57</sup>

Since the recognition of the new government, however, donors have demonstrated a new willingness to allocate funds to Somalia.<sup>58</sup> For example, the European Union's Political and Security Committee, the key body that defines and monitors the Union's crisis response as part of the E.U. Common Foreign and Security Policy, made its first visit to Somalia on June 12, 2013.<sup>59</sup> Similarly, the recognition of the provisional government by the United States has opened up the potential for Somalia to access funds deposited in the U.S. Federal Reserve Bank prior to the civil war.<sup>60</sup> Section 25B of

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the Security Council Committee established pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council, ¶ 53, U.N. Doc. S/2013/413 (July 12, 2013); see Alan Cowell, *West African Piracy Exceeds Somalia Attacks, Report Says*, N.Y. TIMES, June 18, 2013, available at <http://www.nytimes.com/2013/06/19/world/africa/west-african-piracy-exceeds-somali-attacks-report-says.html>.

57. Chris Spillane, *Somalia Asks Barclays to Review Closing Money-Transfer Account*, BLOOMBERG NEWS (Sept. 23, 2013), <http://www.bloomberg.com/news/2013-09-23/somalia-asks-barclays-to-review-closing-money-transfer-account.html>.

58. Henry Ridgwell, *Donors Pledge \$2.7 Billion in 'New Deal' for Somalia*, VOICE OF AMERICA (Sept. 16, 2013, 9:00 AM), <http://www.voanews.com/content/eu-pledges-650-million-euros-for-somalia-reconstruction/1750496.html/>.

59. Press Release, Magali Uytterhaeghe, EU Mission to Somalia, The EU's "Political and Security Committee" Visits Somalia (June 12, 2013), [http://eeas.europa.eu/delegations/somalia/documents/press\\_corner/20130612\\_en.pdf](http://eeas.europa.eu/delegations/somalia/documents/press_corner/20130612_en.pdf) (noting that "[t]he [Committee] underlined the commitment of the EU to the new political [organization] and the people of Somalia, and the extensive support for the normalization of the situation in Somalia both politically and in terms of security").

60. 12 U.S.C. § 632 (2006) ("No attachment or execution shall be issued against any Federal Reserve bank or its property before final judgment in any suit, action, or proceeding in any State, county, municipal, or United States court. Whenever (1) any Federal Reserve bank has received any property from or for the account of a foreign state which is recognized

the Federal Reserve Act provides that the Secretary of State may recognize accredited representatives of foreign states to the U.S. government and name such persons to receive and control property.<sup>61</sup> The newly approved Somali New Deal Compact resulted in the pledge of \$2.7 billion for the implementation of a New Deal to help rebuild the country, including \$870 million from the European Union.<sup>62</sup>

In light of this newfound donors' interest, two fundamental issues must be resolved before more funds may be allocated directly to the government. First, a financial management system must be implemented, including anti-corruption legislation, and a banking system must be in place. Second, the question of Somalia's foreign debt must be addressed.

Some donors mistrust the ability of Somalia's government to handle large amounts of foreign money because of corruption. Somalia is considered the most corrupt country in the world. In a recent report, the U.N. Monitoring Group on Somalia heavily criticized the former governor of the newly established Central Bank of Somalia, accusing him of maintaining a slush fund and reporting that the great majority of approved expenses were untraceable and made for private purposes.<sup>63</sup> The Somalia National Bank is the Central Bank of Somalia and, as such, it is tasked with managing Somalia's monetary policy, including managing interest rates, setting reserve requirements, and acting as a lender of last resort to the banking sector during financial crises.<sup>64</sup> Without a working and credible Central Bank, Somalia will be unable to fully operate in the global financial market.

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by the Government of the United States, or from or for the account of a central bank of any such foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control, or dispose of such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary of State to the Federal Reserve bank, the payment, transfer, delivery, or other disposal of such property by such Federal Reserve bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of the Federal Reserve bank for or with respect to such property.”).

61. *Id.*

62. Ridgwell, *supra* note 58.

63. Monitoring Group on Somalia and Eritrea Report, *supra* note 56.

64. CENTRAL BANK OF SOMALIA, <http://www.somalbanca.org/> (last visited Oct. 16, 2014).



Moreover, Somalia owes approximately \$1.8 billion in principal arrears on long-term debt,<sup>65</sup> with its total external debt valued at more than \$3 billion.<sup>66</sup> Although the IMF recognized Somalia's new government, Somalia remains ineligible to borrow from it because of its outstanding arrears, which in April 2013 amounted to approximately \$352 million.<sup>67</sup> A fundamental question for the new Somali government is how to clear these arrears and thus gain access to the international financial markets, without overburdening and antagonizing private and public revenue bases.<sup>68</sup>

It is likely that the payment of arrears and the question of debt relief will be negotiated with all involved actors, including the IMF, the World Bank, and the African Development Bank, once the SFG demonstrates its commitment to financial stability. In the past, a bid donor has taken charge of repaying the entire debt, and this scenario may materialize in Somalia's case as well.<sup>69</sup> In the meantime, the question of how to re-launch the Somali economy and attract foreign investments remains fundamental.

### 3. Human Rights and Transitional Justice

Accountability for past human rights violations and abuses is a fundamental step for reconciliation. Accountability, even decades

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65. *Somalia: Principal Arrears, Public and Publicly Guaranteed (Current US\$)*, QUANDL, [http://www.quandl.com/WORLDBANK/SOM\\_DT\\_AXA\\_DPPG\\_CD](http://www.quandl.com/WORLDBANK/SOM_DT_AXA_DPPG_CD) (last visited Oct. 30, 2014) (defining principal in arrears on long-term debt as "principal repayment due but not paid, on a cumulative basis. Long-term external debt is defined as debt that has an original or extended maturity of more than one year and that is owed to nonresidents by residents of an economy and repayable in foreign currency, goods, or services. Data are in current U.S. dollars").

66. *Somalia: External Debt Stocks*, INDEXMUNDI, <http://www.indexmundi.com/facts/somalia/external-debt-stocks> (last visited Oct. 30, 2014) (defining total external debt as the "debt owed to nonresidents repayable in foreign currency, goods, or services. Total external debt is the sum of public, publicly guaranteed, and private nonguaranteed long-term debt, use of IMF credit, and short-term debt").

67. IMF Recognizes the Federal Government, *supra* note 23.

68. Matt Baugh, *Somalia and the G8: Push to Start*, FOREIGN & COMMONWEALTH OFFICE: GLOBAL CONVERSATIONS (Apr. 10, 2013), <http://blogs.fco.gov.uk/mattbaugh/2013/04/10/somalia-and-the-g8-push-to-start/> ("[T]he process is reciprocal. [International Financial Institutions] re-engagement is contingent on the commitment of the Federal Government of Somalia continuing to make progress on strengthening transparency and accountability (both to Somalis and its partners).").

69. *Net Official Development Assistance and Official Aid Received (current USD)*, WORLD BANK, <http://data.worldbank.org/indicator/DT.ODA.ALLD.CD> (last visited Oct. 16, 2014).

late, strengthens the chances of durable peace and security. Allegations that crimes against humanity and war crimes were and still are committed in Somalia have come from different sources. The U.N., for example, called for the prosecution of those who allegedly committed atrocities in 1993—more than twenty years ago. Other similar calls have followed.<sup>70</sup>

Subsequent appeals for investigations and accountability have continued.<sup>71</sup> In 2013, the U.N. Security Council stressed “the need for the Federal Government of Somalia to ensure that all perpetrators of serious violations and abuses of human rights and serious violations of international humanitarian law are held accountable.”<sup>72</sup> The U.N. Secretary-General then requested that the local staff offer the government assistance in order to “review, develop and implement legislation necessary to comply with international human rights and protection standards . . . [and] provide assistance . . . [to] monitor[] and report[] on grave violations of children’s rights [as well as other grave human rights violations.]”<sup>73</sup>

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70. S.C. Res. 814, ¶¶ 8, 35, U.N. Doc. S/RES/814 (Mar. 26, 1993) (noting with deep regret and concern the continuing reports of widespread violations of international humanitarian law and requesting that the Secretary-General assist in the re-establishment of a Somali police, as appropriate at the local, regional, or national level, to assist in the restoration and maintenance of peace, stability, and law and order, including the investigation and facilitation of the prosecution of serious violations of international humanitarian law); Special Rapporteur on the Situation of Human Rights in Somalia, *Advisory Services and Technical Cooperation in the Field of Human Rights*, Comm’n on Hum. Rts., ¶ 32, U.N. Doc. E/CN.4/2000/110 (Jan. 26, 2000) (by Mona Rishmawi) (declaring that many acts that could be qualified as war crimes or crimes against humanity were committed in Somalia, which could give rise to international criminal jurisdiction, either by an international criminal tribunal or by the exercise of universal jurisdiction by national courts, and encouraging the authorities in foreign countries to take steps to bring to justice those suspected of committing such crimes in Somalia); Special Rapporteur of the Situation of Human Rights in Somalia, *Advisory Services and Technical Cooperation in the Field of Human Rights*, Comm’n on Hum. Rts., ¶ 40, U.N. Doc. E/CN.4/1999/103 (Jan. 26, 2000) (by Mona Rishmawi) (“[T]he establishment of an international tribunal for Somalia might be envisaged at some stage.”).

71. See, e.g., *IHASA’s Current Research: Transitional Justice in the Context of Somalia*, ALLIANCE FOR PEACEBUILDING: INSTITUTE FOR HORN OF AFRICA STUDIES AND AFFAIRS (Sept. 27, 2013), <http://www.allianceforpeacebuilding.org/2013/09/ihasa-current-research-transitional-justice-in-the-context-of-somalia/>; HUMAN RIGHTS WATCH, *WORLD REPORT 2011 165–70* (2011), available at <http://www.hrw.org/sites/default/files/reports/wr2011.pdf>; AMNESTY INTERNATIONAL, *ANNUAL REPORT 2011: SOMALIA* (2011), <http://www.amnesty.org/en/region/somalia/report-2011>.

72. S.C. Res. 2102, ¶ 36, U.N. Doc. S/Res/2102 (May 2, 2013).

73. U.N. Secretary-General, *Results of the Secretary-General’s Technical Assessment Mission to Somalia, Pursuant to Security Council Resolution 2093*, ¶ 18, U.N. Doc.

Importantly, the SFG has also recognized the importance of human rights.<sup>74</sup> The Provisional Constitution provides for the establishment of a Truth and Reconciliation Commission—the implementation acts, however, have not yet been drafted.<sup>75</sup>

The establishment of a new, internationally recognized federal government for Somalia is an important development. It brings Somalia closer to the international community and has resulted in an increased interest and commitment by its members. Resolving security problems, tackling financial questions, and addressing the issue of past human rights violations are necessary priorities for the success of the SFG.

## II. POST-CONFLICT RECONSTRUCTION AND INTERNATIONAL LAW IN SOMALIA

Numerous international actors are present in Somalia to assist the SFG in its reconstruction efforts. These include international organizations, state donors, and non-governmental organizations. These actors are engaged in an essentially political process, but among the many advisors and experts working in Somalia, legal advisors are absent.<sup>76</sup> Indeed, the present reconstruction approach adopted by the international community does not include an explicit international

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S/2013/239 (Apr. 19, 2013).

74. See, e.g., S.C. Res. 2102, ¶ 9, U.N. Doc. S/RES/2102 (May 2, 2013) (“*Welcoming* the Federal Government of Somalia’s commitment to improving human rights in Somalia, *expressing* its concern at the reports of violations of human rights, including extrajudicial killings, violence against women, children and journalists, arbitrary detention and pervasive sexual and gender-based violence, particularly in camps for internally displaced persons, and *underscoring* the need to end impunity, uphold human rights and to hold accountable those who commit any such related crimes.”).

75. PROVISIONAL CONSTITUTION art. 111(I) (Som.) (providing that: “(1) There shall be established a Truth and Reconciliation Commission to foster national healing, reconciliation and unity and to ensure that matters relating to impunity, revenge and other triggers of violence are addressed through a legal and state directed process. (2) The Truth and Reconciliation Commission shall be independent, impartial and representative and shall include: traditional elders and leaders, members of the Federal Parliament, respected members of civil society, judges and security personnel. (3) The mandate of the Truth and Reconciliation Commission shall include: (a) Bearing witness to, record, and in some cases, grant amnesty to the perpetrators of crimes relating to human rights violations, and rehabilitation of the criminals; and (b) Promoting forgiveness, reconciliation and national unity”).

76. This is an observation that I made during my trip to Kenya and is further supported by interviews with Somali experts.

law component.

This section first reviews the approach presently adopted by the U.N. and other actors in the international community to post-conflict reconstruction. It then explains why international law must play a role in post-conflict reconstruction. Finally, it focuses on Somalia's most important existing international law obligations to show how fundamentally intrinsic international law has become to all state action.<sup>77</sup>

### *A. Lack of An International Law Component*

Some experts have recently argued that a special set of rules should apply to post-conflict situations. These rules, aptly referred to as *jus post bellum*, would apply to situations after a war is ended.<sup>78</sup> *Jus post bellum* aims to create a body of law that applies after a war ends, in the important period of reconstruction. It includes a responsibility of the victors to participate in the reconstruction of the defeated country.<sup>79</sup> These rules, however, apply only in the aftermath of an international conflict, where victors and losers are clearly defined. In Somalia, the extensive civil war has not created clear winners. Moreover, this doctrine applies only in international conflicts and therefore does not apply to the civil war in Somalia.

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77. GIORGETTI, A PRINCIPLED APPROACH, *supra* note 5, at xv–xvii.

78. See Carsten Stahn, *Jus ad Bellum, Jus in Bello . . . 'Jus post Bellum'?*, 17 EUR. J. INT'L L. 921, 921 (2006); see also SYMPOSIUM, *Just and Unjust Warriors: Marking the 35th Anniversary of Walzer's Just and Unjust Wars*, 24 EUR. J. INT'L L. 13 (2013); Antonia Chayes, *Chapter VII½: Is Jus post Bellum Possible?*, 24 EUR. J. INT'L L. 291 (2013); Guglielmo Verdirame, *What to Make of Jus post Bellum: A Response to Antonia Chayes*, 24 EUR. J. INT'L L. 307 (2013); Larry May, *Jus post Bellum, Proportionality and the Fog of War*, 24 EUR. J. INT'L L. 315 (2013); Ruti Teitel, *Rethinking Jus post Bellum in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May*, 24 EUR. J. INT'L L. 335 (2013).

79. The paradigmatic shift that the creation of a *jus post bellum* would entail is well-described by Verdirame, *supra* note 78, at 311–12 (“It is hard to think of the emergence of an obligation to reconstruct incumbent upon the victors as a superficial addition to the existing law. It would rather signal a paradigm shift in the legal regulation of war: from a Grotian approach to a Kantian one . . . . In this discussion we should not lose sight of what it is within the power of victors to accomplish. Although the states that won a conflict, and the international community in general, may help with reconstruction, success does not ultimately depend on them. It would be unfair to impose an obligation of result on the victors where that result is one that they cannot deliver. It might even be counterproductive if it ended up supporting the perception among the defeated that reconstruction is the responsibility of others. Ultimately, unless people acquire a sense of political ownership and moral urgency about their future, there can be reconstruction only in the most superficial of senses.”).

There is also a significant corpus of state and international institutional practice that addresses various kinds of post-war situations. These, however, are essentially *ad hoc* political processes. The U.N., for example, identified post-conflict peace building and reconstruction as a separate area of intervention more than twenty years ago with the Agenda for Peace.<sup>80</sup> Since then, the U.N. has been involved as an advisor in numerous post-conflict situations, including in Afghanistan, Burundi, Central African Republic, Iraq, Lebanon, and Somalia.<sup>81</sup>

More recently, in December 2005, the U.N. General Assembly and the U.N. Security Council adopted resolutions to create the Peacebuilding Commission.<sup>82</sup> The Commission, presently chaired by Ambassador Antonio de Aguiar Patriota of Brazil, aims to bring together all relevant actors to advise and develop integrated strategies for post-conflict peace building and recovery; to focus attention on the reconstruction and institution-building efforts needed for post-conflict recovery; to improve coordination within and outside the U.N.; to develop best practices; and to ensure predictable and long-lasting financing for early recovery.<sup>83</sup>

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80. U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Rep. of the Secretary-General*, ¶ 55, U.N. Doc. A/47/277-S/24111 (June 17, 1992) (“Peacemaking and peace-keeping operations, to be truly successful, must come to include comprehensive efforts to identify and support structures which will tend to consolidate peace and advance a sense of confidence and well-being among people. Through agreements ending civil strife, these may include disarming the previously warring parties and the restoration of order, the custody and possible destruction of weapons, repatriating refugees, advisory and training support for security personnel, monitoring elections, advancing efforts to protect human rights, reforming or strengthening governmental institutions and promoting formal and informal processes of political participation.”).

81. See *Ongoing Political and Peacebuilding Missions*, U.N. DEP’T OF FIELD SUPPORT, <http://www.un.org/Depts/Cartographic/map/dpko/ppbm.pdf> (last visited Oct. 30, 2014); see also *Harmonized List of Fragile Situations FY14*, WORLD BANK, <http://siteresources.worldbank.org/EXTLICUS/Resources/511777-1269623894864/HarmonizedlistoffragilestatesFY14.pdf> (last visited Oct. 30, 2014).

82. See G.A. Res. 60/180, U.N. Doc. A/RES/60/180 (Dec. 20, 2005); S.C. Res. 1645, U.N. Doc. S/RES/1645 (Dec. 20, 2005).

83. See *generally Mandate*, U.N. PEACEBUILDING COMM’N, <http://www.un.org/en/peacebuilding/mandate.shtml> (last visited Oct. 30, 2014). The Peacebuilding Commission (PBC) operates in three principal configurations: the Organizational Committee, the Country Specific Configurations, and Working Groups on Lessons Learned. *Structure & Membership*, U.N. PEACEBUILDING COMM’N, <http://www.un.org/en/peacebuilding/structuremember.shtml> (last visited Oct. 30, 2014). The thirty-one members of the PBC Organizational Committee include seven each for the General Assembly, the Security Council, and the Economic and Social Council, five for the top providers of military

The World Bank has also singled out “Fragile and Conflict-affected Situations” (FCSs) as a priority for its goal to eradicate extreme poverty by 2030. In 2011, the World Bank dedicated its annual World Development Report (WDR) to “Conflict, Security and Development.” The 2011 WDR called for a paradigm shift in the development community’s approach to fragile and conflict-affected situations.<sup>84</sup> The shift was premised on the idea that violence and other challenges could not be resolved by short-term solutions and that comprehensive institutional strengthening was necessary to provide security, justice, and jobs to people, and thus ensure long lasting peace.

Separately, several states affected by conflict and that are undergoing a transition to the next stage of development have created a voluntary association called the “g7+.”<sup>85</sup> The objectives of the g7+ are to share experiences and learn from each another, to promote state-building and peacebuilding, and to advocate for reforms in the way the international community engages in conflict-affected states.<sup>86</sup>

These efforts signal the growing interest of addressing post-conflict reconstruction through the lenses of international law. The effort is still nascent, however, and requires further development.

Two particular and important post-reconstruction frameworks are specifically applicable to the situation in Somalia: the government-centered New Deal Compact and the international community-oriented UNSOM. Neither, however, espouses an international law approach. Each is examined in detail below.

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personnel and civilian police to U.N. missions and five for the top providers of assessed and voluntary contributions to U.N. funds. *Organizational Committee Members*, U.N. PEACEBUILDING COMM’N, <http://www.un.org/en/peacebuilding/orgcommittee.shtml> (last visited Oct. 30, 2014). The PBC is now active in Burundi, the Central African Republic, Guinea, Guinea-Bissau, Sierra Leone, and Liberia. *Country Specific Configurations*, U.N. PEACEBUILDING COMM’N, <http://www.un.org/en/peacebuilding/countryconfig.shtml> (last visited Oct. 15, 2014).

84. THE WORLD BANK, WORLD DEVELOPMENT REPORT 2011: CONFLICT, SECURITY AND DEVELOPMENT 1–2 (2011), available at [http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011\\_Full\\_Text.pdf](http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf).

85. *Introduction, G7+*, <http://www.g7plus.org> (last visited Nov. 2, 2014). Member countries presently include: Afghanistan, Burundi, Central African Republic, Côte D’Ivoire, the Democratic Republic of Congo, Guinea, Guinea-Bissau, Haiti, Liberia, Papua New Guinea, Sierra Leone, Solomon Island, Somalia, South Sudan, Timor-Leste, and Togo.

86. *Id.*

## 1. The New Deal Compact

In October 2013, the Somali government and several donors met in Brussels to draft and finalize the New Deal Somali Compact.<sup>87</sup> New Deal Compacts are documents negotiated between new governments in fragile states and members of the international community within the framework developed by the 2011 Fourth High Level Forum on Aid Effectiveness in Busan, Korea.<sup>88</sup>

The Somali Compact outlines priorities and commitments of the SFG and how international funds will be used for recovery.<sup>89</sup> The New Deal Compact sets priorities and new support for the reconstruction of Somalia for 2014 to 2016<sup>90</sup> and is based on an inclusive process initiated by the government of Somalia and the international community in December 2012.<sup>91</sup> It is designed to provide an overarching strategic framework that coordinates political, security, and development efforts with the aim of ensuring peace and promoting statebuilding.<sup>92</sup> In line with previous New Deal Compacts, the Somali government identified five strategic objectives to support Somali peace- and statebuilding goals: (1) inclusive politics, (2) security,

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87. *A New Deal Compact for Somalia*, G7+ (Oct. 8, 2013), <http://www.g7plus.org/news-feed/2013/10/8/a-new-deal-compact-for-somalia>.

88. New Deal Compacts represent a new way for the international community to engage with fragile and failing states. *See generally* INTERNATIONAL DIALOGUE ON PEACEBUILDING AND STATEBUILDING, A NEW DEAL FOR ENGAGEMENT IN FRAGILE STATES (2013), available at <http://www.newdeal4peace.org/wp-content/uploads/2013/01/new-deal-for-engagement-in-fragile-states-en.pdf>. On November 30, 2011, the “New Deal for Engagement in Fragile States,” which was developed through the forum of the International Dialogue for Peacebuilding and Statebuilding, was presented and widely endorsed at the 4th High Level Forum on Aid Effectiveness in Busan, Korea. The New Deal Compacts were developed as a new way to tackle the specific problems of fragile and failed states working to achieve the Millennium Development Goals (MDGs). Donor countries and several international organizations recognized that transitioning out of fragility was a long political process requiring the engagement and ownership of receiving countries. New Deal Pilots are currently being implemented in Afghanistan, Central African Republic, the Democratic Republic of Congo, Liberia, Sierra Leone, South Sudan, and Timor Leste together with several partners. *See generally* *New Deal Pilots*, NEW DEAL, <http://www.newdeal4peace.org/new-deal-pilots/> (last visited on Oct. 30, 2014).

89. *See* THE SOMALI COMPACT, *supra* note 46.

90. *The EU and Somalia to Hold “The New Deal for Somalia Conference, 16 Sept. 2013,”* EUR. COMM’N. (Jul. 30, 2013), [http://ec.europa.eu/commission\\_2010-2014/ashton/topics/20130729\\_en.htm](http://ec.europa.eu/commission_2010-2014/ashton/topics/20130729_en.htm).

91. *See* THE SOMALI COMPACT, *supra* note 46, at 3.

92. *Id.* at 4–12.

(3) justice, (4) economic foundations, and (5) revenue and services.<sup>93</sup> Each strategic objective then identifies specific priorities and action items.

Priority 1 of the justice strategic objective, for example, requires that “key priority laws in the legal framework, including on the reorganization of the judiciary, are aligned with the Constitution and international standards.”<sup>94</sup> Priority 4 under the security strategic objective calls for the development of “an effective maritime security strategy within the framework of the Maritime Resource and Security Strategy.”<sup>95</sup> Priority 1 of the economic foundations strategic objective urges enhancing “the productivity of high priority sectors and related value chains, including through the rehabilitation and expansion of critical infrastructure for transport, market access, trade, and energy.”<sup>96</sup>

Each of the priorities is to be further developed with specific milestones that include delivery dates and assigned responsibilities within the government and by the development partners’ support. These milestones, however, are either very vague or altogether lacking. In the context of the justice priority, for example, the milestones are to create a Legal Policy and Drafting Unit by 2014, to establish a Constitutional Court and a Judicial Service Commission, and to review existing legal frameworks including the organization of the judiciary and witness and victim protection—without giving any further details on mandates and structures.<sup>97</sup> Similarly, the security priority requires the government to ratify the Somali Maritime Security and Resource Strategy by 2014 and to create a maritime coordination mechanism.<sup>98</sup> The economic foundation priority is equally vague and requires the strengthening of productive sectors, the completion of two flagship programs on “Rapid Rehabilitation of Infrastructure,” and the preparation of a growth strategy program, though it does not specify who within the government is responsible for accomplishing any of these goals.<sup>99</sup>

International law is not one of the enumerated pillars and is not identified as a cross-sectorial tool to implement existing priori-

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93. *Id.* at 5–13.

94. *Id.* at 7.

95. *Id.*

96. *Id.* at 9.

97. *Id.* at 33.

98. *Id.*

99. *Id.* at 34.



ties. However, international law obligations permeate all of the identified priorities and goals. Given Somalia's international obligations, international law provisions should be better taken into account in the development of action items.

## 2. The United Nations Assistance Mission in Somalia

From an international perspective, the U.N. Security Council unanimously established UNSOM on May 2, 2013, for an initial renewable term of twelve months.<sup>100</sup> UNSOM's core role is to act as an enabler to foster an environment that can support the stabilization and peacebuilding process.<sup>101</sup> Within this role, UNSOM's mandate is to provide policy advice to the SFG and to AMISOM on a variety of issues including peacebuilding and statebuilding, governance, security sector reform and rule of law, development of the federal system, and coordination of international donors' support.<sup>102</sup>

Specifically, UNSOM will focus on four key areas:

- Good offices: support reconciliation efforts, assist with mediation and facilitation in support of the Government to deliver core political tasks, such as the development of a federal system, the constitutional review process and subsequent referendum on the constitution, and preparations for elections in 2016;
- Rule of law and security sector: support the Government's priority objectives of transforming and building Somalia's security and justice institutions by providing technical advice and aligning security sector reform, rule of law (including police, justice and corrections), disengagement of combatants, disarmament, demobilization and reintegration, maritime security, and mine action;
- Human rights: promote awareness and respect for human rights with a focus on women's empowerment, child protection, and prevention of conflict-related sexual and gender-based violence; strengthen Somalia's justice and human rights institutions; monitor, in-

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100. S.C. Res. 2102, U.N. Doc. S/RES/2102 (May 2, 2013).

101. UNITED NATIONS POLITICAL OFFICE FOR SOMALIA, UNITED NATIONS ASSISTANCE MISSION IN SOMALIA (2013), *available at* <http://unpos.unmissions.org/LinkClick.aspx?fileticket=TUqISABGCOA%3d&tabid=9705&mid=12667&language=en-US>.

102. *Id.*

investigate, prevent, and report on any abuses or violations of human rights and international humanitarian law committed in Somalia; support the Government to review, develop, and implement necessary legislation in compliance with international human rights standards; and

- Coordination of international assistance: support the Government's efforts to coordinate donor support, in particular for security sector assistance and maritime security, stability and recovery, public finance management and capacity development, working with bilateral and multilateral partners through the New Deal framework.<sup>103</sup>

Both the New Deal Compact and the UNSOM mandate specify important policies and priorities to enable post-conflict reconstruction. The Compact is directed mostly to the SFG, and provides for collaboration with numerous international actors. Conversely, UNSOM focuses on actions to be taken by the international community to assist the SFG in reconstruction efforts. Both plans essentially provide policy directions but do not provide guidelines or frameworks to be followed to achieve the desired outcomes. Furthermore, neither plan includes a separate international law component or explicitly refers to the use of international law provisions. This is shortsighted. As the next section demonstrates, international law can be immensely useful in Somalia's post-conflict reconstruction.

### *B. The Importance of International Law*

Increased globalization and the interconnectedness of states' actions mean that international law necessarily plays an increasingly important role in all states' actions.<sup>104</sup> As such, post-conflict priorities cannot be appropriately addressed without referring to international law. Indeed, becoming an effective player in the international community has become a necessity for any country in order to ensure its development, to guarantee basic rights and protections to its people, and to promote stability within the international community.

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103. *Id.* at 1–2; see S.C. Res. 2102, ¶ 2, U.N. Doc. S/RES/2102 (May 2, 2013).

104. See, e.g., Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 *EUR. J. INT'L.* 1, 1 (2006) (arguing that “globalization and the rise of global governance are transforming the structure of international law . . . the distinction between domestic and international law becomes more precarious”).

States are increasingly interconnected and interdependent: each state must perform actions that have both domestic and international components and functions.<sup>105</sup> State actions that are regulated by interconnected international and domestic provisions include, at a minimum:

- Defense and justice: increase border patrols; collaboration to combat transnational criminal activities; anti-terrorism activities; extradition and judicial collaboration; the development and implementation of rules to curb human, arms, and drug trafficking; and immigration policies;
- Public health: directed at controlling safety and hygiene, the containment of epidemics and other emergencies, health hazards and diseases for both humans and animals, the regulation of environmental transboundary activities, agricultural and veterinary imports and exports;
- Commerce and trade: include banking and financial services, custom regulations, trade and investment measures, collection of duties, and commercial and trade permits;
- Transport and communication: include the obligations to grant and provide safety in national airspace; control of coasts and maritime zones; and access to ports, roads, and railways. Other included activities relate to postal, radio, telephone, satellite, and electronic communications; and
- Diplomatic and representative functions: increase representations at international and multilateral posts and conferences; diplomatic and consular services; reception of foreign diplomats; and consular officers.<sup>106</sup>

Given the number of issues that are regulated by both international and domestic laws, a post-conflict process that lacks an international law component also ignores fundamental consequences of a state's activities. For these reasons, and as discussed below, Somalia needs to reenter the web of inter-state and international private relations created and regulated by international law to fully recover from conflict.

Another important role that international law can play in the reconstruction of post-conflict countries is to offer guidance by indi-

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105. GIORGETTI, A PRINCIPLED APPROACH, *supra* note 5, at 1–8.

106. *Id.* at 5.

cating core and priority issues for action. Because of the complexity of contemporary relations, it can be challenging to acquire and maintain an overview of the priorities and functions that states need to execute. This problem is compounded in post-conflict situations, where governments also need to reengage in many domestic and international functions, which they used to perform, but either ceased to perform or lack the capacity to fully perform because of the conflict.<sup>107</sup> Referring to existing international law can be especially useful to highlight the means needed to reengage with the international community and to accomplish identified priorities.

### *C. Somalia and International Law*

Somalia is party to 209 bilateral and multilateral treaties.<sup>108</sup> These treaties include the Charter of the U.N. and regulate issues like privileges and immunities, diplomatic and consular relations, human rights, refugees, narcotic drugs, health, international trade and development, transport and communications, navigation, educational and cultural matters, the status of women, criminal matters, the law of the sea, telecommunications, disarmament, the environment, and fiscal matters.<sup>109</sup>

More specifically, these treaties address fundamental topics such as human rights, including the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. They further include treaties on environmental protection, such as the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal and the Convention on Biological Diversity and the Montreal Protocol on Substances that Deplete the Ozone Layer. Somalia is also a party to the primary treaties related to diplomatic and consular activities: the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. Somalia is likewise a member of several international organizations and is a party to the U.N. Convention on the Law of Sea (UNCLOS). It has ratified several bilateral agreements on financial cooperation.

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107. In many cases, newly nominated Ministers have little or no help to implement their strategies and there are too few civil servants.

108. See U.N. Treaty Collection, Somalia's Treaties, <https://treaties.un.org/pages/UNTSOnline.aspx?id=3> (last visited Nov. 11, 2014) (select "Somalia" under Historical/Existing Values; then click "Search").

109. U.N. Treaty Collection, Multilateral Treaties Deposited with the Secretary-General (last visited Nov. 2, 2014) <https://treaties.un.org/pages/ParticipationStatus.aspx>.

Since its establishment, the SFG itself has demonstrated an interest in international law through both its domestic and international actions. Domestically, Somalia's Provisional Constitution, adopted on August 1, 2012,<sup>110</sup> contains several references to international law principles. For example, Article 41 requires the Federal Parliament to establish a Human Rights Commission as an independent body. Its objective is to promote understanding of human rights, set implementation standards and parameters for the fulfillment of human rights obligations, monitor human rights protections within Somalia, and investigate allegations of human rights violations.<sup>111</sup> In the application of Article 41, a draft law was presented for discussion to the Somali Parliament in the Summer 2013.<sup>112</sup> Similarly, Article 7 states that any international boundaries dispute should be resolved in accordance with international law.

Internationally, the SFG was keen to retake control of the Somali airspace soon after its establishment, which encompasses a large strategic section that is crossed by both north-south flights from Europe to Africa and east-west flights from Africa to Asia.<sup>113</sup> During the civil war, and from 1992 to 2013, the airspace of Somalia was managed by an International Civil Aviation Organization (ICAO)/U.N. Development Programme (UNDP) project based in Nairobi, which controlled civil aviation and collected overflying fees.<sup>114</sup> Issues that needed to be resolved included the location of the main air traffic control facilities and fee-sharing arrangements with the breakaway province of Somaliland. In May 2013, Somali Minister for Information Ellmoge announced that, after nineteen years,

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110. PROVISIONAL CONSTITUTION (Som.).

111. *Id.* ch. 2, art. 41 (Som.) (stating that "(1) The Federal Parliament shall establish a Human Rights Commission that is independent of State control, and has adequate resources to carry out its functions effectively. (2) The functions of the Human Rights Commissions shall include the promotion of knowledge of human rights, and specifically Shari'ah, setting implementation standards and parameters for the fulfillment of human rights obligations, monitoring human rights within the country, and investigating allegations of human rights violations").

112. Draft Law (2013) (on file with the author). The law made no reference to international human rights standards. Additionally, similarly to the functions of the Human Rights Commission, Somalia's human rights treaties obligations require monitoring and investigation of human rights violations.

113. See Flight Information Region Map, INTERNATIONAL CIVIL AVIATION ORGANIZATION, <http://gis.icao.int/appsilver/ICAOFIR2014/> (last visited Nov. 2, 2014) (select "WORLD ROUTE 2014/UPP Routes op 2014/NAVH"; then zoom in on "FIR MOGADISHU HC SM").

114. GIORGETTI, A PRINCIPLED APPROACH, *supra* note 5, at 31.

Somalia had regained control over its airspace.<sup>115</sup> The plan was in compliance with ICAO requirements and provided for a fee-sharing agreement between Somaliland and Somalia.

Interestingly, the new government of Somalia also acceded to the Chemical Weapons Convention (CWC). On May 29, 2013, it deposited its instrument of accession to the CWC with the U.N. Secretary-General.<sup>116</sup> “After thirty days, the Convention entered into force for the country, making Somalia the 189th State Party to the treaty.”<sup>117</sup>

Given the nature and extent of Somalia’s international obligations, post-conflict reconstruction must include an explicit international law component, which is now missing. Somalia’s post-conflict priorities cannot be properly addressed without applying and explicitly referring to international law. In fact, increased globalization and the interconnectedness of states’ actions mean that international law necessarily plays an increasingly important role in all of a state’s activities, including post-conflict reconstruction.<sup>118</sup>

### III. USING INTERNATIONAL LAW IN SOMALIA’S RECONSTRUCTION

The section above demonstrates that, although no overarching international legal framework is specifically applicable to post-conflict reconstruction, international law permeates all actions by states and private parties, from trade to immigration and from food safety to travel.<sup>119</sup> Post-conflict reconstruction requires a sophisticated approach by sophisticated users. International law can mandate resolution frameworks and provide analyses that can assist in understanding complexity.<sup>120</sup> Furthermore, reconstruction efforts require

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115. *Somalia Regains Control over Its Air Space*, ALLAFRICA (May 13, 2013), <http://allafrica.com/stories/201305140319.html>.

116. *Somalia Joins the Chemical Weapons Convention*, ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS (May 31, 2013), <http://www.opcw.org/news/article/somalia-joins-the-chemical-weapons-convention/> (“On 29 May 2013, Somalia deposited its instrument of accession to the Chemical Weapons Convention (CWC) with the Secretary-General of the United Nations. . . . This will reduce to seven the number of States that have not yet joined.”).

117. The CWC is a widely ratified convention: Only seven countries have not yet joined. *Id.*

118. See GIORGETTI, A PRINCIPLED APPROACH, *supra* note 5, at 4–6.

119. *Id.* ch. 1.

120. American Society of International Law, Washington, D.C., Mar. 28–31, 2012, *106th Annual Meeting Final Program: Confronting Complexity*, available at <http://www.asil.org/106th-annual-meeting-final-program-confronting-complexity>.

coordination with efficient international instruments.<sup>121</sup>

By including an international law component in post-conflict priorities, international law can provide a framework for action and best practices. These translate into specific items to facilitate the reconstruction in Somalia in its identified priorities. This section highlights three specific examples of how international law can address the three priorities—security, economic development, and human rights—discussed above and identified by the SFG. First, as a tool to strengthen security, international law can provide a framework to assist in the delimitation of maritime boundaries by using principles found in the U.N. Convention on the Law of the Sea. Second, as a way to meet the economic goals, international law can provide issues for action and encourage economic development through the negotiation of international investment treaties. Third, as an instrument to implement the transitional justice and human rights priority, international law transitional justice examples can be used as best practices to identify instruments to foster reconciliation in Somalia.

*A. Security Objectives: International Law Can Mandate a Framework for Action to Delimit Maritime Borders*

As discussed above, one of the main security priorities confronting Somalia is the delimitation of the maritime border in the Indian Ocean.<sup>122</sup> International law can provide a framework to immediately assist in the negotiation process and to facilitate a binding delimitation of its maritime boundaries.

The primary dispute exists between Somalia and Kenya and is now being fueled by natural resources.<sup>123</sup> In fact, a contested mari-

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[asil.org/sites/default/files/ASIL\\_ANNUAL\\_MEETING\\_Program\\_2012.pdf](http://asil.org/sites/default/files/ASIL_ANNUAL_MEETING_Program_2012.pdf).

121. See U.N. PEACEBUILDING COMM’N, *supra* note 83.

122. See *supra* Part I.

123. The dispute became evident during a weekly SFG council of ministers gathering on June 6, 2013, where officials discussed Somalia’s maritime borders. At the meeting, the ministers “had agreed to make ‘null and void’ the 2009 maritime borders Memorandum of Understanding (MOU) between Kenya and Somalia’s now-defunct Transitional Federal Government (TFG). Adding fuel to the fire, the Somali Government, led by President Hassan Sheikh Mohamud, officially ‘extended’ the country’s sea territory by 200 nautical miles, and also defined the continental shelf as part of its maritime boundary.” Cassie Blombaum, *Stirring the Somali Waters: Toward a Maritime Oil War?*, INKERMEN INSIGHTS ON GLOBAL BUSINESS THREAT AND VOLATILITY (June 10, 2013), <http://blog.inkerman.com/index.php/2013/06/10/stirring-the-somalia-waters-toward-a-maritime-oil-war/>; Kim Moss, *Somali-Kenya Maritime Boundary Dispute Remains Unresolved*, FUTURE DIRECTIONS INTERNATIONAL (June 12, 2013),

time zone that both Kenya and Somalia claim may have the potential for oil exploration. Kenya identified several new offshore exploration blocks available for licensing, and all but one are located in the contested area in the Indian Ocean.<sup>124</sup> Private companies have approached both governments. Reportedly, French firm Total and Texas-based Anadarko obtained exploration licenses from Kenya for blocks in the disputed area.<sup>125</sup> At the same time, a Somali minister reportedly granted similar rights to another foreign company.<sup>126</sup> To make matters even more complicated, separate concessions for both on-land and off-shore drilling have allegedly been granted by a high official in the Puntland administration.<sup>127</sup> In January 2013, the Canadian company Africa Oil began its first on-shore drilling operation in Somalia. Africa Oil estimated that its two drilling blocks could include reserves of up to four billion barrels, worth about \$500 billion at today's prices.<sup>128</sup>

The exact amount of hydrocarbon reserves in the contested maritime region are, of course, unknown. Initial reports, however, estimate that the combined onshore and offshore reserves could be

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<http://www.futuredirections.org.au/publications/energy-security/27-energy-security-swa/1091-somali-kenya-maritime-boundary-dispute-remains-unresolved.html>.

124. Kelly Gilblom, *Kenya/Somalia Border Row Threatens Oil Exploration*, REUTERS, Apr. 20, 2012, available at <http://www.reuters.com/article/2012/04/20/us-kenya-exploration-idUSBRE83J0M120120420>.

125. *Id.*

126. *Troubled Somalia Hustles Big Oil To Resume Exploration*, UPI (Oct. 16, 2013, 12:58 PM), [http://www.upi.com/Business\\_News/Energy-Resources/2013/10/16/Troubled-Somalia-hustles-Big-Oil-to-resume-exploration/UPI-31691381942688/](http://www.upi.com/Business_News/Energy-Resources/2013/10/16/Troubled-Somalia-hustles-Big-Oil-to-resume-exploration/UPI-31691381942688/) (reporting that “Abdullah Haidar of Somalia’s Ministry of Natural Resources reported recently that discussions in London with the major oil companies, including Conoco Phillips, Chevron Corp. and Eni of Italy, ‘are going well’” and that “[t]he only Western company to sign up with Mogadishu so far is the British company Soma Oil & Gas, established in 2012 and headed by Lord Michael Howard, a former Conservative Party leader who’s held several cabinet posts. It signed an agreement Aug. 6 and will conduct seismic surveys in designated areas on land and offshore, and update historic seismic data for the government, in return for nominating exploration and drilling rights for up to 12 blocks”).

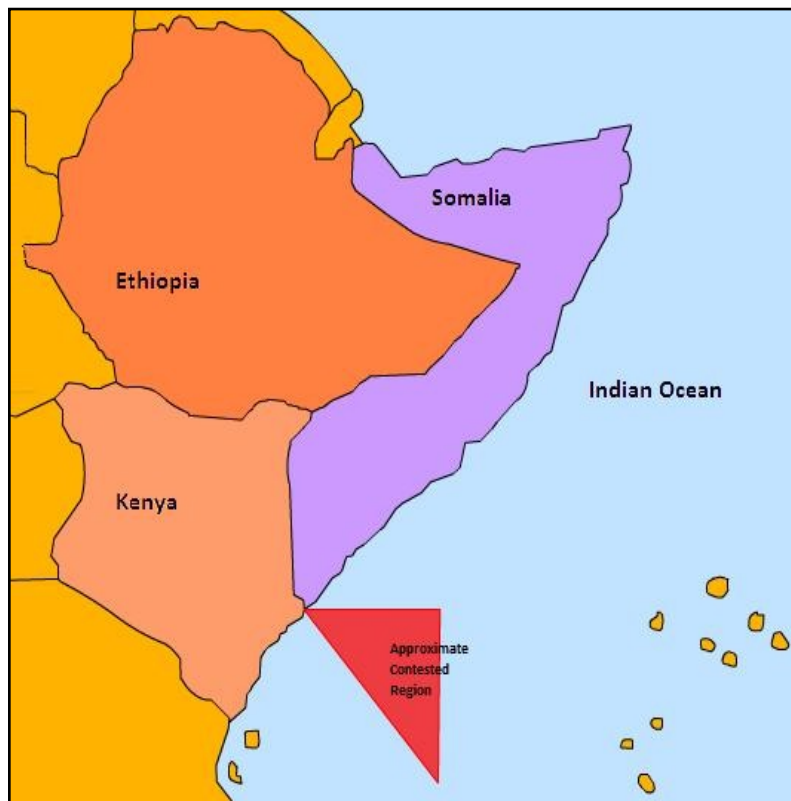
127. See Alexis Flynn & Justin Scheck, *Somalia Seeks to Restart Oil Exploration*, WALL ST. J., Oct. 7, 2013, available at [http://online.wsj.com/news/articles/SB10001424052702303442004579121310761917156?mod=\\_newsreel\\_2](http://online.wsj.com/news/articles/SB10001424052702303442004579121310761917156?mod=_newsreel_2) (reporting that “[a] number of small companies have signed oil-exploration deals with regional authorities in Somalia, raising tensions with the central government. The only company to sign an agreement with the central government is private startup Soma Oil & Gas Ltd., which is conducting early-stage data collection, its chief executive, Robert Sheppard, said in an interview last month”).

128. *Somalia’s Oil Prospects Add New Dangers*, UPI (March 1, 2012, 3:53 PM), [http://www.upi.com/Business\\_News/Energy-Resources/2012/03/01/Somalias-oil-prospects-add-new-dangers/UPI-81601330635213/](http://www.upi.com/Business_News/Energy-Resources/2012/03/01/Somalias-oil-prospects-add-new-dangers/UPI-81601330635213/).



substantial, and could amount to as much as 110 billion barrels of oil.<sup>129</sup> The development of natural resources in Somalia could therefore be a turnaround for Somalia's development and could bring much needed revenue. At the heart of the matter is how to demarcate the maritime boundary that lies between Somalia and Kenya. Kenya claims that the maritime boundary should run east from the point where the territorial border ends. Somalia claims that the border continues diagonally southeast into the Indian Ocean, following the general direction of the territorial border (see Figure 1).

Figure 1: Contested Region between Somalia and Kenya\*



Clearly, an arrangement to delimit the Somalia-Kenya maritime border would be key to ensuring the successful development of

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129. *Id.*

\* Original figure from Blombaum, *supra* note 123.

offshore resources. Without assurances that the maritime borders are finally delimited, however, oil companies may not invest in exploration and research and thus possible revenues will not be produced. Indeed, the ongoing dispute over their maritime boundary has already deterred interest in developing the offshore blocks.<sup>130</sup> It is thus crucial to both Somalia and Kenya that their border dispute be resolved.<sup>131</sup> In fact, the U.N. has also warned that Western commercial oil exploration in the disputed areas, as well as existing discrepancies over which authorities could issue licenses, “could spark further conflict.”<sup>132</sup> The U.N. experts were also concerned about a request by Norway to Somalia to implement an Exclusive Economic Zone (EEZ) off its coast, which they highlighted may be connected with commercial interests held by a Norwegian oil company.<sup>133</sup>

International law provides the necessary instruments and frameworks to resolve the dispute finally and satisfactorily. Both Somalia and Kenya are parties to UNCLOS, which they both ratified in 1989.<sup>134</sup> UNCLOS includes detailed provisions on how to regulate

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130. The U.N. Monitoring Group reports that Kenya suspended a concession to a Norwegian company because of the ongoing dispute. See Michelle Nichols & Louis Charbonneau, *Exclusive: Western Oil Exploration in Somalia May Spark Conflict—U.N. Report*, REUTERS, July 17, 2013, available at <http://www.reuters.com/article/2013/07/17/us-somalia-oil-un-idUSBRE96G06R20130717> (“The U.N. report said late last year that Kenya had suspended Statoil’s license for block L26 because the Norwegian company did not want to spend money on exploration while there was the legal uncertainty over the maritime border with Somalia.”).

131. See Moss, *supra* note 123 (explaining that “one of the most important issues arising from the inability of the two countries to come to an agreement on their maritime boundary, is that their legal claims to sell exploration blocks and collect revenue from any subsequent discoveries, are at risk. Kenya’s Petroleum Energy Commissioner, Martin Heya, has previously confirmed that companies awarded exploration rights in the contested area, will be unable to begin exploration/drilling until the boundary dispute is settled, as it is unclear which country will receive the revenue from any subsequent resource discoveries. . . . This comes at an unfortunate time, because the wider East Africa region has attracted considerable international interest and most importantly, promises of investment, following large discoveries of oil and natural gas”).

132. See Nichols & Charbonneau, *supra* note 130.

133. *Id.* (stating “[e]fforts by Norway to lobby Somali officials to adopt the EEZ now coincide with current Norwegian interest in the fate of L26 [blocks which are contested with Kenya] as well as with Norwegian involvement in the application of a Special Financing Facility donor fund of \$30 million which has been allocated under the management of [Somali government] officials with a track record of corruption”).

134. Somalia ratified the Convention on July 24, 1989, and Kenya ratified it on March 2, 1989. See U.N. Division for Ocean Affairs and the Law of the Sea, *Chronological Lists of Ratifications Of, Accessions and Successions to the Convention and the Related Agreements as at 3 October 2014 [sic]* (Oct. 3, 2014), [http://www.un.org/depts/los/reference\\_files/](http://www.un.org/depts/los/reference_files/)

boundaries in specific sections of the sea. Using UNCLOS as a framework to resolve the maritime dispute is useful in at least two ways. First, UNCLOS provides recognized principles to resolve the substance of the dispute. Second, UNCLOS provides a way to resolve disputes by a binding decision, should inter-state negotiations fail to reach an agreement.

UNCLOS provides that the sovereignty of a coastal state extends to the territorial sea up to a limit not exceeding twelve nautical miles, measured from the baselines determined in accordance with provisions of the Convention itself.<sup>135</sup> The Convention also provides for the establishment of an EEZ defined as “an area beyond and adjacent to the territorial sea” and subject to a specific legal regime established by the Convention. The legal regime governs the rights and jurisdiction of the coastal state and the rights and freedoms of other states.<sup>136</sup>

The EEZ is limited to 200 nautical miles from the state’s baselines. In the EEZ, the coastal state retains:

[S]overeign rights for the purpose of exploring and exploiting, conserving and managing natural resources whether living and non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.<sup>137</sup>

UNCLOS also defines the obligations applicable to the continental shelf, which comprises “the seabed and subsoil of the submarine areas”<sup>138</sup> that extend beyond the territorial sea and through the natural prolongation of the territory to the outer edge of the continental margin, or a distance of two hundred nautical miles from the baselines if the outer edge of the continental margin does not extend to that distance.<sup>139</sup> Under UNCLOS, the coastal state exercises sover-

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chronological\_lists\_of\_ratifications.htm.

135. See United Nations Convention on the Law of the Sea art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

136. *Id.* art. 55.

137. *Id.* art. 56(1)(a); see *id.* art. 55 (governing the specific legal regime of the exclusive economic zone); *id.* art. 56 (governing the rights, jurisdiction, and duties of the coastal state in the exclusive economic zone); *id.* art. 76 (governing the definition of the continental shelf); *id.* art. 83 (governing the delimitation of the continental shelf between States with opposite or adjacent coasts).

138. *Id.* art. 75.

139. *Id.*

eign rights of exploration and exploitation of its natural resources over the continental shelf.<sup>140</sup> It also maintains an exclusive right to authorize and regulate drilling of the continental shelf for all purposes.<sup>141</sup>

Importantly, UNCLOS provides means to delimit both the EEZ and the continental shelf for states with adjacent coasts, as is the case between Somalia and Kenya.<sup>142</sup> The relevant provisions refer to Article 38 of the Statute of the International Court of Justice, which indicates the appropriate international legal instruments to be used to resolve the dispute.<sup>143</sup> The provision also signals that an equitable solution should be achieved.<sup>144</sup> Pending agreement, the states concerned shall make every effort to enter into provisional arrangements of a practical nature in a spirit of understanding and cooperation. During the transitional period, the states shall not jeopardize or hamper the conclusion of the final agreement. These arrangements are without prejudice to the final delimitation. Interestingly, Kenya claims that such a provisional arrangement exists and was signed as a Memorandum of Understanding (MoU) in April 2009 with the TFG, a previous incarnation of the SFG.<sup>145</sup> Somalia, however, has maintained that the MoU is invalid and registered its rejection of the MoU with the U.N. Secretariat in March 2010.<sup>146</sup>

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140. *Id.* art. 77.

141. *Id.* art. 81.

142. *Id.* arts. 74, 83 (governing the EEZ and the continental shelf respectively).

143. *Id.*; see Statute of the International Court of Justice, 1946 I.C.J. art. 38 (“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”).

144. UNCLOS, arts. 74, 83.

145. See Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to Grant to Each Other No-Objection in Respect of Submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, Kenya-Som., Apr. 7, 2009, 2599 U.N.T.S. 35; Blombaum, *supra* note 123.

146. U.N. Division of Ocean Affairs and Law of the Sea, Somalia (July 17, 2014), <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SOM.htm> (“By a note verbale dated 2 March 2010, the Permanent Mission of the Somali Republic to the United Nations informed the Secretariat that the MOU had been rejected by the Parliament of the Transitional Federal Government of Somalia, and ‘is to be hence treated as

The framework provided by UNCLOS can thus fruitfully guide the negotiation for the delimitation of the maritime borders between Somalia and Kenya. Pursuant to the rules governing the territorial sea, the EEZ, and the continental shelf under UNCLOS, Kenya and Somalia could reach an agreement that is based on the principles and sources of international law. UNCLOS also provides that an equitable solution should be achieved, with the interests of both parties taken into consideration. Pending the agreement, both parties should refrain from taking any actions that could jeopardize and hamper the final agreement and should act in a spirit of cooperation and understanding. These guiding principles provide each party with an important framework for negotiation. They also allow for the same guiding principles to be used by both parties, and thus clarify parties' expected behavior and provide a level playing field.

Further, if no agreement is reached within a reasonable period of time, UNCLOS can guide the process to a legally binding agreement decided by a neutral arbitral tribunal.<sup>147</sup> Part XV of UNCLOS provides an efficient dispute resolution mechanism through a binding international arbitration process administered by the Permanent Court of Arbitration, to which both Kenya and Somalia have access.<sup>148</sup> This binding process has been used successfully on several occasions. For example, in the arbitration between Guyana and Suriname, the arbitral tribunal was also confronted with a request to demarcate the territorial sea, the EEZ and the continental shelf between the two adjacent claims of Guyana and Suriname. Both claimed an overlapping area for which they had both given exploration concessions.<sup>149</sup> Ultimately, the arbitral tribunal delimited the maritime border applying the provisional equidistance line approved by the parties.<sup>150</sup>

By encouraging the use of the international law framework provided by UNCLOS, Somalia could address the fundamental issue

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non-actionable.”).

147. UNCLOS, arts. 74, 83.

148. Laurence Boisson de Chazournes, *The International Tribunal for the Law of the Sea*, in *THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 115 (Chiara Giorgetti ed., 2012).

149. *Guyana v. Suriname*, 139 I.L.R. 566 (Perm. Ct. Arb. 2007).

150. *Id.* ¶¶ 392–400. Note that in that situation, oil explorations had begun and, in the view of the tribunal, Suriname had threatened to use force on an oil rig and drill ship that had permission from Guyana and which Suriname claimed was within its jurisdiction. *Id.* ¶¶ 435–39. For another interesting case, see *The Government of the State of Eritrea v. the Government of the Republic of Yemen*, Award of the Arbitral Tribunal in the Second Stage of the Proceeding (Maritime Delimitation), 119 I.L.R. 417 (Perm. Ct. Arb. 1999).

of maritime boundary delimitation with Kenya. This will be important for economic development, security issues, and the restoration of a good relationship with an important neighbor. Moreover, because both Somalia and Kenya are parties to UNCLOS, if they fail to find an agreement by consent, both have access to a binding dispute resolution mechanism that can effectively resolve the issue and delimit the maritime border once and for all.

In addition to providing useful and mandatory frameworks for action, international law can also indicate priorities and issues for action that are particularly important for post-conflict reconstruction.

*B. Economic Objectives: International Law Can Offer Core Issues for Action for Economic Development*

A second key priority identified by the SFG is economic recovery, which is generally key in post-conflict situations.<sup>151</sup> Providing means of economic growth is crucial to ensuring a successful and sustainable reconstruction and it is an integral part of a comprehensive restructuring and stabilization effort.<sup>152</sup> Economic growth programs not only enhance the well-being of the general population, but can also reduce the risk of returning to conflict.<sup>153</sup>

Somalia is one of the poorest countries in the world, with one of the lowest GDPs per capita. Ensuring the flow of foreign direct investment is particularly important to stimulate economic recovery.<sup>154</sup> To attract international investment, it is vital to provide an environment that welcomes investments and adequately addresses the

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151. Paul Collier & Anke Hoeffler, *Aid, Policy and Growth in Post-Conflict Societies 1* (World Bank Policy Research Working Paper 2902, 2002), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2902> (“We find that during the first three post-conflict years absorptive capacity is no greater than normal, but that in the rest of the first decade it is approximately double its normal level.”); see THE SOMALI COMPACT, *supra* note 46; SECURING PEACE: STATE-BUILDING AND ECONOMIC DEVELOPMENT IN POST-CONFLICT COUNTRIES (Richard Kozul-Wright and Piergiuseppe Fortunato eds., 2011).

152. U.S. AGENCY FOR INT’L DEV. OFFICE OF ECON. GROWTH, A GUIDE TO ECONOMIC GROWTH IN POST-CONFLICT COUNTRIES VI (2009).

153. *Id.* (“The purpose of economic growth programming in post-conflict countries is both to reduce the risk of a return to conflict and to accelerate the improvement of well-being for everyone, particularly the conflict-affected population.”).

154. THE WORLD BANK, INVESTING ACROSS BORDERS 2010: INDICATORS OF FOREIGN DIRECT INVESTMENT REGULATION IN 87 ECONOMIES 1 (2010).

concerns of investors while protecting their interests.<sup>155</sup> To ensure such an environment and demonstrate their commitment to economic stability, many capital-importing countries have participated in the negotiation of bilateral or multilateral international investment treaties (IIAs) with capital-exporting countries.<sup>156</sup>

IIAs are international agreements that regulate the conditions for private investments by national and foreign companies.<sup>157</sup> Typically, they provide a number of guarantees to investors, including protection from expropriation, fair and equitable treatment, free transfers of means and full protection and security. An important and distinctive feature of many IIAs is to provide a specific and alternative dispute resolution mechanism, which allows recourse to international arbitration rather than the use of domestic courts in case of an alleged violation of the investment treaty. Most often, international investment arbitration occurs under the arbitration rules of the International Convention for the Settlement of Investment Disputes (ICSID) or of the United National Commission on International Trade Law (UNCITRAL).

In the specific case of Somalia, the negotiations of IIAs would be particularly important, especially to foster and reengage relations with key trade partners. Before the beginning of the civil war, Somalia had entered into Bilateral Investment Treaties (BITs), namely with Germany and Egypt.<sup>158</sup> Since 1985, however, it has not ne-

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155. See U.N. Conference on Trade and Dev., *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (2013), [http://unctad.org/en/publicationslibrary/wir2013\\_en.pdf](http://unctad.org/en/publicationslibrary/wir2013_en.pdf) (concluding that developing countries have taken the lead in attracting foreign direct investment and that “[m]ost governments are keen to attract and facilitate foreign investment as a means for productive capacity-building and sustainable development”).

156. *Id.* (“By the end of 2012, the regime of international investment agreements (IIAs) consisted of 3,196 treaties. Today, countries increasingly favor a regional over a bilateral approach to IIA rulemaking and taking into account sustainable development elements.”).

157. See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 6–8 (2d ed. 2008); see generally U.N. Conference on Trade and Dev., *World Investment Report 2006: FDI from Developing and Transition Economies: Implications for Development* (2006), [http://unctad.org/en/Docs/wir2006\\_en.pdf](http://unctad.org/en/Docs/wir2006_en.pdf) (discussing BITs); U.N. Conference on Trade and Dev., *World Investment Report 2004: The Shift Towards Services* (2004), [http://unctad.org/en/Docs/wir2004\\_en.pdf](http://unctad.org/en/Docs/wir2004_en.pdf) (discussing the Canadian model BIT).

158. U.N. Conference on Trade and Dev., *Bilateral Investment Treaties Signed by Somalia* (June 1, 2013), [http://unctad.org/Sections/dite\\_pcbb/docs/bits\\_somalia.pdf](http://unctad.org/Sections/dite_pcbb/docs/bits_somalia.pdf)

gotiated, signed, or ratified any new BITs and has remained completely excluded from the international investment arbitration movement.

The negotiation and drafting of IIAs by Somalia can be informed by existing IIAs and their interpretation by international arbitral tribunals. The principles that are included in existing IIAs could be used by the Somali government as priorities for consideration and for possible inclusion in IIAs signed by Somalia. Some of the most common IIA principles are included in Figure 2. They could serve as an initial negotiation starting point and blueprint for discussions with other interested parties.

**Figure 2: Sample Negotiating Blueprint**

Negotiation principle	Observations	Conclusions
Bilateral or regional approach?		
Applicable law?		
Definition of investment?		
Confidentiality?		
Type of expropriation protection?		
Definition of fair and equitable treatment		
Full protection and security		
Include umbrella clause?		
Provide national treatment?		
Provide Most Favored Nation Treatment?		
Allow ICSID Arbitration?		

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(reporting that Somalia concluded a BIT with Egypt on May 29, 1982 (which entered into force on April 16, 1983) and with Germany on Nov. 27, 1981 (which entered into force on February 15, 1985)).



At the same time, joining the ICSID Convention would guarantee an efficient and neutral binding international dispute resolution mechanism. Thus, any IIA signed by Somalia should include a binding international dispute resolution mechanism through international arbitration. This would be also an important signal to potential investors.

Using international law to identify priorities offers an important tool to structure post-conflict reconstruction. The example of IIAs, identified above, would be particularly important to ensure economic reconstruction and to stimulate foreign investment.

*C. Human Rights and Transitional Justice Objective: International Law Can Offer Examples of Best Practices*

A third way in which international law can assist in post-conflict reconstruction of Somalia is by providing examples of best practices, particularly for transitional justice issues, thus promoting the third priority identified in Part I.<sup>159</sup> Addressing and resolving issues of accountability for human rights violations is fundamental in order to guarantee stability in post-conflict situations.<sup>160</sup> Transitional justice mechanisms consolidate peace, foster social and national reconstruction, and secure long-term peace.<sup>161</sup>

Somalia's Provisional Constitution mandates the creation of a Truth and Reconciliation Commission to "foster national healing, reconciliation and unity" and to ensure that "matters relating to impunity, revenge and other triggers of violence are addressed through a legal and state-directed process."<sup>162</sup> The Commission has not yet been established. At this point, therefore, other past examples can be

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159. *See supra* Part I.

160. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Summary, U.N. Doc. S/2004/616 (Aug. 23, 2004) (stating that "recent years have seen an increased focus by the United Nations on questions of transitional justice and the rules of law in conflict and post-conflict societies, yielding important lessons for our future activities").

161. *Id.* ¶ 2 (stating "our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice").

162. *See* PROVISIONAL CONSTITUTION (Som.).

particularly useful to guide the creation of the Commission and structure a comprehensive and effective transitional justice process in Somalia.

Transitional justice has become an important part of all reconciliation processes. In addition to truth and reconciliation commissions, other transitional justice instruments include international *ad hoc* tribunals, hybrid tribunals, domestic courts, and the International Criminal Court (ICC). More than one instrument is often implemented in transitional justice processes.<sup>163</sup> Assessing precedents can serve as best-practice examples for Somalia and can be an important tool to develop the best transitional mechanism for Somalia.<sup>164</sup>

Indeed, international law and transitional justice provide a real menu of options that could be used as examples for Somalia to develop its own transitional justice mechanism in application of the Provisional Constitution.

The main goals of each transitional justice process vary. Specific goals are intrinsically linked to the nature of the conflict and post-conflict priorities. Figure 3 identifies the main means and different goals of each transitional justice mechanism, and can also serve as a template to assess best practices.<sup>165</sup>

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163. For an introduction, see International Center for Transitional Justice, Fact Sheet: What is Transitional Justice? (2009), <http://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>.

164. Margherita Zuin, *A Model of Transitional Justice for Somalia*, 23 FLETCHER J. HUM. SECURITY 89 (2008).

165. This is adapted from DAVID LUBAN, JULIE R. O'SULLIVAN & DAVID P. STEWART, INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW (2009).

### Figure 3: Goals and Means of Transitional Justice Mechanisms

	Int'l Tribu- nals	Hybrid Tribu- nals	Nat'l Courts	Local justice	Lustra- tion/Com pensation	TRCs
Retribution						
Deterrence						
Creating a record						
Social healing						
Individual healing						
Due process						
Rebuilding rule of law						

In terms of possible transitional justice mechanisms, several choices are available. First, international criminal tribunals are available. The early 1990s witnessed one of the most significant recent developments in international criminal law with the creation of two *ad hoc* international criminal tribunals and the establishment of a permanent international criminal court. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created by U.N. Security Council Resolutions.<sup>166</sup> These Tribunals have specific and primary jurisdiction. The ICTY has jurisdiction over crimes committed on the territory of the former Yugoslavia since 1991, and specifically grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity.<sup>167</sup> The

166. Procedurally, the Security Council first created two commissions of experts, both of which, after examining the evidence, suggested the creation of *ad hoc* tribunals. Both the ICTY and ICTR were created by Security Council resolutions adopted under U.N. Charter Chapter VII. See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) and S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), respectively, which are binding for all U.N. members. The tribunals are both subsidiary, although independent, organs of the Security Council. The ICTR is structurally linked to the ICTY, sharing the same Prosecutor, Appeal Chambers, and prosecutorial staff.

167. See generally U.N. International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org> (last visited Sept. 23, 2014).

ICTR has jurisdiction over the crime of genocide and other serious violations of international law committed in Rwanda, or by Rwandan citizens in nearby states, between January 1 and December 31, 1994.<sup>168</sup> The establishment of the ICTY and the ICTR led, to a certain extent, to the creation of the ICC.

The ICC is the first permanent, treaty-based international criminal court established to prosecute the most serious crimes of international concern, for example, genocide, crimes against humanity, and war crimes. The ICC is a court of last resort and its jurisdiction is retrospective only. The ICC is based on the 1998 Rome Statute, which had 122 states parties as of November 24, 2014. Somalia has not ratified the treaty and is therefore not a party to the ICC. The ICC does not have jurisdiction over Somalia. Because of the existence of the ICC, additional *ad hoc* international criminal tribunals would be hard to justify. However, given the unique situation of Somalia, it is possible that sufficient political will may be summoned.

Second, hybrid criminal tribunals are available. They incorporate both international and national elements.<sup>169</sup> Typically, a majority of the judges are international judges, and principles of international criminal law apply. At the same time, national judges complement the court and specific principles of domestic law may also apply. Generally, hybrid tribunals sit in the country in which

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168. See generally U.N. International Criminal Tribunal for Rwanda, <http://www.unictr.org> (last visited Sept. 23, 2014).

169. In the aftermath of the U.N.-brokered 1999 Lomé Peace Agreement between the Sierra Leonean government and the Revolutionary United Front, and to begin a process of national reconciliation, the Government of Sierra Leone requested the U.N. to establish an international court to prosecute those responsible for committing atrocities during the war. With S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000), the Security Council requested that the Secretary-General negotiate with the Government of Sierra Leone to create an independent special court. In October 2000, the Secretary-General issued a report to the Security Council outlining the characteristics of the court. The court is treaty-based and established by a special agreement between the U.N. and the government of Sierra Leone. It has primacy over domestic prosecutions in Sierra Leone, but not in other states. The Court has jurisdiction over crimes against humanity, war crimes, and certain crimes under Sierra Leonean domestic criminal law. It does not have competence over the crime of genocide. The Court has personal jurisdiction over persons who bear the greatest responsibility for those crimes. Its temporal jurisdiction began in 1996, the date of the first failed peace agreement between the two parties, not the beginning of the civil war in 1991. See U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (Oct. 4, 2000).

they focus. The tribunal's staff includes both international and domestic personnel.<sup>170</sup>

Third, national courts are available. They are often considered the forum of first resort to prosecute human rights abusers.<sup>171</sup>

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170. For example, in the Sierra Leone tribunal, the Chief Prosecutor, the Registrar, as well as the majority of the Judges in both the Trial and Appeal Chambers are appointed by the U.N. Secretary-General. *See id.* ¶¶ 47–48; *see also id.* Annex art. 2. The government of Sierra Leone appointed the other judges as well as the Deputy Prosecutor. *Id.* art. 3. The only other existing example of a hybrid tribunal was the ones established in Cambodia. *See Cambodian Genocide Program: Chronology, 1994-2004*, YALE UNIV. (last visited Oct. 24, 2014), [http://www.yale.edu/cgp/chron\\_v3.html](http://www.yale.edu/cgp/chron_v3.html). In July 2001, the Cambodian National Assembly passed the final legislation enabling the establishment of a tribunal in conjunction with the United Nations to try the former leaders of Khmer Rouge for genocide. *See id.* Contrary to the Sierra Leone example, the majority of judges and prosecutors of the special tribunal for Cambodia will be Cambodian, while only a minority will be international staff. *See* Donald W. Beachler, *The Quest for Justice in Cambodia: Power, Politics, and the Khmer Rouge Tribunal*, 8 GENOCIDE STUD. & PREVENTION 67, 69 (2013); *see also Cambodia: Background: A Long Road to Justice*, INT'L CENTER FOR TRANSITIONAL JUST. (Oct. 21, 2014), <http://www.ictj.org/our-work/regions-and-countries/cambodia>; *Criminal Court for Cambodia: Establishment of Extraordinary Chambers Responsible for the Prosecution of Crimes Committed by the Khmer Rouge in Cambodia*, TRIAL (June 6, 2014), <http://www.trial-ch.org/en/resources/tribunals/hybrid-tribunals/criminal-court-for-cambodia.html>.

171. *See* Hum. Rts. Watch, *The International Criminal Court: How Nongovernmental Organizations Can Contribute to the Prosecution of War Criminals*, 8 (2004), available at <http://www.hrw.org/legacy/backgrounder/africa/icc0904/icc0904.pdf>. Recent cases of prosecution in national courts offer a mixed outcome, which becomes questionable especially in cases of prolonged mass abuses in poorer countries. *See generally* LEGAL VICE PRESIDENCY, WORLD BANK, ETHIOPIA: LEGAL AND JUDICIAL SECTOR ASSESSMENT (2004), available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EthiopiaSA.pdf>. For example, the Ethiopian government announced its intention to bring to justice the officials of the previous regime for crimes committed by the Dergue between 1974 and 1991, which included arbitrary detention, torture, disappearances, and extra-judicial executions. *See generally id.* The protracted civil conflict and history of repression debilitated its judicial system, which is weak and lacks a tradition of independence. *Id.* As a result, the number of cases and the amount of evidence are challenging the capacity and competence of the Ethiopian judicial system and its ability to impartially and effectively prosecute the cases heard before it. *Id.* A similar situation is found in Rwanda. *See* AMNESTY INT'L, RWANDA: THE TROUBLED COURSE OF JUSTICE (2000), available at <http://www.amnesty.org/en/library/asset/AFR47/010/2000/en/8c1fc557-df6b-11dd-aaaa-7d9091d4638f/af470102000en.pdf>. In the aftermath of the genocide of 1994, the Tutsi government began to try offenders. *Id.* Six years after the genocide in Rwanda, there were an estimated 125,000 people still in detention, including minors, the elderly, and the infirm. *Id.* By January 2000, over 2,500 had been tried, several hundred of whom had been sentenced to death. *Id.* At this pace, it will take about 400 years to process them all. Rwanda suffers extreme poverty and has little tradition of judicial independence. *See id.* Fear, insecurity, and a lack of personnel affect the proceedings. *Id.* Prisoners are often

Because they are close to the facts, the victims, and the evidence, courts of the state where the crimes were committed are at times considered the best and most inclusive form of accountability. Often, however, in post-conflict situations such as in Somalia, an independent and skilled judiciary is lacking, and judges may have fled or may have been the target of abuses themselves. Moreover, the judicial system may lack financial means and may be overwhelmed by the number of cases of a transitional justice process.

Fourth, local justice is available. The use of local or traditional methods of dispute resolution has become more common in situations where the national judicial system does not function properly. Provided that basic rights are respected, local justice mechanisms could provide a good and locally-supported method to deal with past abuses outside national courtrooms.<sup>172</sup> Somalia's traditional justice system, the *Xeer*, is based on clan affiliation. The use of this traditional justice mechanism, in conjunction with other transitional justice means, could be particularly useful in fostering local ownership and support for a transitional justice process.<sup>173</sup>

Fifth, lustration and compensation are available. Lustration laws provide a mechanism to remove perpetrators of human rights violations from positions of authority.<sup>174</sup> Programs of reparation and

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detained without due process and prisons are overcrowded and beatings and torture common. *Id.* The judicial system of Rwanda is severely stretched and does not seem to be able to handle the cases brought to it following internationally recognized standards. *Id.* The cases of Argentina and Germany are also interesting because they highlight the difficulties of effective prosecution in the case of strong internal opposition (the military in Argentina) or where criminal behavior was widespread and a large part of the population played a role in the former abuses (East Germany). *See generally* Int'l Ctr. for Transitional Justice, Accountability in Argentina: 20 Years Later, Transitional Justice Maintains Momentum, (Aug. 2005), available at <http://www.ictj.org/sites/default/files/ICTJ-Argentina-Accountability-Case-2005-English.pdf>; JUSTICE IN TRANSITION: PROSECUTION AND AMNESTY IN GERMANY AND SOUTH AFRICA (Gerhard Werle ed., 2006).

172. In Uganda, President Museveni reestablished "local council courts" at the village level that could also hear land disputes. *See* Local Council Courts Act, 2006 (Uganda), available at <http://www.ulii.org/content/local-council-courts-act-2006>. In Mozambique, *curandeiros*, or traditional healers, played an important role in the reintegration of combatants into their villages at the end of a particularly bloody conflict. SIGNE ARNFRED, SEXUALITY & GENDER POLITICS IN MOZAMBIQUE: RETHINKING GENDER IN AFRICA 234 (2011).

173. *See* Zuin, *supra* note 164, at 94–96.

174. Lustration mechanisms may include total suspension from an assignment, suspension from certain duties, transfers, demotions, early retirement, dismissal, and

compensation by the government can help victims cope with material losses and can also represent public acknowledgment by a government of its (or its predecessor's) wrongdoing.<sup>175</sup>

Sixth, truth and reconciliation commissions are available. These are often employed in contexts where the chances of perpetrators being prosecuted, even in the absence of amnesty, are slim. TRCs are temporary bodies established at the national level to research and report on past patterns of human rights abuses over a certain period of time. Typically, TRCs are created in the aftermath of prolonged social unrest and conflict, and at a point of political transition to a democratic government. Often, TRCs are part of a process of national reconciliation and resolution of a civil conflict and are generally not a substitute for a judicial process.<sup>176</sup> TRCs describe a pattern of violations and do not establish individual criminal behavior.<sup>177</sup> Past experience shows that the success of a TRC relies heavily on the independence, stature, and moral authority of their members. For countries with limited resources or for countries that lack a strong and independent judiciary, TRCs may provide the best solution.

The situation in Somalia is anomalous because it is not structured as a war between a government and an opposition, as it is often

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disqualification from public office. These can also be added to a conviction of other penalties.

175. For example, the Government of Sierra Leone provides monthly payments for the relatives of those named in the Truth and Reconciliation Commission's Report. *See Volume Two Report*, SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, available at <http://www.sierra-leone.org/Other-Conflict/TRCVolume2.pdf>. Similarly, Argentina provided a lump-sum compensation for the families of the disappeared or killed, or to those that were imprisoned for political reasons or forced into exile. *See generally* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY (Eric Stover et al. eds., 2004). In addition to monetary compensation, other forms of compensation may include medical and educational benefits, waiver of mandatory military service, reinstatement in public jobs and housing benefits.

176. *See generally* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2001).

177. TRCs exist for a limited period of time and have specific mandates. *See id.* Their structures and procedures differ. *Id.* Their common goal is to produce and disseminate a final report, which normally includes conclusions and recommendations. *Id.* Members of the TRCs can be well-respected nationals, international experts, or a mix of both. *Id.* Most recent commissions have included representatives of local and national human rights NGOs and other interests groups. *Id.* One of the main purposes of establishing TRCs is to encourage social reconciliation through victims' healing. *Id.*

the case in other conflicts. Somalia is complicated by the fact that there are many actors. In this situation, promoting accountability of human rights violations may be a particularly delicate and complex endeavor.

Given these general conditions, in addition to a Truth and Reconciliation Commission, there are several mechanisms that could be used to account for past human rights abuses. The experience of prior transitional justice processes may serve as a menu of options for Somalia and provide useful best practice examples. The assessment of their achievements can assist the SFG in choosing the mechanisms that are more suitable for its situation, means, and goals.

In sum, international law can be a fundamental tool to assist in reconstruction efforts, and can specifically be applied in Somalia. Indeed, international law can provide and mandate frameworks to guide a new government's actions, can assist in providing actions for government, and can also offer examples of best practices. The final step is to ensure that mechanisms exist that allow for international law principles to be properly utilized.

#### *D. Building an International Law Component in Post-Conflict Reconstruction*

International law can be immensely useful in post-conflict reconstruction of Somalia, not only because it provides mandatory principles, but also because it provides best practices and action items for the SFG. An initial solution to this complex and important problem may be simple: increasing access and exposure to international law. Two mechanisms can be used to ensure that that international law is properly utilized: creating a separate international law component in the intervention framework used by the international community and securing a sufficient number of international law advisers in all projects.

The international community's approach to post-conflict reconstruction in Somalia is principally domestic. UNSOM's mandate focuses on human rights, the rule of law, and aid coordination.<sup>178</sup> A separate international law component would ensure that international law principles are fully considered and assessed. The dearth of international lawyers on staff in international organizations results in lack of knowledge of the importance, role, and relevance of international

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178. See *supra* Section II.A.



law; inevitably, it results in its lack of use. Recruiting international lawyers and using existing international law resources would strengthen the capacity of international actors and help provide a solution.

#### CONCLUSION

Somalia's post conflict reconstruction is—to a great extent—an international legal problem. However, international law instruments are regrettably absent in the post-conflict reconstruction. I argue that this is a mistake, for international law can and does provide important tools to guide and assist the reconstruction of Somalia. Adopting an international law framework will expedite reconstruction, ensure stability, and foster involvement by the international community. While this Article focuses on Somalia, its conclusions can be adopted in all post-conflict reconstruction situations.