POSITION PAPER


1. INTRODUCTION

This paper outlines the legal framework governing the legal responsibility of the United Nations (UN) to take action to ensure that it is not aiding the commission of serious violations of international humanitarian and human rights law in Somalia.

Sexual violence has been reported in very high numbers throughout Somalia, and much of this violence is being committed by state security forces. This constitutes a serious violation of international human rights and humanitarian law (IHL).

Responsibility for these violations is not limited to Somali actors. If the UN bodies supporting the security forces in Somalia do not have strategies in place to address the possible commission of serious violations of international law by those actors, they themselves may be held legally responsible.

This paper will focus on:

- Obligations of the UN under IHL
- Obligations of the UN under its Human Rights Due Diligence Policy on UN support to non-UN security forces

This paper will outline both the legal responsibility and the legal accountability of the UN in relation to the obligations above. Its purpose is to provide recommendations on how the UN might ensure that its support is not being used to facilitate violations of international human rights and humanitarian law, as well as how they may more effectively use their funds and influence to end impunity for such crimes.

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.

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.

2. CONTEXT

1.1 UN support to security actors in Somalia

The three UN agencies primarily involved in providing support and technical assistance to the Somali security forces are the United Nations Assistance Mission in Somalia (UNSOM), United Nations Support Office for AMISOM (UNSOA) and the United Nations Development Programme (UNDP) Rule of Law and Security sector.

- UNSOM provides training directly to AMISOM and the Somali National Army (SNA) in coordination with the UNSOA Training Unit. It is also a member of Somali Police Training Working Group aimed at building the capacity of Somali police to protect and promote international human rights laws and standards.
- UNSOA provides training and assistance to both AMISOM and the SNA, including on international humanitarian and human rights laws and norms, in coordination with UNSOM.
UNDP has provided training, equipment, and salary payments to officers of the Somali Police Force (SPF) as well as prison and judicial reforms through its Rule of Law and Security program since 2007.

1.1 Sexual violence by security actors 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.ii 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,iii the UN Special Representative on Sexual Violence in Conflictiv has stated that the UN has evidence of over 1,700 cases of SGBV committed in the Mogadishu area between January and November 2012,v and a representative for UN OCHA stated that 800 rapes were reported in Mogadishu in the first six months of 2013.vi

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.vii The second category includes the Somali police, military, militias and members of AMISOM. Estimates of what percentage of attacks are carried out by security forces and militias vary. 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 and Violence Prevention in 2011 estimate 30%, 64% and 70%, respectively.viii

In December 2012 Somali President Hassam 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.ix The next section outlines the involvement of each security institution in the commission of sexual violence.

5. LEGAL FRAMEWORK APPLYING TO UN AGENCIES

There are two frameworks under which the UN agencies supporting the security forces in Somalia have obligations to prevent or respond to the commission of sexual violence. These are:

1. The general rules of international humanitarian law

2. The UN Human Rights Due Diligence Policy on United Nations support to non-United Nations security forces

5.1 International Humanitarian Law

AMISOM and the SNA are involved in a non-international armed conflict, subject to the rules of international humanitarian law (IHL). The subjects of IHL include states and international organisations,xi including...
UN agencies. The United Nations Security Council established UNSOA as the oversight body for AMISOM. UNSOA and UNSOM both play a direct role in training and supporting both AMISOM and SNA troops. Under international law, these agencies therefore have the following obligations:

1. **Responsibility for staying within IHL:** UNSOA has a broad responsibility to ensure that the AMISOM mission ‘is carried out in conformity with the dictates of international law’.\(^\text{xii}\)

2. **Responsibility for breaches of IHL by troops:** International organisations may be held responsible for the actions of troops on the ground if they are found to have had ‘effective control’ over those troops at the time the commission of international crimes occurred.

3. **Responsibility for breaches of IHL by staff:** It is also possible that the staff of the UN agencies themselves will be involved in violations of international law.

4. **Responsibility to ensure reparations are made:** According to UN guidelines, the UN has a duty to ensure that reparations are made to victims of gross violations of international law perpetrated by AMISOM or SNA personnel, in circumstances in which the UN bears legal responsibility for the harm caused.\(^\text{xiii}\)

### What does international law provide in relation to sexual violence?

Common Article 3 and Additional Protocol II of the Geneva Conventions prohibit outrages upon personal dignity by military personnel against civilians,\(^\text{xiv}\) including rape, enforced prostitution and ‘any form or indecent assault’.\(^\text{xv}\)

### 5.2 UN Human Rights Due Diligence Policy on United Nations support to non-United Nations security forces

The UN Human Rights Due Diligence Policy on United Nations support to non-United Nations security forces (the ‘UN Due Diligence Policy’) requires in Section II, Part C that the UN undertake a risk assessment of the human rights implications involved in supporting non-UN security forces.

#### Risk assessment

Must assess ‘the risks involved in providing or not providing such support, in particular the risk of the recipient entity committing grave violations of international humanitarian law, human rights law or refugee law’.

The Policy is part of the mandate of UNSOM. This therefore requires that:

1. **UNSOA** undertake a risk assessment of support to AMISOM and the SNA; and
2. The **UNDP** undertake a risk assessment of support to the SPF.

Part of the risk assessment, as specified in paragraph 14 of the policy, includes an assessment of how the UN may intercede to prevent or mitigate any grave violations of
international law committed by the mission, and how it might monitor the support provided.

If the assessment concludes that there are 'substantial grounds for believing that there is a real risk of the intended recipient committing grave violations of international… law, notwithstanding any mitigatory measures that the United Nations might take, then the United Nations entity concerned must not engage in the provision of support to that intended recipient.\textsuperscript{xvi}

This provision is very clear: in such circumstances, the UN must not provide support.

It is understood that the risk assessment for AMISOM and the SNA has been carried out by the UNSOM human rights department and is currently under review. It is unclear whether any risk assessment has been carried out by the UNDP for support to the SPF.

3. INVOLVEMENT BY SECURITY FORCES IN SEXUAL VIOLENCE

The following section is relevant to determine:

1. Whether the allegations of sexual violence committed in Somalia triggers the responsibility of the UN under IHL; and
2. Whether the allegations mean that the UN agencies charged with making the risk assessment under the Due Diligence framework should determine that the current mode of support to the security forces cannot continue.

3.1 Somali Police Force

Supported by: UNDP (directly), UNSOM (indirectly)

There are currently around 6,000 registered police officers in South-Central Somalia, although the number of police men and women on active duty is a significantly smaller group. The 2012 National Security and Stabilization Plan (NSSP), which provides a blueprint for the rebuilding of Somalia's security forces, envisages a 12,000 person police force by 2015.\textsuperscript{xvii} All 6000 registered police receive a stipend from UNDP, who have difficulties monitoring activities on the ground because of security concerns. The majority of current personnel have received only limited training in the areas of human rights and sensitivity to women’s issues.\textsuperscript{xviii} There is no vetting process for those wishing to join the police force,\textsuperscript{xix} nor are there internal investigation procedures through which to handle allegations of misconduct.\textsuperscript{xx}

To date, police have not effectively, comprehensively or impartially undertaken investigations or allegations of rape or sexual abuse made by Somali women.\textsuperscript{xii} This is substantiated by the fact that there have been very high numbers of women reporting rape, but only a handful of prosecutions since the appointment of the new government, pointing to failures in the handling of these cases. In the same time, there have been five arrests of women reporting rape or journalists involved in interviewing them for offences of ‘defamation’ or ‘insult’ under the Somali Penal Code.\textsuperscript{xxii}

3.2 Somali National Army

Supported by: UNSOM, UNSOA
Estimates suggest there are more than 10,000 members in the formally constituted Somali National Army (SNA), and that around 12,000 to 13,000 soldiers from both the formal military and government-aligned militias receive government stipends. These are provided by international donors. The NSSP envisages an army of 28,000 professional soldiers by 2015. It is often difficult to distinguish between troops from the SNA and the militias that operate throughout the country, as well as other security forces and there is no national uniform for the Somali army. Since January 2014, requirements have been introduced by the UN Support Office for AMISOM (UNSOA) that SNA troops must be registered, vetted and receive compulsory training in a variety of areas, including human rights. From information received this has not yet been implemented.

Reports from the UN and other sources have alleged that SNA personnel have been involved in sexual violence. In December, while speaking to military cadets in Mogadishu, President Hassan Sheikh acknowledged that government security personnel had been involved in sexual violence and announced that those found guilty of rape would be executed. On 16 January 2013, a man was executed for rape in a military tribunal. According to information available, there have been no convictions since. The unnamed woman who accused AMISOM personnel of gang-raping her over a period of two days also claimed that it was SNA troops who abducted her from the street and delivered her to the AMISOM base.

3.3 AMISOM

AMISOM is an African Union-led peacekeeping mission authorised by the UN Security Council in 2007. The mission consists of 21,586 soldiers and 540 police officers. The military component is comprised of troops drawn from Uganda, Kenya, Burundi, Djibouti, Sierra Leone and Ethiopia, who are deployed in six sectors covering south and central Somalia.

Information on allegations of SGBV against AMISOM is patchy and available primarily through public news sources. The UN Secretary General and Security Council have recommended that AMISOM establish mechanisms to track reports of abuses:

**2001:** UN Secretary General recommended AMISOM establish a Civilian Casualty Tracking, Analysis and Response Cell (CCTARC) to record allegations of abuse and track investigations conducted by TCCs.

**2012:** AMISOM committed to doing so.

Currently: CCTARC has been established but is not functioning.
2013: UN Security Council called on the AU to "establish a system to address systematically allegations of misconduct, which includes clear mechanisms for receiving and tracking allegations, as well as for following up with troop-contributing countries on the results of investigations and disciplinary actions taken as applicable." xxxvii

Currently: It does not appear that any such system or mechanisms have been implemented.

Although it is not possible to accurately track allegations or cases made against AMISOM, it is known that such allegations exist, predominantly relating to the commission of sexual exploitation and abuse (SEA). xxxviii A rape crisis center based in Mogadishu reports having responded to 33 cases of SEA by AMISOM personnel since 2011. xxxix

Allegations against AMISOM have also included reports of rape. xli On 10 August 2013, an unnamed woman stated on the internet-based Somali channel that she was kidnapped, drugged and gang raped by uniformed African Mission in Somalia (AMISOM) soldiers. xlii Following these accusations, the Prime Minister’s office released a statement instructing the immediate formation of an ‘Investigation Committee’ to formally investigate and release a report on the incident within 60 days. xl This report was never released.

It should be noted that AMISOM is the body charged with facilitating trainings for the SNA on improving understanding and compliance with international humanitarian law (IHL) and human rights. xliii

### 6. LEGAL RESPONSIBILITY OF THE UN

#### 6.1 Legal responsibility under IHL

Article 3 of the Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts states that ‘every internationally wrongful act of an international organization entails the responsibility of the international organization.’ Thus:

<table>
<thead>
<tr>
<th>UNSOA may be held accountable for:</th>
<th>1. Failing to ensure that AMISOM remains within IHL.</th>
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<tbody>
<tr>
<td>UNSOA and UNSOM may be held accountable for:</td>
<td>2. International crimes committed by AMISOM, SNA or UN staff.</td>
</tr>
<tr>
<td></td>
<td>3. Not providing or ensuring reparations are made to victims of international crimes.</td>
</tr>
</tbody>
</table>

**First type of responsibility:** The first of these duties is vague and difficult to monitor. It appears to relate more to the mandate and official activities of the mission rather than the individual conduct of troops. It is therefore unlikely that UNSOA has violated this obligation.

**Second type of responsibility:** This would need to be determined on a case by case basis. Recent jurisprudence has tended to define ‘effective control’ as ‘factual control’ over ‘specific conduct’, determined on a case by case basis. xliiv It is possible that there have been some offences committed by AMISOM or SNA personnel who, at that time, were factually within the control of UNSOM or UNSOA.
Third type of responsibility: If the UN is legally responsible for international crimes committed by AMISOM or SNA troops as per the test above, it is liable to provide the victims with reparations. Section 15 of the UN’s Basic Principles and Guidelines on the Right to a Remedy states that, ‘In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim.’

6.2 Legal responsibility under the UN Due Diligence Policy

Responsibility of agencies

Both UNSOM and the UNDP have a responsibility to carry out the risk assessment described in Section 3.2. Both agencies have the responsibility not to support armed forces if there is a real risk they will commit grave violations of international law.

Usually, the risk assessment should be completed before support has been extended. In the present case, however, the Due Diligence Policy did not come under UNSOM’s mandate until 2013, at which point it was already providing support to AMISOM and the SNA, and when UNDP was already providing support to the SPF. In this case, a negative assessment would therefore involve withdrawing support from these bodies.

In assessing whether there is a real risk that the bodies will commit violations of international law, the answer appears to be clearly in the affirmative for all three. As detailed in section 3, these bodies have already been involved in the commission of sexual violence against civilians, which constitute war crimes and crimes against humanity.

Responsibility of individuals

In a section entitled ‘Accountability’, the policy provides that senior managers at Headquarters (Under-Secretaries-General, the Administrator of the United Nations Development Programme [UNDP], the Executive Directors of funds and programmes) are responsible for ensuring their departments regularly review their compatibility with the policy.

Case study: Best practices for a UN mission in a conflict

The United Nations Mission in Liberia (UNMIL)’s Office of the Gender Advisor (OGA), has succeeded in implementing numerous policies and strategies for the empowerment of women and the prevention of sexual violence. Best practice strategies include:

- UNMIL’s founding mandate specifically addressed the “importance of a gender perspective… in accordance with Resolution 1325”;
- UNMIL advocated for women to be involved in the country’s disarmament, demobilization, reintegration and rehabilitation activities;
- UNMIL’s Police Unit established the Liberian National Police Committee for National Recruitment of Women. The Committee created the Educational Support Programme-
a condensed high school diploma that women can complete as a pre-requisite for joining the national police force;

• The OGA established a strong relationship with the UN Country Team, and helped establish the Gender Theme Group to coordinate gender activities with them.
• The OGA supported women’s civil society to facilitate country-level consultations on the Liberian government’s poverty reduction strategy, National Action Plan on Resolution 1325, National Gender Policy and Truth and Reconciliation Report.
• The OGA provides training programmes, capacity building, technical expertise and long-term support for the Ministry of Gender.

A study by Conflict Trends concluded that UNMIL’s focus on gender has enabled it to more successfully contribute to the process of meaningful peacebuilding in Liberia.iii

7. LEGAL ACCOUNTABILITY

Article 105 of the UN Charter provides that members of the UN enjoy the privileges and immunities ‘as are necessary for the fulfilment of its purposes’. The Convention on the Privileges and Immunities of the United Nations specifies that the UN will enjoy immunity from ‘every form of legal process.’xlvii However, this immunity relates to actions the UN takes in its official capacity. Actions by individuals within the UN that cannot be considered to have been committed in their official capacity may still attract criminal liability, which may be prosecuted in the state that the alleged perpetrator is from, or in a third state using universal or extraterritorial jurisdiction. Given that the UN due diligence policy specifically provides that senior managers at Headquarters will be accountable for implementing the policy, it is also possible that they will be subject to disciplinary measures for failing to do so.

Further, the immunity given to the UN does not exist to absolve UN agencies of legal responsibility under their own policies or under international law. The UN plays a vital role in the stabilization and reconstruction of post-conflict Somalia. Its ability to continue to play that role is dependent on the confidence and trust of the Somali people and the capacity of UN actors to abide by both the standards set by international law and those they set for themselves.
# RECOMMENDATIONS

## To all UN agencies

- **Undertake vetting of UN staff**, with an emphasis on:
  - Prior direct involvement in sexual violence or SEA; or
  - Prior responsibility for sexual violence or SEA committed by subordinates as grounds for exclusion.

- Publicly name AMISOM troop contributing countries that fail to investigate and prosecute credible cases.

- Publish the report ‘Violence in the Lives of Girls and Women in the Somali Republic (draft)’, 2013 by UNDP, UNPOS and UN Women.

- Identify which UN agency is taking the lead on addressing SEA by security forces.

## To UNSOM

- Publicly release the Risk Assessment conducted into AMISOM by UNSOM.

- Support the creation of a **Unit in the Somali Ministry of Women and Human Rights Development** that has the ability to receive anonymous complaints of sexual violence committed by the security forces and follow these up with AMISOM, the Somali Army and the Somali Police Force. The Ministry should submit these complaints to the relevant agency and UNSOM Human Rights Department, who should then oversee their follow up.

- Send an independent investigation team to Somalia. This team should be prosecutor-led, trained in investigating SGBV and SEA and in collecting and preserving evidence, and be independent of AMISOM.

- Combine UNSOM’s Gender and Protection advisers into a **Gender Office that coordinates all gender activities**.

## To UNSOA

**Trainings by UNSOA should include:**

- Clear instructions on command responsibility so that military personnel understand that their commanders may be held liable for any criminal acts that they commit;

- Greater clarity and guidance should be given in training on SEA

## To UNDP

- **Conduct a Risk Assessment** of UNDP under the UN Human Rights Due Diligence Policy if it has not done so already, and **publicly release this Assessment**.

- Provide technical assistance in drafting an **accountability policy for the Somali police**.

(S/2011/759) of 9 December 2011

S/RES/2093 (2013)

Security Council: Text of Resolution 2036(2012) on AMISOM

S/RES/2093 (2013)


Information provided during a roundtable on accountability for sexual violence in Somalia in Nairobi in May 2014.

Above n 5, p 4; Human Rights Watch reports that the soldiers guarding IDP camps, which include AMISOM personnel, are complicit in the commission of rape and sexual abuse: Above n 5, p 7.


Ibid


UN’s Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

UN Security Council Resolution 1509

Section 2