1. INTRODUCTION

This paper outlines the legal responsibility and accountability of the Somali government for ensuring the prevention and prosecution of sexual violence in Somalia. It will focus on:

- The legal obligations of the government to ensure that state actors are not involved in committing sexual violence; and
- The legal obligations of the Somali government to investigate and prosecute sexual violence.

This paper will outline both the legal responsibility and the legal accountability of the Somali government in relation to the obligations above. Its purpose is to provide recommendations to the government for effectively responding to sexual violence, including ending impunity for sexual violence committed by state actors.

What is legal responsibility?

‘Legal responsibility’ refers to whether the conduct of a legal actor, such as an individual, organisation or government, constitutes a violation of a law that applies to that legal actor.

For example: the Somali government has an obligation to ensure legislation complies with both the Somali constitution and international treaties it has signed, such as the International Covenant of Civil and Political Rights (ICCPR).

What is legal accountability?

Legal accountability’ refers to whether the legal actor can actually be held to account in any court or tribunal for violations of a law that applies to them.

For example: when the Constitutional Court is established in Somalia, it will have the power to determine whether legislation passed by the government complies with the Constitution. The government is therefore accountable to the Constitutional Court.

By contrast, Somalia has not signed the ICCPR’s Additional Protocol 1, which allows complaints to be submitted to the Human Rights Committee by individuals from state parties alleging breaches of the ICCPR by their governments. Somalia is therefore legally responsible under the ICCPR, but cannot be held legally accountable.

1.2. Actors who bear legal responsibility and accountability for actions by state security forces

The main bearer of legal responsibility and accountability for individual acts by members of the security forces is the individual themselves.

However, in some cases, actors other than the individual may be found legally responsible for the commission of these offences. These include:

- The direct superior of the person who committed the offence, if the superior knew or had information which should have enabled him or her to conclude that a breach was being committed or was going to be committed and did not...
take all feasible measures to prevent it.

- The people with authority or control over that security body, for example the Chief of the Army or the Police Commissioner, if they did not act in accordance with their duties to prevent, report or punish the offence;
- The Ministry or Department that oversees the security body;
- The government as a whole;
- Individuals from the government if they are closely connected enough with the offences to bear responsibility under international criminal law.

What is the difference between criminal and civil responsibility?

**Criminal responsibility** means that an individual person has committed a crime under domestic or international law. In domestic cases, the state prosecute against a defendant before a court that can hear criminal cases. The perpetrator may be liable to punishment including imprisonment, depending upon the offence.

**Civil responsibility** means that a person or other legal actor, has failed to carry out a legal duty owed to another person. These legal duties include respecting rights under the Constitution and other laws. The person or other actor will usually be liable to take some action to rectify this, or to pay damages or compensation to the victims.

When can individuals from the government be held criminally responsible?

To attract criminal responsibility, individuals from the government do not have to have committed the crime themselves. Under international law, the other potential modes of responsibility are:

- Planning, instigating or ordering;
- Aiding and abetting, which consists of providing support or assistance to a crime by act or omission;
- Joint criminal enterprise, which occurs when several individuals with a common purpose embark on criminal activity that is then carried out either jointly or by some members of the group;
- Command responsibility, where a superior officer will be held liable if he or she knew or ought to have known about criminal acts committed by subordinates.

Individuals from the government or security body who were in some way complicit in the crime

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<th>Matrix of potential legal responsibility</th>
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<td>Civil responsibility</td>
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These actors may attract civil or criminal liability, or both.
Each of these bodies can also be held accountable for violations of their responsibilities under domestic, regional or international law.

Individuals can be held accountable under the domestic criminal and military codes in Somali courts (criminal responsibility);

Commanders can be held accountable under Somali domestic criminal and military codes in Somali courts (criminal responsibility);

The people with authority or control over that security body and the responsible Ministry or Department can be held accountable for breaching the Somali constitution in public interest cases brought to the Constitutional Court, when it is formed (civil responsibility);

The government as a whole can be held accountable using regional and international courts and complaint mechanisms (civil responsibility);

Individuals from the government may be held liable in civil or criminal cases in third states if they have citizenship in or some connection with those states (civil or criminal responsibility).

Legal responsibility in third states

Civil responsibility: Two civil cases addressing human rights abuses committed in Somalia have been taken outside of the Somali jurisdiction; Samantar v Yousef and Ahmed v Magan, both civil suits taken in the US. In both cases, former state actors were taken to courts by Somali-Americans in the US and found liable for committing international crimes, both directly (in one case) and through command responsibility.

Criminal responsibility: An arrest warrant has been issued in Canada for Somali Chief of Police Mohamed Sheikh Hasan Ismail, who has dual Canadian citizenship. He may be prosecuted if he returns to Canada.

1.2 Sexual violence in Somalia

Statements made by the Somali government and statistics compiled by the United Nations (UN) indicate that Sexual and Gender-Based Violence (SGBV) is prevalent in Somalia. A Joint Communique released by the Federal Republic of Somalia and the UN on 7 May 2013 acknowledged that “very high levels of sexual violence” had been consistently reported in the country.

The Report of the UN Secretary General on Somalia released in January 2013 stated that 800 rapes were reported between September and late November 2012 in South-Central Somalia. The UN Special Representative on Sexual Violence in Conflict Zainab Hawa Bangura has stated that the UN has evidence of over 1,700 cases of SGBV committed against women in IDPs camps in the Mogadishu area between January and November 2012. In August 2013, a representative for UN OCHA stated that these trends are continuing, with 800 rapes reported in Mogadishu in the first six months of 2013.
Why is ensuring accountability for sexual violence important to stability and security in Somalia?

**Security:** Systematic rape and other forms of SGBV are frequently used to destabilise entire communities, as such acts of violence inflict harm on the victims, their families and their culture. Communities cannot be considered secure if women, children and men remain at constant threat of such crimes. Governments and security actors must protect civilians from sexual violence in the same way as they protect them from external military threats.

**Strong state institutions:** When violations of the fundamental rights protected by a state’s domestic laws are committed, the state must be able to ensure that the perpetrators are brought to justice. If such acts are met with impunity, the state will be unable to maintain its control or authority over the population. Further, for security institutions to effectively uphold law and order, they must be able to do so within their own ranks.

**Unique opportunity:** A growing body of research shows that the protection and promotion of women is vital to the achievement of sustainable peace and development. Somalia is in a unique place to become a global model for post-conflict reconstruction, rebuilding itself in a manner that prevents violence against women and entrenches respect for all civilians.

**Perpetrators**

Statistics collected by the UN and other bodies indicate that SGBV in Somalia is primarily committed by two groups of people: those known to the woman affected, and armed men in uniform.\(^x\) The second category includes the Somali police, military, militias and members of AMISOM. It is difficult for survivors to identify which of these groups the perpetrators belong to, if any. Different military and police uniforms have been donated by different donors and all are readily available on the market, and many Somali security personnel operate as private security providers while off duty.\(^{xi}\) Estimates of what percentage of attacks are carried out by security forces and militias vary.
However, while perpetrators are difficult to identify, both UN actors and the Somali government acknowledge that they include security actors. The UN GBV Working Group, UN Special Envoy on Sexual Violence in Armed Conflict and a Crime and Victimization Survey carried out by the Somali Observatory of Conflict in 2011 estimate that the numbers of sexual violence committed by armed men in uniform are 30%, 64% and 70% of total offences, respectively.\textsuperscript{xii} In December 2012, Somali President Hassan Sheikh Mohamud issued a statement in which he noted the increase in reported rapes and acknowledged that members of government security forces had been involved.\textsuperscript{xiii}

Further, courts are inaccessible to a large percentage of Somali women.

2.3.2 Investigations and prosecutions

The information available indicates that there have been a handful of convictions for rape in a civil court since the appointment of the new government. Human Rights Watch found evidence of one conviction in a civilian court in 2013,\textsuperscript{xiv} and news outlets reported on three in military courts in 2012 and 2013.\textsuperscript{xv} By contrast, it is widely known that five people were arrested and charged with insult or defamation under the Penal code for making or reporting on allegations of rape in 2013.\textsuperscript{xvi}

![Bar chart showing estimates of % of sexual violence committed by armed men in uniform](image)

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<th>Official reports of court prosecutions: 2013</th>
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<td>Number of people convicted for rape in civilian courts</td>
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<td>Number of people convicted for reporting rape through the media</td>
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This is the number of successful convictions for each offence. The number of prosecutions is not known.

Security personnel who have been tried for rape have been tried through military tribunals, rather than the civilian justice system.\textsuperscript{xvii} This appears to be in violation of the Somali Provisional Constitution, which provides that 'human rights abuses alleged to have been committed by members of the armed forces against civilians shall be brought before a civilian court.'\textsuperscript{xviii}
Official reports of court prosecutions: 2013

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<th>Issue</th>
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<tr>
<td>Number of people convicted for rape in civilian courts</td>
<td>1</td>
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<tr>
<td>Number of people convicted for rape in military courts</td>
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<td>Number of people convicted for reporting rape through the media</td>
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After twenty years as a failed state, the Somali government faces significant difficulties in producing functioning justice and security institutions, including a well-organised police force, prisons and court system.xix However, the human rights held by women and girls and the obligations conferred on states to protect them apply regardless of the difficulties the government may face in ensuring their protection.

3. DOMESTIC LEGAL FRAMEWORK

The Somali government is responsible for ensuring that its security agencies uphold both domestic legislation and the Somali constitution by protecting women and girls from SGBV.

- The prohibition on sexual violence is contained in the Penal Code and Chapter 2 of the Constitution.
- The legal responsibility of superior officers for acts committed by their subordinates is provided for in the Penal Code.
- The duty of the security forces to uphold human rights is contained in Chapter 14 of the Constitution.
- Taking court action against government actors is allowed by Article 109 of the Constitution.

3.1 The Penal Code

The Penal Code prohibits certain forms of sexual violence, including:

- **Rape and other types of sexual assault**, defined as when threats or violence are used or the other person is incapable of giving consent;xx

- **Instigation, facilitation or aiding of prostitution** and the ‘exploitation’ of its proceeds.xxi

The Penal Code recognises command responsibility, providing that if a criminal act is committed by a subordinate on the order of a superior officer, the officer who has given the order shall be liable for the offence.xxii

3.2 Provisional Constitution

The provisional constitution protects the rights to:

- dignity,xxiii
- equality,xxiv
- liberty and security, including a specific prohibition of violence against women,xxv
- access to the courts,xxvi
- redress for human rights violations.xxvii

The constitution also mandates that security forces of Somalia must protect all Somali citizens, implement the constitution, uphold, respect human rights and be transparent and accountable.xxviii

If the constitution is violated, Article 109 provides that any individual or group ‘may submit a reference application directly to the Constitutional Court on matters concerning the public interest’.
What is a public interest case?

A public interest case is taken by an individual, group or government for the protection of the public interest. A constitutional public interest usually alleges that a government body has violated its own constitution. These are undertaken in many countries to ensure the government stays within its constitutional boundaries. Usually, if it is found that these have been overstepped, the court will rule that the government body take action such as the payment of compensation, the repeal of a law or the re-making of a decision depending on the context.

4. REGIONAL LEGAL FRAMEWORK

The Somali government must put measures in place to ensure it fulfils its obligations under the African Charter. The Somali government has signed but not ratified the Maputo Protocol, which means it is not bound by every Article but it does have an obligation not to commit acts which defeat its ‘object and purpose’.

Rights contained in the African Charter which must be guaranteed to survivors of SGBV in Somalia include:

- the right to dignity;
- the right to equality;
- the right to integrity of the person;
- the right to security of the person;
- the right against cruel, inhuman and degrading treatment;
- the right to equality before the law;
- the right to a remedy.

Somalia also has an obligation under Article 18 of the African Charter to eliminate every form of discrimination against women and to ensure the protection of the rights of women, and to refrain from acts that defeat the object and purpose of the Maputo Protocol. The aim of the Maputo Protocol is to achieve the substantive equality between men and women and the elimination of harmful practices against women.

Fulfilment of these obligations requires that state agencies do not engage in SGBV, and that if individual members of those agencies do commit such offences, they are appropriately and efficiently investigated and prosecuted by the state. Failure to do so places the state in violation of regional law.

5. INTERNATIONAL LEGAL FRAMEWORK

The Somali government is bound by the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT), and the general rules of international humanitarian law (IHL).

- Under the ICCPR, sexual violence is a serious violation of human rights law;
- Under the CAT, sexual violence is a form of torture;
- Under IHL, sexual violence may be considered a war crime and a crime against humanity.
- Under all three legal frameworks, the state must take positive steps to investigate, prosecute and work to prevent sexual violence.

The Somali government must take positive steps to fulfil the following obligations:
Articles 2(1), 2(3), 7, 9(1) and 26 of the ICCPR: rights to equality, a remedy, against cruel, inhuman and degrading treatment, to security and integrity of the person and right to equality before the law.

Articles 2, 10, 12-14 and 16 of CAT: duties of the state to take measures to prevent and to ensure the impartial investigation of complaints of sexual violence. The CAT also imposes a duty on the state to ensure people who make legal complaints about and witnesses in cases are not subject to intimidation.

The prohibition on sexual violence under international humanitarian law: rape committed as part of a widespread or systematic attack against civilians can now be classified as crime against humanity, and rape committed in conflict can be considered a war crime and a grave breach of the Geneva conventions. Sexual violence is defined as any act of a sexual nature which is committed on a person under circumstances which are coercive.

Each of these three documents provides the Somali government and security and justice sectors with guidance and best practices on how allegations of sexual violence should be responded to in order to comply with best practice standards and international law. These standards include:

- Ensuring all survivors have access to a medical facility that will provide them with legally admissible medical certificates;
- Ensure protection for civil society groups;
- Develop systems to receive and track complaints made against the police by civilians;
- Ensure the survivor is individually provided with compensation;
- Provide protection for survivors and witnesses;
- Establish vetting procedures;
- Ensure superior officials are held responsible for the sexual violence committed by those under their command.

6. INTERNATIONAL STANDARDS

The Somali government also has non-binding obligations to adhere to the international standards outlined in:

- The Declaration on Ending Sexual Violence in Conflict (‘the Declaration’).
- The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (‘the International Protocol’)
- The UN High Commissioner for Human Rights Human Rights Standards and Practice for the Police (‘the Police Standards’)

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- Provide protection for survivors and witnesses;
- Establish vetting procedures;
- Ensure superior officials are held responsible for the sexual violence committed by those under their command.

7. RELEVANT CASE LAW

Numerous cases have found governments liable both for the involvement of their security forces in sexual violence and for their failure to properly investigate it. In recent years, such verdicts have been handed down in Kenya, South Africa and the African Commission.

These cases have held the state liable for:

- Rape committed by both on and off duty police officers (South Africa).
- The rape of a woman following the escape from custody of a known sex offender (South Africa).
The failure of the police to conduct prompt, effective, proper and professional investigations into complaints of sexual abuse (Kenya).

- Human rights abuses, including sexual violence, committed by its political supporters in the lead up to an election (African Commission).

"[A] state can be held complicit where it fails systematically to provide protection of violations from private actors who deprive any person of his/her human rights," where it can be established that the state “condones a pattern of abuse through pervasive non-action”.


8. INDIVIDUAL CRIMINAL RESPONSIBILITY

Sexual violence can be considered a war crime and a crime against humanity under IHL. If individuals within the government are seen to be complicit in these breaches, they may bear individual criminal responsibility under international criminal law (ICL). They could therefore be held accountable:

- Through extra-territorial litigation: This is when the perpetrator is held accountable via civil or criminal law in a third state, usually when they have dual nationality with the third state and they or the victim is present in its territory.
- Through universal jurisdiction: This is a type of extra-territorial litigation which allows prosecution in a third state for grave breaches of ICL.

In many countries, sexual crimes come under the ambit of their universal jurisdiction (UJ) laws. In a number of these countries, the reach of these laws extends not only to the perpetrator themselves, but could extend to their superiors - for example, police commanders, the Police Commissioner and Ministry of Security staff. Some jurisdictions require only that a perpetrator or victim have dual nationality in that country to prosecute such crimes.
RECOMMENDATIONS

There are enormous challenges faced by the Somali government to implement its obligations to prevent and prosecute sexual violence. It is well known that the numbers of sexual violence incidents are significantly higher in conflict and post-conflict contexts, where the risks are compounded by displacement, breakdowns in social norms and lack of access to services. However, there are some practical steps that could be taken by the government to ensure that it fulfils its obligations under the frameworks outlined in this paper.

1. Develop the Family Centre in Madina Hospital into a ‘one stop’ rape crisis centre

This recommendation expands on the National Action Plans (NAPs) for the Ministry of Health and the Ministry of Women, which mandate establishing a Family Centre in Madina Hospital. This centre should have the following staff on at all times:

- A doctor with training enabling him or her to provide medical documentation;
- At least one member of the CID;
- One psycho-social support staff;

A paralegal from one of the legal aid providers. The paralegal can provide legal aid and advice. If the survivor wishes to prosecute, the paralegal should call a lawyer to attend the hospital.

2. Imbed an Independent Complaints Mechanism in the Ministry for Women and Human Rights Development

An Independent Complaints Mechanism should be imbedded in the Ministry of Women and Human Rights Development. This mechanism should be empowered to receive complaints from survivors of sexual violence committed by the security forces through the following process:

- These complaints should be submitted by legal aid providers and the survivor’s name should be anonymous. All other details of the offence should be recorded.
- The Ministry should then forward the complaint to both the relevant agency (AMISOM, the Somali Police Force or the Somali National Police) and the UN Assistance Mission in Somalia (UNSOM) Human Rights Department.
- UNSOM will oversee the investigation of these offences.
3. **Adopt Accountability Policies for the Somali Police Force and the Somali National Army**

The current NAP for the Ministry of National Security contains provisions for the vetting of the police force, but does not include activities relating to accountability. The NAP for the Ministry of Defence contains provisions for the vetting of the army, as well as provisions for accountability of the army through military courts. However, the Somali constitution states that abuses against civilians by security personnel must be tried in civilian courts. The Ministries of National Security and Defence should adopt policies which:

- Introduce a **vetting process** for all personnel under which history of sexual violence is mandatory grounds for exclusion;
- Introduce an **internal investigation and procedure** for personnel accused of SGBV and other human rights abuses, subject to external monitoring and control;
- Stipulate that all allegations of human rights abuses committed by police or army personnel are **tried in civilian courts**.

4. **Appoint specialist judges, prosecutors and investigators**

- **Appoint an SGBV Oversight Officer** in the Ministry of Women and Human Rights, who will chair the Sexual Violence Oversight Committee suggested in the National Action Plans, oversee the reporting, investigation, prosecution and court processes relating to SGBV, and report to the police commissioner, Attorney General’s Office or appropriate court when necessary.

- **Appoint one judge, 1-2 prosecutors and 2-3 Criminal Investigations Department staff**, as a pilot, to form an SGBV Unit that hears, prosecutes and investigates all sexual violence cases. These judges, prosecutors and investigators should receive intensive training by implementing partners.

5. **Release a circular prohibiting the release of perpetrators**

The Attorney General and the Police Commissioner should issue a joint circular stating that:

1. Once a person has been arrested for a crime, no person or group can intervene to prevent the conclusion of the formal legal process;

2. Any police, court or prison official who releases someone who has been charged with a crime listed in the Criminal Procedure Code Article 35(b), excluding 35(b)(viii), will be charged with Abuse of Office as per Art 250 of the Penal Code. This will result in the termination of that person’s employment and the commencement of prosecution against them.

The Prime Minister of Somalia should then make a statement expressing the government’s commitment to the circular.
The ICRC Commentary (para. 3545)

The ICRC Commentary (para. 3548) states that as a matter of common sense a superior is only under an obligation to take measures that are "within his power".

Somali Criminal Code, Art. 33.

130 S.Ct. 2278 (2010); 552 F.3d 371 (4th Cir. 2009).

Case No. 2:10-cv-342


UN Secretary General, ‘Report of the Secretary General on Somalia, 31 May 2013, http://www.securitycouncilreport.org/atf/cf/%7B65621520-56e4-42ec-9182-0c16802d50f2%7D/2013%5B6%5D/S5529-1.pdf.


Above n (US Dep), p 37


Human Rights Watch, ‘Here, Rape is Normal’, 2014.

Article 128


Articles 398 and 399

Articles 408 and 409

Article 33

Article 10

Article 11

Article 15

Article 34

Article 29

Chapter 14, Articles 127 and 128

Article 5

Article 2

Article 4

Article 6

Article 5

Article 3

Article 7

According to its Preamble, the Protocol was adopted to address the concern that ‘despite the ratification of the African Charter on Human and Peoples’ Rights and other international human rights instruments by the majority of State Parties… women in Africa still continue to be victims of discrimination and harmful practices’.


Akayesu (Trial Judgement), supra note 34, paras 686-688 (emphasis added). The Trial Chamber found that forcing a young girl to do gymnastics naked in front of a crowd constitutes sexual violence: para 688

Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust as Amicus Curiae) 2003 (1) SA 389(SCA).

C.K. et al v The Commissioner of Police et al, Petition no. 8 of 2012

Above n 11.

Above n 12.