



# Gender Equality and Social Inclusion Analysis

Expanding Access to Justice (EAJ) Program in Somalia

### **Acknowledgements:**

Photo Front Cover: Mohamed Abdullah Adan from PACT, SHIIR Progra; Caption: Somali women living in a small town called El Waq in Somalia have long suffered years of conflict, marginalization and drought. USAID, through a program called SHIIR (Somalis Harmonizing Inter-and-Intra Communal Relationships) has brought together women from conflicting clans to learn, decide and plan the future of their district; Location: El Waq, Somalia; 4 November 2017.

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## Abbreviations and Acronyms

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A2J	Access to Justice
ABA-ROLI	American Bar Association Rule of Law Initiative
ADR	Alternative Dispute Resolution
AMISOM	African Union Mission in Somalia
EAJ	Expanding Access to Justice Program
FGMC	female genital mutilation and cutting
FGS	Federal Government of Somalia
FHH	female-headed household
GDP	gross domestic product
IDP	internally displaced person
IPV	intimate partner violence
MDG	Millennium Development Goals
NGO	non-government organization
SCS	South Central Somalia
SGBV	sexual and gender-based violence
SOPs	standard operating procedure
UNSC	United Nations Security Council
US\$	United States dollars

## Terms and Translations

Term	Explanation
<i>Anno</i>	revenge killing
<i>Dhabar-garaac</i>	where a women or girl is abducted and abused until she marries the abductor
<i>Diya/mag group</i>	a blood-payment compensation group
<i>Dumaal</i>	forced marriage between a widow and a male relative
<i>Fiqh</i>	the science of deducing laws from the Holy texts
<i>Godobtir</i>	marriage of a female as compensation
<i>Hadith</i>	a record of an act or saying of the Prophet Muhamad written after his death
<i>Ijma'</i>	(literally 'to agree upon something') the unanimous agreement of the <i>mujtahidun</i> of the Muslim community following the Prophet's death
<i>Madhhab</i>	school of Islamic jurisprudence
<i>Gar dawo</i>	light arbitration
<i>Maslaxo</i>	restitution
<i>Muhram</i>	male guardians, usually a father, brother or uncle
<i>Qiyas</i>	the application of a ruling to a new case on the basis that the effective cause was common to both
<i>Qur'an</i>	the holy book of Islam
<i>Raganimo</i>	manhood
<i>Shafi'i</i>	one of the schools of Islamic jurisprudence in Islam
<i>Shari'ah</i>	Islamic law and jurisprudence derived from Islamic religious precepts of Islam, particularly the Quran and Hadith
<i>Sunnah</i>	acts and sayings of the Prophet and everything that he approved
<i>Tahriib</i>	irregular migration
<i>Tanazul</i>	where women are pressured into renouncing their inheritance rights to male relatives, usually her husband, brother(s) or son(s)
<i>Ulama</i>	Islamic religious leaders
<i>Xaal marin</i>	compensation usually in the form of an apology and financial remuneration
<i>Xeer</i>	Somali customary law
<i>Xigisian</i>	marriage between widower the sister of a deceased wife
<i>Fatwa</i>	a legal ruling given by a recognized religious scholar in answer to a question of religious importance

# Executive Summary

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Somali women, girls, minorities and internally displaced people (IDPs) are among the most marginalized and discriminated against groups in the world. Principal violations include sexual and gender-based violence (SGBV) (rape, forced prostitution, intimate partner violence (IPV), forced marriage, early marriage, female genital mutilation and cutting (FGMC)); denials of humanitarian assistance; land disputes; child labor and trafficking; forced recruitment; and forced migration. Within these groups, there are large pockets of multi-faceted vulnerability and intersectionality. Poverty, clan status, displacement and bereavement can each operate to expose individuals or families to broadened risks and threats. Vulnerability is also contextual and dynamic. Marriage, divorce, aging and displacement can create new risks for an individual, or in some cases negate them. For these groups, access to justice can be described as highly limited.

Across Somalia, as in many other countries, access to justice is embedded in a context of legal pluralism, in which different justice institutions, authorities and normative orders exist. While the *shari'ah* constitutionally serves as the basis of all justice, strong local justice norms and concepts are expressed in the local 'xeer'. A fledgling system of state courts and statutory laws exists, but only in a complex interplay with *shari'ah* and *xeer* norms.

While the *xeer* and state courts co-exist in a state of mild tension, both ultimately operate to protect the collective and individual interests of adult males from majority clans. Moreover, while women and marginalized groups are best protected under the binary *shari'ah*-secular laws, the structures representing these remain largely out of reach. Judges, prosecutors, defense attorneys and police are insufficiently trained and resourced, and their relative strength compared to the clans leaves them with only perfunctory authority in many locales. The outcome is one of uncertainty; complainants cannot be sure what law will be applied, nor whether a court will assert its jurisdiction, and if it does, whether it will make a judgement according to law or *xeer*. This recipe does not offer women and minorities a sufficiently improved alternative to encourage them to access the courts, particularly given the backlash they may face for disrespecting social conventions. Thus, whether by choice or lack of options, in practice, women tend to engage the *xeer* system – the system that is least structured to protect their rights. However, minority clans and IDPs may not even have this option. Their lack of relative power leaves them highly exposed to violence and expropriation, including by officials. At the same time, they are less likely to have their complaints taken seriously by courts and have little or no bargaining power to seek redress through *xeer*. The takeaway is that women and other marginalized groups currently lack the tools to work the plural system to their advantage; stripped of meaningful choice and bargaining power, many are relegated to *xeer* where clan interest is the unabashed object of protection, or they are forced into silence as a tool of self-preservation. Taking these challenges into account, approaches should on the one hand support a gradual transfer of influence and power in favor of a strengthened formal justice model, while on the other support normative and attitudinal changes that reflect international human rights standards in society and its informal justice institutions.

## Principal Access to Justice Challenges

- **Lack of confidence in the formal justice system:** Poor knowledge on the part of justice sector actors, coupled with low resourcing and power asymmetries vis-à-vis the clans means that rights holders do not know what law/norms will be applied.
- **Legal pluralism:** The pluralism inscribed in the constitutions of the FGS, Puntland and Somaliland is complicated by the fact that judges are poorly schooled in both *shari'ah* and secular law. This vests judges with broad liberty when resolving cases, creating opportunities for corruption and loopholes for power-holders to influence judgments.
- **Different conceptualizations of justice:** The patriarchy underpinning the clan system, deeply entrenched discrimination, and decades of inequality have normalized certain practices to the point where they are no longer regarded as rights violations.
- **Exclusion from decision-making:** Marginalized groups are excluded from participating in discussions and adjudication processes relating to issues that impact them; such exclusion permeates the entire justice system, from rules requiring that women be represented at *xeer* by a male relative, through to the lack of female and minority representation in policing services, courts or governance.

- **Relative strength and durability of the clan system vis-à-vis the state:** Clans use power differentials to control outcomes and exercise *de facto* authority over jurisdictional matters, for both political ends and functional reasons.

### Principal Access to Justice Goals

- **Strengthened courts:** Women and marginalized groups will not be sufficiently incentivized to use the courts until outcomes become more reliable and law-based and inroads for corruption and influence are closed. This will require steady investment in the capacity of the personnel staffing the justice and policing sectors, as well as a bolstering of the resources available to them.
- **Expansion of justice options:** Providing marginalized groups with more and better justice options must start with broadening the reach of judicial and policing services into rural and peri-urban areas, for example, through mobile courts, and removing cost and conceptual barriers through expanded legal aid.
- **Rights awareness:** Improved rights awareness is an essential complement to improved access to judicial fora. Such knowledge extends beyond laws and procedure to include *shari'ah*, insight into what constitutes a violation of individual rights and basic justice principles such as equality and individual rights.
- **Norms and attitudinal transformation:** Beyond the strengthening of the formal justice system as a key conduit for rights protection, change in norms and attitudes among the population and among informal justice providers can similarly promote individualist-based rights in practice. Rights awareness, legal aid or mobile courts can be drivers in the change of local normative orders.

# I. Introduction

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In Somalia, norms, institutional structures, economic forces and security imperatives combine in complex and dynamic ways to craft the environment in which women and marginalized groups exist. Understanding these influences is pivotal to designing impactful and safe interventions that will serve broader access to justice goals. To this end, the following gender and social inclusion analysis seeks to map the context against which different groups experience violence and rights violations, and in turn have them dealt with. It identifies key players, institutions and social influences and tries to explain existing and potential future trends.

## Aims and Objectives

It is broadly accepted that Somali women, girls, minorities and internally displaced persons (IDPs) are among the most marginalized and discriminated against in the world. Their exposure to violence, vulnerability to dangerous cultural practices, and lack of participation in decisions that impact and shape their lives is well documented in both academic studies and the experiences of non-government, humanitarian and development agencies. While these issues may appear clear cut, care must be taken to avoid generalizations when crafting policy and programs. Within these groups, there are hierarchies of power and influence, as well as large pockets of multi-faceted vulnerability. Poverty, clan status, displacement and bereavement can each operate to expose individuals or families to broadened risks and threats. It is particularly important to avoid generalizations based on gender. The power structures and social orders that regulate Somali society are complex, geographically heterogeneous and dynamic. For some women, their clan, marital status, resources or political connections allows them to exercise power over or even exploit others, including the displaced, those from minority clans, the poor and some groups of men. Reciprocally, men – especially young men, minority clan members and those who are displaced – share many of the challenges generally attributed to women and girls. The common thread is that discrimination and exclusion – gender-related or otherwise – are manifestations of power holdings, built up over time in response to economic and political factors, as well as the civil conflict. This has manifested in a normative and governance system dominated by men and majority clans, which reflects and reinforces a skewed set of priorities.<sup>1</sup> **The takeaway is that individual or group vulnerability must be understood in relation to other social, economic and political inequalities, as well as competitions over power, resources and political control.**

Moving towards a more egalitarian society is a principal policy objective, enshrined in Somalia's national legal system as well as donor policy and the international jurisprudential framework. On the one hand, gender equality and protection against discrimination are among the most fundamental of human rights. On the other – and from a more localized perspective – it is clear that when a large proportion of the population's views, needs and interests do not inform decision-making and policy prioritization, the likelihood of impact and sustainability is greatly diminished. Indeed, there is a solid body of evidence connecting an empowered population to outcomes ranging from economic growth, to improved health statistics and environmental sustainability.<sup>2</sup> For example, societies with large and persistent gender gaps tend to suffer more from poverty, malnutrition and illness, whereas more equal societies grow, enjoy improved living standards

Poverty, weak governance and insecurity are both causes and consequences of exclusion, discrimination and marginalization. These forces operate in a self-fulfilling and mutually constituting manner sustained by established power hierarchies, vested interests and entrenched cultural norms. Reversing this situation will require deliberate and targeted actions to protect the marginalized from violence and exploitation, as well as interventions targeting the causal drivers and structural inhibitors.

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<sup>1</sup> C Sweetman and J Rowlands, 'Introduction: Working on Gender Equality in Fragile Contexts', *Gender and Development*, 24:3, 337-351 (2016)

<sup>2</sup> See e.g., 'UN World Survey on the Role of Women in Development' (2014) [http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2014/unwomen\\_surveyreport\\_advance\\_16oct.pdf](http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2014/unwomen_surveyreport_advance_16oct.pdf)

and are more stable.<sup>3</sup> Most recently, trends indicate that women’s participation and inclusion improves the success of peace negotiations, the duration of a peace agreement, and post-conflict economic recovery.<sup>4</sup>

From this, the principal question for access to justice initiatives is how to interrupt the pathways that maintain gender bias and social exclusion in a way that will facilitate transition towards equality most rapidly and painlessly. The scholarship suggests that while economic development and peace maintenance does improve the rights of and opportunities available to suppressed groups, these forces alone are insufficient to ensure full protection and rights realization.<sup>5</sup> Specific actions to enhance the opportunities, positioning and agency of women, minorities and IDPs will thus be required to dilute the process of domination by those in power and create a framework that reflects the needs and priorities of Somalia’s eclectic population.

Strategies to induce such changes need to be developed against a nuanced understanding of Somali gender identities, social dynamics and power structures, as well as the clan, religious and economic forces that influence them.<sup>6</sup> A key challenge is that the causal factors and sustaining systems cut across several spheres and sectors, making it difficult to isolate or compartmentalize so-called gender or discrimination problems. Violence, for example, is generally understood to be a gender-related, societal phenomenon. In the Somali context, however, violence has not only gender dimensions but can also be linked to asymmetries in political power, competition for resources, and generalized fragility.<sup>7</sup> Another example is the role of marginalized groups in maintaining, either consciously or inadvertently, cultural practices that are harmful to them. Examples include female genital mutilation and cutting (FGMC, or women viewing domestic violence and rape as shameful issues to be kept within the family sphere.<sup>8</sup> A final example relates to beneficiary targeting. While men are not the typical objects of gender programming, Somali societal tensions around gender relations are closely connected to the civil conflict and consequent economic stagnation. Male role displacement, decreased social mobility and their inability to fulfil basic socio-cultural expectations has unquestionably exposed women to heightened levels of violence and exclusion. Each of these examples demonstrate that **only when gender inequality and social exclusion are seen as multidimensional and contextualized phenomena can holistic and impactful responses be developed.**

This table sets out the relations, norms and asymmetries that can impact decision-making around rights violations and the pathways for addressing them. The list is non-exhaustive; its purpose is to illustrate how multi-faceted vulnerability begets myriad secondary implications, all of which need to be assessed in order for the best possible outcome to be secured.

Principal considerations	Knock-on considerations
Victim clan positioning vis-à-vis perpetrator clan	<ul style="list-style-type: none"> <li>• The availability of a <i>xeer</i> option (e.g., displaced persons may not have a clan to represent them)?</li> <li>• Possibility of threats or retaliation if there is a power asymmetry between the victim and perpetrator clans?</li> <li>• Likelihood that judge can be influenced/pressured by dominant clan?</li> </ul>
Clan/family preference for dispute resolution modality and outcome	<ul style="list-style-type: none"> <li>• Likely outcome under <i>xeer</i> vis-à-vis protections offered under law?</li> <li>• Is preferred outcome compatible with the rights of the victim under law/<i>shari’ah</i>?</li> <li>• Likelihood of court judgement being realized if there is family/clan resistance?</li> <li>• Enforceability of a court judgement?</li> <li>• Potential that victim will be exposed to retaliation/greater vulnerability at community level for having access the courts?</li> <li>• Preference/knowledge of rights-holder regarding potential outcomes?</li> </ul>
Gender/minority status	<ul style="list-style-type: none"> <li>• Different legal outcomes under <i>xeer</i> based on gender or clan status vis-à-vis outcomes possible at court?</li> <li>• Possibility of discrimination/retaliation at court and police levels?</li> </ul>

<sup>3</sup> *Engendering Development: Through Gender Equality in Rights, Resources and Voice*, World Bank Group and Oxford University Press (2001) 8.

<sup>4</sup> C Sweetman and J Rowlands, ‘Introduction: Working on Gender Equality in Fragile Contexts’, *Gender and Development*, 24:3, 337-351 (2016)

<sup>5</sup> See e.g., E Duflo ‘Women Empowerment and Economic Development’ *Journal of Economic Literature*, 50:4 (2012).

<sup>6</sup> F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013) 57.

<sup>7</sup> ‘The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia’ *International Committee for the Development of Peoples and International Alert*, (2015) 12-13.

<sup>8</sup> *Ibid.*

Principal considerations	Knock-on considerations
Discriminatory cultural norms	<ul style="list-style-type: none"> <li>• Is the violation viewed as a crime, even if under statute?</li> <li>• Potential social implications of raising a rights violation deemed 'private' under customary norms?</li> </ul>
Role of <i>shari'ah</i> interpretation	<ul style="list-style-type: none"> <li>• Is the violation supported or prohibited under <i>shari'ah</i>?</li> <li>• <i>Xeer</i> leader/judge's knowledge of <i>shari'ah</i>?</li> <li>• Existence of a clash between <i>xeer</i> and <i>shari'ah</i>?</li> <li>• Relative power asymmetries between the ulama, judge and <i>xeer</i> leader (if different)?</li> </ul>
Economic status	<ul style="list-style-type: none"> <li>• Willingness/capacity of family/clan support a court action?</li> <li>• Victim's access to independent financial resources?</li> <li>• Availability of and access to legal aid?</li> <li>• Likelihood of corruption impacting case outcome?</li> <li>• Other costs such as transport, bribes, temporary closure of a business?</li> </ul>
Security implications	<ul style="list-style-type: none"> <li>• Likelihood of conflict spill-over (intra- or inter-clan)?</li> <li>• Exposure to greater vulnerability e.g., retaliatory attack, expulsion from IDP camp, social exclusion?</li> <li>• Access to safe public transportation and travel documents?</li> </ul>
Other considerations	<ul style="list-style-type: none"> <li>• Presence of and access to medical facilities?</li> <li>• Presence of and access to psycho-social assistance and/or women's shelters?</li> <li>• Access to humanitarian and/or material assistance?</li> <li>• Access to education?</li> </ul>

The complexity of the structures, conventions and forces influencing vulnerability, and their mutually constituting nature, has important implications for access to justice programming:

- To the extent that gender-based discrimination and social exclusion is rooted in culture, deeply entrenched norms and established power hierarchies, **progress will often be incremental and non-linear**. Programming will need to set goals that are realistic, pragmatic and, thus, modest in terms of protection outcomes and attitudinal changes. Moreover, approaches should anticipate that 'small wins' will occur alongside negative outcomes in terms of where and how disputes are resolved. This should not be cause for discouragement. Such small wins can have disproportionately positive spill-over effects in terms of norm diffusion; capacity development; identifying and empowering change agents; and providing material for advocacy actions. In any case, plans to manage foreseeable developments and regressions should be integrated into program development and management.
- Gains in protection, inclusivity and empowerment need to be approached through **a social cohesion and conflict sensitivity lens**. The structures and hierarchies giving rise to gender stereotypes and marginalization also maintain stability; any shifts to the former have the potential to spill over into conflict or create discord between or within groups, thus creating opportunities for spoilers. This means that programming will need to develop and apply risk assessment tools at both the individual and community levels. Again, this may lead to varied outcomes, and the process of balancing individual justice against broader vulnerability and conflict risk brings many ethical questions to the fore.
- Because those with the power to modify gender norms and social exclusion have much to lose in terms of power consolidation and resource allocations, **interventions promoting gender equality, non-discrimination and enhanced participation have the potential to cause harm and result in increased violence or a consolidation of existing hierarchies**. The importance of developing risk assessments and decision-guidance tools is mentioned above. Equally important is the notion of informed decision-making on the part of the rights holder. A key role of paralegals and legal services providers will be to assist beneficiaries understand the rights and options *against* their broader social, economic and security context. This includes an examination of all potential scenarios and their implications for the individual, and persons related or connected to them. In concert, the paralegal/legal services provider must also assess the potential risks they and others, including contracted lawyers, judges, police, detention workers, and/or medical or psycho-social workers, may face.

## Methodology

This analysis relied upon three approaches. First, a desk review of academic, policy and country-specific literature on customary justice, minority rights, gender and access to justice (bibliographic database search, institutional database consultation and searching on specific websites), as well as material produced by the project. A list of articles and texts reviewed appears in annex II. The search focused on literature produced since 2009 in order to build upon research conducted in post-conflict and transitional period. The focus was informed by the research questions included in the terms of reference, as well as research sub-questions developed by the author on an iterative basis. The knowledge generated from the literature review was synthesized and examined on a content basis. Second, a (non-scientific) audit of the principal donors in the justice field was undertaken. These donors were: USAID, DFID, Swiss Development Cooperation, GIZ, Dutch Aid, Sweden and the EU. In addition, the largest operational agencies in the justice field were identified, again using a non-scientific process: Norwegian Refugee Council, World Bank, UNDP, OHCHR, UNICEF, UNHCR, UN-Women. For each of these entities, a review of their programming, policy documents and positional statements regarding access to justice was undertaken. From this analysis, a set of investigation areas were elaborated based on gaps in the knowledge base and specific points of learning relevant to the project.

## 2. History and Analysis of Somali Gender Relations and Social Order

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Somalia's socially complex and conflict-ridden history is pivotal to understanding the position of marginalized groups, their specific vulnerabilities and opportunities for their enhancing protection. To that end, this section discusses Somalia's social order, the conflict, and current trends in brief detail with an emphasis on women and other excluded groups.

Somalia is a small country spanning around 250,000 square miles, (approximately the size of Sweden) with an estimated population of around 15 million, steeply concentrated towards youth.<sup>9</sup> Situated in the Horn of Africa, Somalia has dual sea access to the Gulf of Aden and Indian ocean, and shares borders with Djibouti, Ethiopia and Kenya. Despite being predominately arid, Somalia's economy is heavily dependent on agriculture. Today, this sector accounts for an estimated 65% of both Gross Domestic Product (GDP) and employment; 60-80% of the population are nomadic pastoralists or agro-pastoralists tending goats, sheep, camel and cattle. Somalis also rely heavily on remittances, and the economy is largely informal with small petty trading of low value goods. This, coupled with near chronic conflict and instability since its independence in 1960, has resulted in stagnating development and widespread poverty.

Somalis are almost exclusively Muslims structured into patrilineal clans. Clan ideology regulates all aspects life — political, economic, security, institutional and social — and is the principal determinant of safety, security, accountability, opportunity, access to services and protection. Two central tenets of the clan operating system are patriarchy and social hierarchy, creating important implications for women, girls and other socially marginalized groups.

Clans are composed of members who are linked together through a *diya*-paying (*mag*) group. These groups — which may number hundreds up to several thousand — are linked together through up to eight generations of male blood lines. The *diya*-paying group can be best understood as a security-political alliance. Members are contractually bound to protect the interests of the group with undivided loyalty, and in turn can rely upon the group for protection and to collectively take responsibility for a member's actions against another group. Clans co-exist in a clearly-defined socio-political hierarchy. Majority clans enjoy greater numbers, wealth, and stronger negotiating power.<sup>10</sup> Minority clans, by contrast, suffer discrimination, enjoy less protection and have limited access to resources.

Within any clan, a male's alliances, opportunities and responsibilities are static. This is not the case for women. Although clan identity is inherited from one's father, a woman will likely enter a different sub-clan or even clan upon marriage.<sup>11</sup> The implications are broad-reaching. First, it explains the limitations on women's inheritance; although under Islam and statutory law women are entitled to inheritance, in practice, if they inherit at all, they will rarely inherit valuable assets such as land and income-producing animals. It can also make investing in girls — for example in their education — a perceived misuse of scarce resources, especially in times of poverty and insecurity.<sup>12</sup> Over and above this — whether they are born into or marry into a clan — women are not considered principals; they are not *diya*-paying members and thus do not usually share in *diya* receipts, even if they relate to a violation against them. This somewhat explains why women are excluded from *diya* negotiations when crimes occur. It also creates important vulnerabilities. While a woman must be protected by her clan members by convention, as a non-*diya* paying member and one who cannot contribute to clan security in times of conflict, women will always be less valuable and more dispensable.

A final noteworthy point is that when a female moves clans upon marriage, she will often retain close ties to her birth clan and may even share bonds with her maternal relatives' clans. This multifaceted identity is an asset for women as well as an encumbrance. On the one hand, she can call on these relationships for protection, support and influence in times of conflict. It can also imbue her with a peacebuilding/negotiation

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<sup>9</sup> Up to 45% of the population are thought to be under 15 years, however Somalia's last official census took place in 1975 so estimates are relied upon.

<sup>10</sup> For a discussion on majority and minority clans, see "The Role of Women in Promoting Peace and Development: Proceedings of the 10th Annual Conference on the Horn of Africa" Sweden (2011), *N Svensson (ed.)* 112-115; "The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia" International Committee for the Development of Peoples and International Alert, (2015) 17.

<sup>11</sup> Majority clans prefer exogamous marriage i.e., marriage between couples from different clans or sub-clans.

<sup>12</sup> 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 36-37.

role. If clans to which she has links to are in conflict, she has both motivation and relationships that she can draw upon to negotiate a solution.<sup>13</sup> The flipside is that women are understood as having divided loyalties and never considered a permanent clan member, providing further rationale for their exclusion from clan negotiations, deliberations and decision-making. The results cannot be understated. Non-participation in important discussions pertaining to their safety, security and protection means that women's views, needs and perspectives cannot directly influence clan conventions or norm evolution.<sup>14</sup>

This is not to say that clan functioning, social hierarchies and gender roles have not changed over time or with circumstance. During the Barre political period (1969-1991),<sup>15</sup> broad reforms widened women's rights and protection — from equal rights in marriage, divorce and inheritance, to opportunities for political participation and protection from SGBV.<sup>16</sup> While the reform agenda may not have been fully realized, women were certainly better off than those in comparable African contexts. Such reforms, however, would eventually prove to be a double-edged sword. A key objective of the Barre administration was to reduce clan power; it sought to ban clan identity, curb the use of customary law and limit social exclusion practices. One tool for achieving this was to empower traditionally disenfranchised women as political pawns. As the state, clan leaders and religious leaders jostled for power, women (and their empowerment) came to be seen as a symbol of this 'divide and conquer' political era.<sup>17</sup>

When the Barre government collapsed in 1991 the country descended into civil war, punctuated by natural disasters such as drought and famine.<sup>18</sup> The clan system regained strength, along with norms of discrimination, exclusion and inequality. Women and minority clans existed in a general state of eroded protection.<sup>19</sup> The Islamic Courts Union established a system of courts, policing services and prisons with a strict and conservative brand of *shari'ah* applied. **The plural justice system composed of *xeer*, secular law (in the few areas where the state was strong enough to assert control) and *shari'ah* meant that the powerful had more and better options to assert their strength over less powerful groups.**<sup>20</sup> Moreover, the gains made during the Barre period were reversed; exclusion and clan hierarchy re-emerged as the determinative forces for protection, and women's enfranchisement, in particular, was seen as a risk that could not afford to be repeated.

A second implication of this conflict period was the use of sexual violence against women as a tool of war, including *leheyste-galmo*, a form of sexual hostage-taking.<sup>21</sup> **While SGBV and other physical protection violations, such as child marriage, FGMC and domestic violence, were already normative practices, the conflict arguably played a role in further normalizing sexual violence and was pivotal in the high incidence of rape that continues in Somalia today.**<sup>22</sup>

A third implication was also gender-specific: the extent to which women were forced to assume male roles and the implications this has had on gender identity and relations. The division of labor that had previously existed shifted as women became principal breadwinners and took on tasks traditionally reserved for men

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<sup>13</sup> Ibid; F Musse and J Gardner 'A Gender Profile of Somalia' EU Mission Somalia (2013) 21-22; see further 'The Role of Women in Promoting Peace and Development: Proceedings of the 10th Annual Conference on the Horn of Africa' Sweden (2011), N Svensson (*ed.*) 233-234.

<sup>14</sup> 'The Role of Women in Promoting Peace and Development: Proceedings of the 10th Annual Conference on the Horn of Africa' Sweden (2011), N Svensson (*ed.*) 229.

<sup>15</sup> Somalia's first president Abdi Rashid Ali Shermarke was assassinated in 1969, opening up the rein of Mohamed Siad Barre.

<sup>16</sup> see further Family Law (1975) Somalia. 'The Role of Women in Promoting Peace and Development: Proceedings of the 10th Annual Conference on the Horn of Africa' Sweden (2011), N Svensson (*ed.*) 228; 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015) 27-28.

<sup>17</sup> 'SSF II Gender Equality and Social Inclusion Strategy', Somalia Stability Fund (2017) 37-38.

<sup>18</sup> For example, in 1992 a drought killed up to 300,000.

<sup>19</sup> 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015) 18; 'SSF II Gender Equality and Social Inclusion Strategy', Somalia Stability Fund (2017) 5.

<sup>20</sup> 1991 also saw Somaliland declare independence from Somalia, followed by Puntland and Jubaland in 1998.

<sup>21</sup> The practice involved armed men raiding the area of an opposing clan to either kidnap women and young girls or occupy the settlement and keep the women in captivity in their own homes; the victims were used as sexual slaves and to provide domestic services. The practice was usually restricted to times of clan warfare, but gained in strength during the civil conflict. 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015) 32-33.

<sup>22</sup> Ibid, p. 27-30.

through economic necessity. Wealthier women in urban areas started to engage in trade activities in the informal economy, including livestock trading, currency exchange and fuel sales, while more marginalized and displaced women were employed as manual and household laborers. Although this expanded women's economic independence and opportunities, the patriarchal social system remained fundamentally intact and women's economic power did not translate into gains in decision-making or political power. These shifting gender roles, and particularly the inability of men to fulfil the normative roles assigned to them, i.e., breadwinners and providers/protectors of the family unit, have also been presented as an explanation for increased rates of domestic violence.<sup>23</sup>

A final consequence of the void in political control and security was the emergence of Islamic political extremism. In 2006, the Islamic Courts Union took control of the south of the country, including the capital Mogadishu, in one of the worst incidences of violence Somalia had yet experienced.<sup>24</sup> For women, the curtailment of rights and interpretation of freedoms under Islam were unprecedented. Although the occupation was short-lived, the conservative influence is still observable.

Instability prevailed until 2012 when a new federal government was born within the framework established by the Provisional Constitution and followed by the Somali New Deal and Compact (2014-2016) and New Partnership for Somalia (2017).<sup>25</sup> Despite these trends, the position of women and other excluded groups remains dire according to almost every development indicator. Somalia has a gender inequality index of 0.773 — a score only surpassed by Yemen, Mali, Afghanistan and Papua New Guinea.<sup>26</sup> Women suffer particularly severe exclusion in the areas of health, education and labor market participation.<sup>27</sup> Women's access to health services are limited, and Somalia's maternal mortality rates are among the highest in the world at 1,600 per 100,000 live births with only 9% of births attended by a midwife.<sup>28</sup> FGMC is almost universal and is usually practiced in its most severe form on girls between the ages of 4–11 years.

Somalia has one of the world's lowest gross enrolment rates for primary school children; as of 2012, only 42% of children attended school and of those only 36% were girls.<sup>29</sup> Drivers of low school enrolment include generalized discrimination based on clan and gender, the nebulous position of women within the clan unit (discussed earlier) and high rates of early marriage (45% of women aged 20–24 are married before the age of 18).<sup>30</sup>

Poor education and literacy rates<sup>31</sup> coupled with low rights and opportunities around asset accumulation and responsibilities divided by gender roles leave women with few formal employment options. This is not to say that women do not work, however. Some estimates have women contributing up to 60% of Gross National Product and up to 70% of family income.<sup>32</sup> But this employment is predominately in the informal sector, in low wage positions (an average of US\$3 per day) and in menial roles that men will not assume, such as agriculture and domestic labor.<sup>33</sup> In such roles there is little regulation or formal protection, which leaves women highly

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<sup>23</sup> Ibid, p. 18; see further F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013) 60–62.

<sup>24</sup> By 2007 most Islamists had fled the country, but some groups splintered and formed new entities including Al-Shabaab.

<sup>25</sup> The New Deal Compact is an organizing framework for the delivery of assistance to Somalia in line with national priorities and increasingly delivering through Somali institutions. The New Partnership for Somalia 2017 is structured around 4 development pillars: a) Humanitarian Assistance, b) Strengthening National Security, c) More Inclusive Stable Politics, and d) Accelerating Economic Recovery.

<sup>26</sup> 'Somalia Human Development Report: Empowering Youth for Peace and Development', UNDP (2012) 29. The GII reflects women's disadvantages in three dimensions—reproductive health, empowerment and economic activity. It shows the loss in human development due to inequality between female and male achievements in these dimensions. It ranges from zero (complete gender equality), to one (extreme gender inequality). 'Gender in Somalia Brief', UNDP, 2.

<sup>27</sup> 'Somalia Human Development Report: Empowering Youth for Peace and Development', UNDP (2012).

<sup>28</sup> Mortality rates largely a consequence of early marriage and thus early pregnancy, greater vulnerability to violence and secondary health risks; 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 19–20.

<sup>29</sup> 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' 17. In primary schools, the Gender Parity Index (GPI) is 0.9; in secondary school the GPI drops to 0.7. See further [www.unicef.org/somalia/education.html](http://www.unicef.org/somalia/education.html).

<sup>30</sup> 'Gender in Somalia Brief', UNDP, 2.

<sup>31</sup> The female literacy rate of around 26% in 2006 must be compared to 36% for men, and 31% overall.

<sup>32</sup> 'SSF II Gender Equality and Social Inclusion Strategy', Somalia Stability Fund (2017) 6; M Beata Tungaraza 'Women's Human Rights in Somaliland' NAGAAD, Ministry of Justice Somaliland 7.

<sup>33</sup> 'Somalia Human Development Report: Empowering Youth for Peace and Development', UNDP (2012); 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 29; 'Gender in Somalia Brief', UNDP, 3–4; see further F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013) 45–6.

vulnerable to exploitation and abuse.<sup>34</sup> Women also have limited autonomy to alter their situation. With poor access to and control over assets, little union representation, generalized discrimination and non-delegable household responsibilities, they cannot obtain credit, and thus cannot enter the formal market or start a business.<sup>35</sup> As such, it should not be surprising that women, especially those displaced and from minority clans, are among the most politically, economically and socially disempowered group in Somalia today.<sup>36</sup>

These ends speak to a more pervasive problem of participation and representation. Despite the introduction of a gender quota in the public sector in 2007, engagement in politics and governance remains limited to men and majority clans.<sup>37</sup> Where women and minorities are positioned, these are generally not in decision-making roles, which limits their ability to influence policy and funds distribution.<sup>38</sup> Civil society organizations, although growing in number, still have limited power and reach.<sup>39</sup> **The result is a self-reinforcing cycle of disempowerment; with men and powerful clans dominating the lucrative positions in the economy, controlling credit markets and monopolizing (local and state) political processes, women, IDPs and minorities have few economic opportunities, their productivity remains limited and their ability to control their education and health outcomes are poor.**<sup>40</sup>

## Guiding Points

- Somalia is dominated by an informal and pastoral-based economy where women and minority groups are currently active but discriminated against in terms of earnings, occupational rank and occupational mobility. The risk associated with informality is that rights abrogating practices are often hidden. Examples include the private nature of domestic service and power differentials between employers and their very poor employees. Approaches may need to take special measures to seek out and assist those most at risk of violating labor practices, including women, children and displaced persons. However, while labor market dynamics currently present a constraint, this can change rapidly in the context of a post-conflict growth period. Employment and economic growth have a shielding influence against conflict recidivism. As such, projects to stimulate the economy in sectors where labor needs are greatest are likely to be at the top of most donor agendas. This will create new opportunities for marginalized groups that they can use to augment their resource holdings and thus their relative power. As this takes place, it is important to promote labor rights.
- Somalis are almost exclusively Muslim and, although there is some competition around preferred *madhab* (schools of jurisprudence), religion is not a divisive issue. Quite the contrary, Islam has peremptory standing, as indicated in the FSG, Somaliland, and Puntland Constitutions. As such, religion might be a tool to galvanize population groups and promote unity around a given set of norms and ideals. A key entry point for enhancing the protection of marginalized groups is the areas of practice where *xeer* and *shari'ah* conflict, such as freedom in marriage, inheritance and prohibitions against rape and domestic violence. Modalities for how progressive interpretations of *shari'ah* might be used to contest *xeer* or promote adherence to statute should be explored.
- The clan system, its *raison d'être* and modalities of functioning are core impediments to an enhanced protection framework based on equality and individual rights. The historic and entrenched nature of

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<sup>34</sup> F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013) 14.

<sup>35</sup> 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 15, 29-30; 'SSF II Gender Equality and Social Inclusion Strategy', Somalia Stability Fund (2017) 7; F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013) 14; 'Gender in Somalia Brief', UNDP, 2.

<sup>36</sup> 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015) 18.

<sup>37</sup> For further discussion on the gender quota see 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 31-32, 'SSF II Gender Equality and Social Inclusion Strategy', Somalia Stability Fund (2017) 6, 9; F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013) 14, 25-28; 'Gender in Somalia Brief', UNDP, 3, 6 and 9; 'The Role of Women in Promoting Peace and Development: Proceedings of the 10th Annual Conference on the Horn of Africa' Sweden (2011), *N Svensson (ed.)* 103.

<sup>38</sup> 'SSF II Gender Equality and Social Inclusion Strategy', Somalia Stability Fund (2017) 7.

<sup>39</sup> 'The Role of Women in Promoting Peace and Development: Proceedings of the 10th Annual Conference on the Horn of Africa' Sweden (2011), *N Svensson (ed.)* 27, 231-232.

<sup>40</sup> 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 15; under the Multidimensional Poverty Index (MPI) Somalia scores 0.47 out of 1, placing it 94th out of 104 countries (2010). Somalia has been categorized as a least developed country since 1971 with approximately 43% of Somalis living below the poverty line, and poverty being more concentrated in rural areas and among women.

this system means that reform will be slow and with significant resistance to change. A positive point is that the dominance of the clan system is inherently related to security provision. The implication is that as the operational environment stabilizes, the key logic propping up the clan system will weaken. At this point, those with vested interests in maintaining the clan system (its leaders and those who benefit from associated power, influence and resource control) may either find themselves with reduced influence or a need to find new roles in a revised socio-political order. This presents a key opportunity to promote a re-envisioning of practices that are inimical to women and other marginalized groups, including the elimination of harmful cultural practices, enforcing inheritance rights, participation in dispute resolution processes and assertion of state jurisdiction in cases involving sexual violence.

- Chronic conflict has normalized violence and diluted historic *xeer* rules regulating protection in the context of inter-clan warfare. Somalia already has, embedded in its history and traditions, a framework for protecting society's most vulnerable groups. These norms and practices are important sources of guidance that should be harnessed for learning and advocacy purposes. Furthermore, violence has become so entrenched across generations that specific action needs to be taken targeting attitudinal norms. Such actions must be inclusive of all groups, including both those most vulnerable to violence and those most likely to perpetrate it. Particular attention needs to focus on youth who have grown up against a backdrop of civil war and suffer disproportionately in terms of limited opportunity and role displacement.
- After decades of civil war and a period of control by Islamic extremists, the situation in Somalia is still instable. The risk of conflict recidivism is high, and the balancing of political power is fragile. Peace maintenance and efforts to guard against extremist activity will be at the fore of the government and donor agenda for years to come. Programming needs to be cognoscente that these imperatives will likely trump access to justice, individualized justice and the promotion of a more egalitarian society. To ameliorate this situation, a research agenda should be developed that seeks to build evidence on the linkages between peace maintenance, protection against extremism, justice, violence control and equality.

### 3. Marginalized and Excluded Groups and the Violations Against Them

The following section identifies specific groups in Somali society that are discriminated against, face protection risks or are otherwise excluded or marginalized either by virtue of their gender, clan affiliation, race or other characteristics. It separately discusses the specific types of violations, practices and crimes these groups are most vulnerable to. Inevitably, this results in some intersectionality; specific risk typologies can overlap more than one group, and individuals can belong to multiple marginalized groups simultaneously or over the course of their lives. For example, women, as a gender group, are vulnerable to specific protection concerns. But women may also form part of one or more separate marginalized groups — for example IDP women or IDP women belonging to minority tribes.<sup>41</sup> This should not imply however, that all women face the same challenges; urban women from wealthier clans can sometimes be above the law or exploit other women or minority groups.<sup>42</sup> Vulnerability is also contextual and dynamic. Marriage, divorce, bereavement, aging and displacement can create new risks for an individual or in some cases negate them. A final point is that chronic conflict, weak governance and Somalia’s exposure to natural disasters means that no group or individual is risk impervious; who is excluded or rights vulnerable can change quickly and unexpectedly. The principal takeaway is that there is no single profile for exclusion or marginalization in Somali society.

This means that pervasiveness of risk requires that compound vulnerability be at the fore of strategic decision-making. In other words, in a context where so many people are exposed to rights violations, multidimensional vulnerability is an important tool by which to identify those in the greatest need.

Beyond targeting, the multidimensional nature of vulnerability means that different groups, and also individuals *within* groups, will have different needs. Women, for example, must be examined from a perspective of, inter alia, age, marital status, clan affiliation, displacement status or geography (rural versus urban) in order to fully understand and respond to their situation. Moreover, it means that single groups cannot be assumed to speak with a unified voice. Within every group there are power hierarchies, discrimination and exclusion.

Understanding risk as multidimensional allows for the crafting of pragmatic and sustainable responses. Gender status and clan affiliation, for example, are static, whereas displacement and youthfulness are time-bound conditions. This impacts the techniques and solutions that will be most effective. When disadvantage and discrimination are rooted in permanent characteristics, solutions need to focus on structural protections, attitudinal transformation and normative change. Contextual vulnerability, by contrast, allows programmers to utilize quick impact responses alongside actions designed to induce structural change.

#### Vulnerable and Marginalized Groups

Group	Principal areas of vulnerability	Subgroups with compound vulnerability
Women	<p>Women are vulnerable to multiple forms of SGBV, but especially rape and intimate partner violence (IPV).</p> <p>Impunity and exclusion from participation in decision-making greatly limits women’s access to justice and reinforces their vulnerability to SGBV.</p> <p>Women are exposed to housing, land and property violations, especially land-grabbing and denials of inheritance.</p> <p>In Islamic militia-controlled areas women are routinely exposed to cruel, inhuman and degrading forms of punishment.<sup>43</sup></p>	<ul style="list-style-type: none"> <li>• Minority clan members</li> <li>• IDP women</li> <li>• Female-Headed Households (FHH)<sup>44</sup></li> </ul>
Minority clans	<p>Minorities compose up to 30% of the Somali population. They include the Bantu (Gosha, Shabelle and Boni), occupational caste groups (Gaboye, Tunla and Yibir), Oromo and Benadiri Swahili-speakers, the Maimai-speaking Digil/Mirifle or Rahanweyne, and</p>	<ul style="list-style-type: none"> <li>• Women</li> <li>• IDPs</li> <li>• Children</li> <li>• Clan</li> </ul>

<sup>41</sup> See further, ‘SSF II Gender Equality and Social Inclusion Strategy’, Somalia Stability Fund (2017) 1, 4.

<sup>42</sup> S Allen, H Idris and T Chopra, ‘Women’s Access to Justice and Security in Somalia’s Afmadow District: A Snapshot’, UN-WOMEN Briefing Paper 1: 2016, 3

<sup>43</sup> ‘Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report’ (2014) 37-38.

<sup>44</sup> Estimates on the number of female-headed households vary, but reach as high as 12%, driven by the conflict and male urbanization.

Group	Principal areas of vulnerability	Subgroups with compound vulnerability
	religious minorities (Ashraf, Shekal and Christians). <sup>45</sup> Minority clans hail predominately from South-Central Somalia, but have been displaced to, and still remain in, IDP settlements in Mogadishu and urban centers in Puntland and Somaliland. <sup>46</sup> Of these, the Bantu, Benadiri and the Digil Mirifle are perhaps the most vulnerable from the perspectives of insecurity and sexual violence. Because minorities are unable to negotiate fair outcomes, they are highly vulnerable to rights violations from majority clans, including violence, land expropriation <sup>47</sup> and denials of humanitarian aid; women, boys and girls are highly vulnerable to SGBV.	
Children	Children, both boys and girls, are vulnerable to SGBV (including domestic rape i.e., rape perpetrated by a close relative or neighbor), trafficking, and child labor. <sup>48</sup> Girls are exposed to FGMC almost universally. Particularly in militia-controlled areas, limited access to education for girls, forced marriage and early marriage are common problems. Increasing rates of male urbanization, female-headed households and dependence on women as breadwinners have exacerbated vulnerability; with women away from the household, children have less protection and are easier to target. For example, as girls take on new household responsibilities such as collecting water and firewood, they are more exposed to violence. <sup>49</sup>	<ul style="list-style-type: none"> <li>• Minorities</li> <li>• IDPs</li> <li>• Girls</li> </ul>
Youth	Youth make up 57% of the Somali population, of which almost two-thirds are unemployed. In the context of chronic conflict, insecurity, poverty and weak governance, such lack of opportunity leaves young people vulnerable to multiple forms of exploitation including extremist group recruitment, trafficking and forced prostitution. They are likewise vulnerable to coping strategies that have secondary protection implications such as gang membership, drug abuse or attempting 'tahrīb', which exposes them to violence, kidnapping and/or rape. <sup>50</sup>	<ul style="list-style-type: none"> <li>• Unemployed males</li> <li>• Youth IDPs and minorities</li> </ul>
IDPs	As at 31 December 2017, 825,000 Somalis were internally displaced as a result of conflict, environmental hazard, and/or food and livelihood insecurity. <sup>51</sup> Displacement is largely an urban phenomenon, with most living in squatter settlements in Mogadishu, or cities in Puntland (Bosasso) and Somaliland (Hargeysa). Insecure housing, coupled with poor access to safe drinking water and sanitation, and food insecurity, means that diarrhea, cholera, malaria and malnutrition are endemic issues. <sup>52</sup> Moreover, poverty forces the displaced to partake in risky survival practices which expose them to SGBV, trafficking and child labor. The vast majority of IDPs (between 70–80%) are women and children, and many of these are from the minority Bantu, Bajuni and Rahanweyn minorities. <sup>53</sup> Most importantly from a vulnerability perspective, because of their displacement status, IDPs have lost their clan protection. <sup>54</sup> It is this merging of vulnerability that makes IDPs perhaps more at risk of violence and exploitation than any other group in Somali society. <sup>55</sup> Common forms of rights abrogation include expropriation of humanitarian assistance by majority clans and officials; sexual violence	<ul style="list-style-type: none"> <li>• Women especially FHH</li> <li>• Girls</li> <li>• Minorities</li> <li>• Elderly persons<sup>57</sup></li> </ul>

<sup>45</sup> Minorities are groups that exist outside of the clan system, including outcaste and occupational groups, and fishing and trading communities. It can also include communities displaced from their lands by war, such as those from the Digil Mirifle and/or those with limited physical representation such as the Isaq and Darod in Mogadishu.

<sup>46</sup> Also note the presence of small religious minority communities, such as the Ashraf and the Shekal (minorities within the Islamic majority). See further <https://minorityrights.org/country/somalia/>.

<sup>47</sup> Especially the Bantu in south Somalia who have been forced off their lands by Islamic militant groups and majority clans.

<sup>48</sup> F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013) 10.

<sup>49</sup> 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 25, 37-38.

<sup>50</sup> F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013) 210, 9-33.

<sup>51</sup> This figure is taken from the Internal Displacement Monitoring Centre (see [www.internal-displacement.org/countries/somalia](http://www.internal-displacement.org/countries/somalia)), however other estimates reach as high as 1.1 million (see [www.brookings.edu/research/internal-displacement-in-somalia/](http://www.brookings.edu/research/internal-displacement-in-somalia/)).

<sup>52</sup> See [www.reliefweb.int/report/somalia/background-information-idp-situation-somalia](http://www.reliefweb.int/report/somalia/background-information-idp-situation-somalia)

<sup>53</sup> 'Gender in Somalia Brief, UNDP, 2012. See further [www.reliefweb.int/report/somalia/background-information-idp-situation-somalia](http://www.reliefweb.int/report/somalia/background-information-idp-situation-somalia)

<sup>54</sup> 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 35-36.

<sup>55</sup> 'Country operation profile – Somalia', UNHCR (2013).

<sup>57</sup> 'Somalia Gender-Based Violence Working Group Strategy' (2014 – 2016), 5.

Group	Principal areas of vulnerability	Subgroups with compound vulnerability
	perpetrated by host community men and youth; forced relocation; and the targeting of women and girls as they attend to household duties such as water and fuel collection. <sup>56</sup>	

## Specific Grievances

### Sexual and Gender-Based Violence

Despite being broadly acknowledged, there is a dearth of comprehensive information on SGBV in Somalia.<sup>58</sup> Existing data sets are unreliable, inconsistent and rarely disaggregated by sex or other relevant categories such as age, urban-rural divide or clan affiliation. This is a product of multiple forces, including insecurity, reticence on the part of communities to discuss intra-community dynamics with ‘outsiders’ and fear, particularly in the cases of women and minorities, of retribution. There are also strong social norms that dis-incentivize affected persons from discussing matters considered private or sensitive;<sup>59</sup> sexual crimes against men and boys, for example, are almost certainly more prevalent than case reporting indicates. Finally, there is an amount of ‘white noise’ around SGBV discussions, which can make it difficult to identify central issues or clear trends. In South-Central Somalia, for example, officials strongly contest any increase in crimes of rape, and men more generally deny that violence against women is as large a problem as the international community suggests it to be. This sits uncomfortably against the many and geographically-broad reports that victims face threats and intimidation around discussing or pursuing justice in crimes committed against them.<sup>60</sup>

With this caveat, it appears that SGBV manifests in the following forms: rape; sexual exploitation, assault, abuse and harassment; harmful traditional practices including female genital mutilation and cutting; IPV; physical violence; and discrimination.<sup>61</sup> As noted, rape and sexual abuse also affect men and boys, with street children, IDP boys and those in detention seemingly most at risk.<sup>62</sup> Constraints around data collection and cultural sensitivities concerning reporting make it difficult to establish how endemic such rights violations are, nor whether some violations are more common than others. This said, the weight of evidence seems to suggest that rape and sexual violence (against women and girls), FGMC (against girls), physical assault (women, girls, and boys), and IPV (against women) are the most common forms of violence.<sup>63</sup>

### Rape

It is almost impossible to make out clear geographic trends in relation to rape. Some data suggests that this crime is more of an urban phenomenon, however it is almost certainly the case that rape is more frequently reported in cities and peri-urban areas where there is better access to police, legal aid, women’s NGOs and courts. Moreover, while it might be surmised that IDP areas are perhaps at greater risk and Islamic militia-controlled areas at slightly lesser risk,<sup>64</sup> it appears that the nature of sexual violence is evolving in a way that is generally exposing more of the country. There are three trends, however, that can be noted with more certainty. First, rape seems to primarily affect younger women; one study found most survivors of sexual violence falling between the ages of 11–25 years.<sup>65</sup> Sexual violence against children, both girls and boys, is also

<sup>56</sup> ‘The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia’ International Committee for the Development of Peoples and International Alert, (2015) 39-42; F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013) 10; ‘Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report’ (2014) 23; Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia’ Norwegian Refugee Council and LAW (2014) 28-9, 21-22.

<sup>58</sup> Note that a Gender Based Violence Information Management System (GBVIMS) is maintained and used as a source of data; ‘Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report’ (2014) 23-25.

<sup>59</sup> See e.g., Ibid, pp. 23-25.

<sup>60</sup> ‘The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia’ International Committee for the Development of Peoples and International Alert, (2015) 10.

<sup>61</sup> ‘Gender in Somalia Brief’, UNDP, 9; ‘Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report’ (2014) 23, 32-33.

<sup>62</sup> F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013) 29-33.

<sup>63</sup> ‘Somalia Gender-Based Violence Working Group Strategy 2014–2016’, 5; ‘Gender in Somalia Brief’, UNDP, 2.

<sup>64</sup> S Allen, H Idris and T Chopra, ‘Women’s Access to Justice and Security in Somalia’s Afmadow District: A Snapshot’, UN-WOMEN Briefing Paper 1: 2016, 5.

<sup>65</sup> The report of the Crime Victimization Survey 2012 indicates that survivors are from the range of infancy to women of 45 years, with most aged 11-25 years; ‘Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report’ (2014) 23-25.

widely reported.<sup>66</sup> Second, at least in South-Central Somalia and IDP areas, perpetrators are often ‘uniformed’ i.e., security and law enforcement officials, AMISOM, gang-members and/or freelance militia.<sup>67</sup> This is not a trend made out as clearly in Puntland and Somaliland.<sup>68</sup> Third, rape is increasing in prevalence, becoming more violent and taking on a more normalized form.<sup>69</sup> Some reports suggest a less polarized phenomenon; the urban-rural and majority-minority divide is narrowing while the characteristics associated with perpetrators, particularly age, is broadening. Particularly disturbing is the growing trend of multi-perpetrator or gang rape, ‘date rape’ and the intrusion of such crimes into generally more peaceful areas such as Somaliland.<sup>70</sup> To an extent, this is a youth phenomenon driven by frustrations associated with unemployment, lack of opportunity and de-emancipation. Rape may be a reaction to a girl or young woman’s rejection of sexual advances — a young man expressing his *raganimo* (manhood). Young men are also increasingly making use of technology, for example by recording a rape and then using the threat of social media exposure to secure a victim’s silence.<sup>71</sup> Alternatively, rape may be a tool to facilitate marriage. For many young men, widespread poverty and unemployment has made marriage — which requires a dowry payment — unattainable. Rape thus provides a means of reducing the dowry requested and securing a family’s consent.<sup>72</sup> Controlling the escalation of gang rape is particularly problematic insofar as it begets a lesser compensation payment; gang rapes are treated as single offenses allowing the fine to be split, thereby making the transgression ‘less costly’ in the eyes of would-be perpetrators.<sup>73</sup> An even more distasteful abuse of the *xeer* system is the trend towards group rape being perpetrated across clan lines. Where perpetrators are from more than one clan, compensation payments are split further, or if the victim is part of one of the kin groups, compensation may not even result in a net loss to the clan.<sup>74</sup>

## Forced Prostitution

While prostitution is scarcely discussed, largely invisible and often vehemently denied by authorities and community leaders, anecdotal accounts suggests a survival sex trade is operational, especially in IDP-hosting areas.<sup>75</sup> This sex trade is subject to complex and competing forces. In some areas, Islamic norms operate to quell the practice or force it underground. In others, particularly cities, access to technology and increased connectedness promote the trade by making it easier to offer sexual services, coordinate client meetings and make payments under a veil of obscurity.

## Intimate Partner Violence

IPV takes many forms, ranging from physical violence to verbal and psychological abuse, and appears to principally affect women, girls and boys.<sup>76</sup> Drivers of IPV include violence normalization, post-conflict male de-emancipation and misinterpretation of Islamic norms.<sup>77</sup> IPV also cannot be separated from the deeply entrenched cultural devaluing of and discrimination against women.<sup>78</sup> Principal challenges in this area include the hidden nature of IPV, its acceptance — among men and women — and the (albeit incorrect) use of religious principles to justify practices.

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<sup>66</sup> F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013).

<sup>67</sup> ‘Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report’ (2014) 23-25; ‘Gender in Somalia Brief’, UNDP, 2.

<sup>68</sup> ‘Somalia Gender-Based Violence Working Group Strategy 2014–2016’, 5.

<sup>69</sup> ‘SSF II Gender Equality and Social Inclusion Strategy’, Somalia Stability Fund (2017) 5.

<sup>70</sup> ‘Gender in Somalia Brief’, UNDP, 9.

<sup>71</sup> ‘The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia’ International Committee for the Development of Peoples and International Alert, (2015) 39-42.

<sup>72</sup> Ibid

<sup>73</sup> Ibid

<sup>74</sup> F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013).

<sup>75</sup> ‘The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia’ International Committee for the Development of Peoples and International Alert, (2015) 31.

<sup>76</sup> F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013).

<sup>77</sup> Kaht addiction may be a factor in some cases; ‘SSF II Gender Equality and Social Inclusion Strategy’, Somalia Stability Fund (2017) 5.

<sup>78</sup> ‘The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia’ International Committee for the Development of Peoples and International Alert, (2015) 36-37; ‘Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report’ (2014) 23-25.

## Forced Marriage

Somali customary law outlines several traditional practices that subject women and girls to forced marriage. These include the exchange of women in the context of peace deals, widow inheritance,<sup>79</sup> rape as a means of arranging marriage (usually when the bride-price is considered too high), and *dhabar-garaac*, where a woman or girl is abducted and abused until she marries the abductor.<sup>80</sup> Importantly, although it is in contravention of statutory law, such acts may not be considered crimes under *xeer*. The result is that there is little protection from these acts, nor access to justice for women and girls affected unless they can access the courts system.

## Female Genital Mutilation and Cutting

FGMC affects an estimated 98% of the female Somali population, usually in the form of infibulation (the most severe manifestation whereby external genitalia are removed and the vaginal opening sewn closed with a small opening for urine and menstrual blood).<sup>81</sup> Importantly, despite increased constitutional and legislative controls,<sup>82</sup> FGMC is not considered a form of SGBV in Somalia, but instead a practice demanded by cultural norms and justified under some (albeit incorrect) interpretations of Islamic jurisprudence. The issues stemming from FGMC are vast; apart from being a human rights violation and pivotal in the subjugation of women and girls, those who undergo FGMC risk life-threatening infections, child birth complications and other chronic medical conditions.<sup>83</sup>

### The Normalization of Sexual Violence in Somalia

The patriarchy and inequality embedded in the clan model, social exclusion and deeply entrenched attitudes of discrimination, mean that Somali women have always been vulnerable to SGBV and harmful cultural practices. Historically, however, rape was considered an inexcusable violation of clan honor, and customary norms existed to protect women and children, especially during times of conflict. The civil war irreparably changed this. The fragmentation of the state and its authority coincided with a weakening of traditional norms, with the result that *xeer* conventions were systematically violated. Rape became a tool of political violence, along with the targeting of women and girls for abduction, forced marriage and sexual slavery. Documented as early as the 1976 Somalia-Ethiopia conflict, these tactics were adopted in almost every subsequent uprising. They were also used as a means of consolidating economic power; militias from majority clans used physical and sexual violence to loot, displace and confiscate land and property from minorities.<sup>84</sup> In both cases, the weakened state of the *xeer* system and absence of state institutions meant that victims and their clans had little opportunity for redress; crimes thus went unaddressed and impunity spawned their recurrence. While it appears counterintuitive, the easing of hostilities and expansion of pockets of security seem to have been accompanied by an increase, as opposed to an abating, of sexual violence. In explaining this, four factors seem to be particularly relevant. First, the discrimination, exclusion and inequality that exposed women and girls to sexual violence in the first place, remained even after the conflict ceased. Second, impunity, coupled with entire generations witnessing only violence, was internalized in attitudes and behaviors. Third, cultural norms meant that sexual violence was not included in peacebuilding and reconciliation discussions at the clan or national level. Fourth, decades of conflict created new deficits such as illiteracy, family breakdown and unemployment.<sup>85</sup> Among these, the feminization of poverty and the opportunities this has created for violations seem highly relevant. With so many households dependent on women's labor, children and other dependents have become easy targets. As noted above, there are abundant accounts of vulnerable households with working mothers falling victim to assault. **In short, what has taken place can be understood as a normalization of sexual violence: a prolonged period of violence against women for individual, political or economic gain meant that the phenomenon was carried over into more peaceful times, where it was propped up by**

<sup>79</sup> 'SSF II Gender Equality and Social Inclusion Strategy', Somalia Stability Fund (2017) 5.

<sup>80</sup> The latter is a practice that had largely disappeared but was revived during the war, when an increased number of women found themselves without protection; 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015) 32-33.

<sup>81</sup> 'Gender Equality and Women's Empowerment Strategy', UNDP, 5.

<sup>82</sup> Art 15.4 FGS: "Circumcision of girls is a cruel and degrading customary practice, and is tantamount to torture. The circumcision of girls is prohibited". In Puntland, Type III infibulation is prohibited by law, however other forms of circumcision are permitted; see F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013).

<sup>83</sup> 'Gender and Conflict Note: Somalia', LOGICA, 2013, 6.

<sup>84</sup> 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015), p. 8.

<sup>85</sup> Ibid, p. 30.

entrenched inequality and discrimination and reinforced by impunity and lack of access to justice for survivors.<sup>86</sup>

## Early Marriage

Early marriage — often from around the age of 13 or 14 — is supported under *xeer* and *shari'ah* and is tolerated under the constitutions of each state.<sup>87</sup> Early marriage increased steadily during the conflict period, particularly in South-Central Somalia and even more in militia-controlled areas. For some families, early marriage is a security-related decision, with a union perceived as protecting a child from rape or other forms of sexual violence. This is especially the case for minority clans and IDPs. For others, the decision is driven by poverty. Early marriage has also become more dangerous; there are anecdotal reports that customary due diligence around a prospective husband and his ability to pay dowry is no longer commonplace. Another recent phenomenon is marriage as a tool to sanction rape; during the summer, members of the Somali diaspora are said to visit SCS and marry a girl only to divorce her upon their return. Early marriage comes with a host of protection implications, including sexual violence, health risks, and reduced participation in education (early marriage is the principal factor explaining girls' disproportionate lack of schooling).

## Denial of Humanitarian Assistance

Those eligible to receive humanitarian assistance, especially IDP populations and those affected by drought and/or food insecurity, frequently have their access controlled by officials, majority clans or more powerful persons within the beneficiary population group. Such 'gatekeepers' extort bribes or claim taxes, which may be financial, material or sexual. They may also restrict movement or deny IDPs access to areas where humanitarian goods and services are accessible.<sup>88</sup>

## Land Disputes

Underpinning land and property disputes is a complex web of *xeer*, *shari'ah*, and statutory law, an examination of which is beyond the scope of this analysis. For current purposes, it is sufficient to highlight four categories of land and property disputes impacting marginalized groups:

- Disputes between IDPs residing in a host community and a returnee owner, or an owner who is renting land to an IDP. IDPs are highly vulnerable in such cases and have little avenue for recourse since they have no or weak clan protection and because land use agreements are usually informal.<sup>89</sup>
- In urban areas, land grabbing and forced evictions are increasingly common, usually perpetrated by corporations, businesspeople or diaspora motivated by the climbing property values that have accompanied renewed stability. This phenomenon is complicated by the ease at which forged documentation and counterfeit title documents can be obtained, especially in South-Central Somalia. Minorities and FHHs are most at risk; instigators often recruit majority clan members to threaten bona fide owners, witnesses or neighbors.<sup>90</sup>
- In rural areas, chronic conflict and institutional weakness has eroded customary conventions relating to land use and ownership. This has opened a gateway for majority clans to claim customary ownership over land that is not theirs as a means of augmenting their powerbase, expanding their access to natural resources or to position themselves for future bargaining with neighboring clans.<sup>91</sup>

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<sup>86</sup> Ibid, pp. 39-42.

<sup>87</sup> E.g., Art 28.5 (FGS Provisional Constitution) requires consent of both marrying parties who have reached the 'age of maturity'. Article 29.8, defines a 'child' as a person under 18 years of age, leaving some room for interpretation regarding what constitutes 'maturity'. In practice, a girl is usually understood to have reached maturity upon menstruation or other physical signals of development towards adulthood. See further 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015) 35.

<sup>88</sup> 'Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia' Norwegian Refugee Council and LAW (2014) 36

<sup>89</sup> Ibid, pp. 16-18; F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013).

<sup>90</sup> Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia' Norwegian Refugee Council and LAW (2014) 34-36.

<sup>91</sup> "Conflicts within rural areas must be understood with reference to the traditional Somali concepts of *deegaan* and the *guri/galti* relationship. *Deegaan* refers to traditional ownership over land. The *guri/galti* dynamic refers to the relationship between the settled residents (*guri*) and the 'outsiders' (*galti*). Powerful clans often claim *deegaan* over land that was not

- The aforementioned weakening of *xeer* conventions has also impacted women's land and property rights. Although the rights of women to inherit, own and transfer property are enshrined within the various constitutions,<sup>92</sup> as well as in *shari'ah*, women have always faced difficulty realizing and enforcing such rights at the community level.<sup>93</sup> It is important to highlight that this is rooted in the linkages between a clan's strength and its wealth, including its property holdings. As women may marry outside of their own group (or be traded as compensation), it is considered contrary to clan interests to permit them to own or control property. Various tools have evolved to achieve this, the most common being *tanazul*, whereby women are pressured into renouncing their inheritance rights to male relatives, usually her husband, brother(s) or son(s). Other tools include denials of support by male relatives to represent them at *xeer*<sup>94</sup> and widow inheritance.<sup>95</sup> But while clan functioning sits at odds with women's property ownership, *xeer* often outlined and protected women's use and access rights to land. However, as *xeer* conventions have weakened, women have become more exposed to land grabbing, expulsion and livelihoods denials.

## Child Labor and Trafficking

In Somali culture, girls and boys are expected to take part in household chores from around the age of five years, especially in rural areas. The distribution of such tasks is highly gendered and the burden skewed towards girls. Boys are usually responsible for maintaining income-earning and food-producing animals such as cattle and goats, while girls attend more to cooking, cleaning and resource gathering responsibilities. Particularly in contexts of displacement, girls are exposed to sexual violence when such tasks require that they leave the protection of the home; when resources become scarce it can also contribute to withdrawal from education.<sup>96</sup> In situations of extreme poverty, girls may work in domestic roles or engage in survival sex. Importantly, poverty-driven child labor is not generally considered to be a violation of children's rights.<sup>97</sup> Finally, in addition to increases in child begging, there is some evidence that children are forcibly recruited within (and even outside of) Somalia and used as labor in agriculture, livestock herding, construction, sexual servitude, domestic service and commercial sexual exploitation.<sup>98</sup> In such cases, police lack capacity to properly investigate cases and forced servitude/trafficking is often conflated with migration.

## Forced Recruitment

While there is little hard data, forced recruitment is a tool used by Islamic militant groups, the Somali National Army (SNA) and allied militias, Ahlu Sunna Wal Jama'a (ASWJ) militia, and clan militia. While the recruitment of men and boys is far more common, women and girls are reportedly used to transport weapons or instructions, as nurses and cooks, to gather intelligence data, and to mobilize recruits and raise funds. There are also reports of women participating in active conflict.<sup>99</sup> Little is known about the abuses that forced recruits become exposed to once they formed part of a group, however if more generalized knowledge

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originally theirs for the purpose of expanding their power base and to gain a better position for possible future bargaining with other clans. Historically, the *guri* would grant access to and use of land by *galti* conditional on the latter's deferral to local customs and authorities. Before 1991, rural dwellers tended to be members of minority clans, who lacked the political clout to eke out an existence in the urban centres. The mass displacement of the last two decades, however, brought powerful clans into rural areas. These powerful groups now usually ignore the established rules of the *guri/galti* relationship, grabbing land and extorting food and services from the settled population. Where these groups claimed to have *deegan* over large sections of land, it is extremely difficult for the politically and economically weaker minorities, including POCs, to object. They are generally either be displaced or absorbed into the clan now controlling the area" Housing, Land and Property in Somalia: Persons of Concern in Somaliland and South-Central Somalia' Norwegian Refugee Council and LAW (2014) 34-36.

<sup>92</sup> E.g., Somaliland Constitution, Art 36 (3) "Women have the right to own, manage, oversee, trade in, or pass on property in accordance with the law".

<sup>93</sup> Widows, for example, rarely inherit land under customary norms and are often deprived of access to their husband's land; especially if they are childless land is vested in trusteeship with uncles and other male relatives and inherited by children when they become of age; 'Gender in Somalia Brief', UNDP, 5.

<sup>94</sup> Functionally, in order to inherit a woman needs to have the support of an extended adult male relative to represent her at *xeer*.

<sup>95</sup> F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013). If a widow refuses wife inheritance (*dumal*) she can lose her claim to land.

<sup>96</sup> 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 37-38.

<sup>97</sup> F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013).

<sup>98</sup> There is some limited evidence that children are trafficked to Tanzania to work in prostitution rings; 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 37-38. See further <https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282747.htm>

<sup>99</sup> 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 37-38; F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013) 29-33.

around the workings of groups such as Al Shabab is applied, they were likely exposed to violence, denial of education and, in the case of women and girls, sexual violence and forced marriage.

## Migration

While not a rights violation per se, the phenomenon of *tahriib*, or illegal migration by young people, exposes them to dangerous situations that in turn create vulnerability to violations and abuse. Mainly young men, but also some young women, pay traffickers to reach the West (usually via Ethiopia, Sudan and Libya) to find employment or pursue higher education. While on *tahriib*, youth are at risk of abduction, forced prostitution, forced marriage, organ harvesting, and death. *Tahriib* also has consequences for families and communities; a common situation is for traffickers or kidnappers to move a person out of the country and then demand a ransom for their release.<sup>100</sup>

## Guiding Points

- Even within a marginalized group, individuals are exposed to varying levels of disempowerment and risk. From a programming perspective, the implications are twofold. First, group membership should not be the only, nor even principal, lens through which to gauge vulnerability. Instead, individual vulnerability profiles need to take into account both the risks associated with being a member of a certain group or demographic (including a person's clan and ethnic identity, gender, wealth, education, age and marital status), as well as their exposure to certain typologies of violence. Second, care must be taken when gleaning information from group representatives. Those who are easiest to access and most likely to present as group spokespersons are also likely to enjoy relative power and influence within the group. The upshot is that while it will be pragmatic to use 'representative voices' when conducting research and needs assessments, the information gleaned must be verified through, for example, randomized data collection, and can never substitute for individualized risk assessments.
- Vulnerability and risk exposure is dynamic and cannot be gauged or evaluated exhaustively at any given moment in time. For example, divorce, the death of a spouse or parent and displacement each leave women at high risk of land grabbing or inheritance denials. When working with vulnerable populations, a system should be in place that assesses both immediate risk and exposure to potential future risk, as well as systems to monitor vulnerability, such as linking risk assessments to key life events.
- Some rights violations are not recognized as such under the current *xeer* norms; examples include forced marriage, denial of education, denial of inheritance, IPV and FGMC. Such normative belief is often held by both victims and perpetrators. This adds an additional layer of complication to securing justice for rights-holders and promoting access to the courts. Programming should not assume that a clear conception what acts constitute crimes is universally or even broadly held. In certain cases, efforts to promote access to justice must be preceded by advocacy and information campaigns aimed at attitudinal change. Where norms are deeply entrenched, drawing attention to incompatibilities between rights-abrogating practices and provisions in *shari'ah* may be more effective than sensitizing populations around new laws.
- Despite the strengthened statutory framework, areas remain where misinterpretation and flexibility create vulnerability for rights holders. A key example is that the legal age of marriage is based on maturity. Other 'grey' areas include where there may be perceived inconsistencies between legal provisions and *shari'ah* jurisprudence. Such deficit areas should be identified and interventions launched to promote the introduction of clear guidelines or reform.
- Lessons should be drawn from community-led initiatives that have been effective in stemming harmful practices. Examples include collective community interventions by religious leaders, elders and policy-makers to dissuade youth from entering into piracy, and religious leaders who have campaigned against FGMC.
- Promoting access to land rights for all groups who are vulnerable to land-grabbing or inheritance denials should be prioritized in access to justice interventions. First, such practices are prohibited under both statute and *shari'ah*, providing a solid foundation from which to promote change. Second,

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<sup>100</sup> See generally, N Ali 'Going on *Tahriib*: The causes and consequences of Somali youth migration to Europe' Rift Valley Research Institute Research Paper 5 (2016).

access to land (or other assets) is synergistic insofar as it augments individual agency and empowerment and can provide a bridge to realizing other rights, such as to livelihoods.

## 4. Access to Justice in Somalia

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### The Somali Courts System

Although there is a high degree of variation, the formal justice and policing systems can be broadly characterized as insufficiently resourced and compromised by a shortage of skilled and experienced legal professionals. Despite significant legislative reform, gaps and deficits remain, as do incompatibilities between different bodies of law. In towns and cities, resource shortages mean that courts and police stations lack basic necessities, such as physical structures, vehicles, legal texts and guidelines, security personnel, as well as technical resources such as evidence gathering and preservation tools, recording equipment, translation facilities etc. At all levels, professionals lack knowledge of and experience in applying the relevant legal framework, especially newly introduced acts and guidelines, and on how incompatibilities should be reconciled. This is compounded by institutional issues such as low (and non-payment of) salaries, which has driven widespread corruption.<sup>101</sup> The result is a system that is unpredictable and flexible in ways that make it difficult for vulnerable groups to obtain an outcome that is rule-based and protective. Against this backdrop, six major constraints, many of which overlap and operate in a reinforcing manner, can be highlighted as impeding marginalized groups from accessing the formal justice system.

- **Access:** The penetration of the public sector is geographically limited; in most rural areas, there are no functioning policing system or courts. The result is that those looking to assert or uphold their rights need to travel, often for long distances, to access the state system — largely excluding those lacking clan/family support, information or financial resources.<sup>102</sup>
- **Awareness:** Persons from rural areas, and women in particular, are often illiterate and lacking in basic rights education. The vast majority are unaware of how to access the formal system or legal assistance such as legal aid or legal counselling. IDPs suffer the same constraints, however their ability to connect with clan members who might be more informed or rights-savvy, has often been lost through the displacement process. Perhaps most problematic, however, is the weak understanding of rights violations in local normative systems; physical and sexual violence, especially when this takes place within the home or larger family circle, forced relinquishment of property rights, FGMC, and violence against children, are broadly not understood to be violations of individual legal rights.
- **Cost:** For those who can access to the formal system, the costs associated with transport, case filing and representation, can be prohibitive. Complainants are also often compelled to pay indirect costs (bribes). While this appears to occur at both the courts and police, it is important to highlight that *xeer* fora are not free from corruption; moreover, there is some anecdotal evidence that state actors may be less likely to ask for a bribe than community figures. Cost inhibitors particularly impact women and IDPs who have reduced access to resources or ability to negotiate, and while there is some support is available through legal aid providers, lack of awareness often prevents victims connecting to service providers.<sup>103</sup>
- **Navigability:** Once inside the system, the disjointed nature of the courts system can be difficult to navigate and intimidating for inexperienced users. Even the generalized workings of the system — such as requiring a complainant to speak in an official or a semi-public forum — creates tension with basic social norms for women and minorities. These difficulties only escalate if a case involves a sensitive issue such as sexual violence or the complainant lacks the support of their clan. More generally, despite efforts to increase representativeness and transparency within the system, it remains male-dominated, and its operation driven power differentials, generalized discrimination, and networks of business and political interests.<sup>104</sup>
- **Legal protection framework:** In terms of the applicable law, the new Constitutions and specific legislation provide a strong framework for legal equality and the protection of women and minority groups. However, the elevation of *shari'ah* across all three constitutions, while not necessarily a bar to the

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<sup>101</sup> 'Strengthening the Quality and Scope of Justice Provision and Policing in Somaliland' Faculty of Law, the University of Hargeisa, Somaliland-UNDP (2012) 4-5.

<sup>102</sup> 'Study on Women's Access to Justice and Security in Somalia', Katuni Consult-UN Women (2017), 7, 9; S Allen, H Idris and T Chopra, 'Women's Access to Justice and Security in Somalia's Afmadow District: A Snapshot', UN-WOMEN Briefing Paper 1: 2016, 3.

<sup>103</sup> Ibid.

<sup>104</sup> S Allen, H Idris, and T Chopra, 'Women's Access to Justice and Security in Somalia's Afmadow District: A Snapshot', UN-WOMEN Briefing Paper 1: 2016, 2

realization of such rights, has complex implications in terms of case adjudication given the low levels of legal and religious education held by judges.

FGS Provisional Constitution	Somaliland Constitution	Puntland Constitution
Art 2.3: No law which is not compliant with the general principles and objectives of <i>shari'ah</i> can be enacted.	Art 5.1: Islam is the religion of the Somaliland state, and the promotion of any religion in the territory of Somaliland, other than Islam, is prohibited.	Art 3.3: The political system of Puntland State is based on the guiding principles of: (a) Islamic <i>Sharia</i>
Art 3.1 C: The Constitution of the Federal Republic of Somalia is based on the foundations of the Holy Quran and the Sunna of our prophet Mohamed (PBUH) and protects the higher objectives of <i>shari'ah</i> and social justice.	Art 5.2: The laws of the nation shall be grounded on and shall not be contrary to Islamic <i>Sharia</i> .	Art 9.3: The laws and culture of the people shall be based on the Islamic religion.
Art 4.1: After the <i>shari'ah</i> , the Constitution of the Federal Republic of Somalia is the supreme law of the country. It binds the government and guides policy initiatives and decisions in all sections of government.	Art 5.3: The state shall promote religious tenets (religious affairs) and shall fulfil <i>Sharia</i> principles and discourage immoral acts and reprehensible behavior.	Art 9.4: Any law and any culture that contravenes Islam shall be prohibited
Art 40.1: When interpreting the rights set out in this Chapter, a court shall take an approach that seeks to achieve the purposes of the rights and the values that underlie them. Art 40.2 In interpreting these rights, the court may consider the <i>shari'ah</i> international law, and decisions of courts in other countries, though it is not bound to follow these decisions. Art 40.4: The recognition of the fundamental rights set out in this Chapter does not deny the existence of any other rights that are recognized or conferred by <i>shari'ah</i> , or by customary law or legislation to the extent that they are consistent with the <i>shari'ah</i> and the Constitution.		Art 19.3: All personal liberties shall not in any way contravene the Islamic <i>Sharia</i> , by-laws, ethics, the stability of the country or the rights of another person.

Fully understanding these implications requires a more sophisticated explanation of *shari'ah*-based systems. Islam does not comprise a specific set of laws. Instead, it offers general guidelines concerning duties and legal and moral obligations, which collectively fall under the definition of *shari'ah*.<sup>105</sup> From a practical standpoint, *shari'ah* most clearly applies to family, personal status, civil and criminal matters, and indeed in most Islamic jurisdictions, separate courts have been created for this along with regulating legislation.<sup>106</sup> In Somalia, however, state-level district, regional and appellate courts all apply what is commonly understood to be '*shari'ah*' alongside statutory law (both new and that adopted during the post-colonial period). As *shari'ah* has not been codified, Somali judges rely on the Qur'an. Importantly, the Qur'an is not a legal text. In practice, judges need to apply *fiqh* — the science of deducing laws from the Holy texts — which is traditionally done using three sets of legal tools: *Sunnah*,<sup>107</sup> *Ijma'*<sup>108</sup> and *Qiyas*.<sup>109</sup> How jurists apply their tools depends on the

<sup>105</sup> J Schacht, *An Introduction to Islamic Law* (Oxford University Press 1982) 10-11; M Bello, "Keynote Address" in A M Yakubu, A M Kani, M I Junaid (eds) *Understanding Shariah in Nigeria* (Spectrum Books 2001) 7-14.

<sup>106</sup> Most Islamic majority countries practicalize this by creating (separate) courts for such domains which apply codified *shari'ah*. Areas such as commercial and labour law are regulated through secular legal mechanisms.

<sup>107</sup> *Sunnah* refers to the acts and sayings of the Prophet, and everything that he approved. The *Quran* takes precedence over *Sunnah*, and can be used for guidance only where the *Quran* is not sufficient. *Hadith* is a record of an act or saying of the Prophet written after his death (*Sunnah* is an example or law that is deduced from the *hadith*). J Hussain, *Islam: Its Law and Society* Federation Press 2<sup>nd</sup> Ed (2004) 28-9, 32. See also, generally, MB Hooker, *Indonesian Islam: Social Change Through Contemporary Fatawa*, Allen & Unwin (2003).

<sup>108</sup> *Ijma'* (literally 'to agree upon something'), is the unanimous agreement of the *mujtahidun* of the Muslim community (those who practice *ijtihad*), following the Prophet's death.

<sup>109</sup> *Qiyas* is the application of a ruling to a new case on the basis that the effective cause was common to both. *Qiyas* may only be used where the Qur'an, *Sunna* or *ijma'* cannot assist. Another important tool is fatwa. A *Fatwa* is a legal ruling given by a recognized religious scholar in answer to a question of religious importance. *Fatwa* must be based on the religious sources of the *Quran* or authenticated *hadith Fatwa* may also draw on legal inferences and extractions made by recognized scholars (*mujtahid*) through their *ijtihad* (personal reasoning based on the *Quran* and the *Sunnah*) in the event that the sources are not clear on the matter or where there is no available text.

*madhhab*, or school of jurisprudence ascribed to.<sup>110</sup> Most Somalis follow the *shafi'i* school,<sup>111</sup> although some judges follow other *madhhab*, including those educated in Sudan, Egypt and Saudi Arabia, while others are heavily influenced by Salafism.<sup>112</sup> **The main issue is that the capacity of judges to apply *shari'ah* in a scholarly and authoritative manner, alongside constitutions and other legislation, is very limited.** Most judges have only received religious schooling and they are not required to possess a law degree; indeed, according to a World Bank study, as of 2013, almost half of the judges in Mogadishu identified did not hold a law degree, and only some had experience practicing *shari'ah*.<sup>114</sup>

The outcome is that judges seem to apply a *mélange* comprising their knowledge of religion, *xeer*, statute, and other influences, culminating in a non-codified body of 'common knowledge'. The influence of *xeer* varies between cases and judges but is particularly contingent on the strength of the disputing parties' clans (discussed further below). In cases where this influence is high or the judge feels that a customary solution will be more impactful and sustainable, the court may pronounce an outcome that is undistinguishable from what would be delivered under *xeer*.<sup>115</sup> The takeaway is that courtroom justice is unpredictable and there can be no assumption that a law-based decision will be rendered. At minimum, the combination of low capacity, the elevation of *shari'ah* in the constitutions and norms that regard legislation as cursory or advisory, mean that the protections offered in statutory law are likely to be one of a number of influences on case adjudication and a weak influence at that.

## Technical Equipment

A further challenge to upholding the rights guaranteed in the applicable legal frameworks is the absence of technical expertise and equipment to deal with the types of cases that impact the most vulnerable, from questioning through to evidence collection and case adjudication. Where systems or procedures are available, such as the use of screens to protect privacy, closed courtrooms or court advocacy services, they are not well-utilized. There are few medical facilities able to carry out medical examinations of SGBV survivors, and professional DNA processing and evidence storage is far from universal.<sup>116</sup> Finally, there has been little sustained or comprehensive training of judges, court personnel and police or how to adjudicate cases involving sexual violence, nor are there adequate numbers of female police, women-staffed police help desks or specialist SGBV prosecuting units. Where there are specifically-trained personnel, they are not well aligned or coordinated to work strategically and in a case management framework with legal aid providers, medical personnel and psycho-social support services.

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<sup>110</sup> Kh Husein Muhammad, Faqihuddin Abdul Kodir, Lies Marcoes Natsir, Marzuki Wahid, *Dawrah Fiqh Concerning Women: Manual for a Course on Islam and Gender* 210 (Fahmina Institute 2006). These schools developed as a consequence of *ijtihad* and jurists' different opinions (*ikhtilaf*), however they share the same principles with respect to *fiqh* discourse.

<sup>111</sup> Shafi'i is generally known for being more tolerant of ideological differences. There are five major schools of law in Islam — *hanafi*, *maliki*, *hanbali*, *shafi'i* (all *Sunni* Schools) and the *Shi'a* school. Muhammad ibn Idris al Shafi'i, founder of the third school, formulated the legal theory that *Shari'a* is based on four principles: the holy Qur'an and *Sunna* of the Prophet (as primary sources), and the secondary sources of *ijma'* (consensus of opinion) and *qiyas* (analogical deduction). An important distinguishing characteristic of the Shafi school is that *ijma'* (consensus) overrules a *hadith* narrated by a single authority, however, where a *hadith* is deemed authentic for multiple generations, it becomes conclusive. According to Shafi'i, consensus must derive from the entire Muslim community, whereas for Abu Hanifa and Malik *ijma'* is the consensus of jurists. The Shafi school is also followed in Yemen, and by some groups in Jordan, Palestine, Syria, Lebanon and Egypt.

<sup>112</sup> The key opposition to a *shafi'i* jurisprudential system comes from those who ascribe to Salafism, including several influential judges. Salafism is not one of the jurisprudential schools; it is a strict approach to *shari'ah* that advocates a resurrection of the origins of Islam through a literal interpretation of the Qur'an and Sunnah. Traditionalist *salafis* see themselves as a separate *madhhab* with their own beliefs and laws, although others consider themselves *Sunni*, and are influenced by one of the schools of *Sunni fiqh*; the *al-Shabaab*-backed *shari'a* courts, for example, appear to follow a strict interpretation of the *hanbali madhhab*.

<sup>113</sup> 'Legal Aid Providers Supporting Survivors of Gender Based Violence in Somalia' UNDP, LAW, UNFPA (2014) 18.

<sup>114</sup> Between 1991-2001 universities essentially ceased to function, and while there are at least two universities offering *shari'ah* course, little is known about their quality or teaching pedagogies. See 'Understanding Potential Development of the Justice System in Somalia and Opportunities for Promoting Rule of Law & State and Peace Building Informed by Baseline Analysis of Formal Regional Criminal Courts in Urban Somalia' Coffey (2017).

<sup>115</sup> 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015) 39-42; S Allen, H Idris and T Chopra, 'Women's Access to Justice and Security in Somalia's Afmadow District: A Snapshot', UN-WOMEN Briefing Paper 1: 2016, 7.

<sup>116</sup> 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015) 39-42.

## Power Asymmetries

The final and perhaps most problematic impediment to accessing justice through the courts is the relative weakness of the justice sector vis-à-vis the majority clans. **Clan elders and families routinely lobby to have cases dismissed, an alleged perpetrator released or for the matter to be adjudicated at the community-level.**<sup>117</sup> This especially pertains to matters that have the potential to interrupt clan unity, inter-clan security or are deemed to be internal matters; these might include sexual violence, IPV, murder, serious assault or youth violence.<sup>118</sup> This disconnect is widely acknowledged; cases that have been transferred to clans with judge approval or customary agreements upheld with the acquiescence of high-level stakeholders have been widely publicized. Many judges are reportedly loath to take on cases involving sexual violence or powerful perpetrators as they fear push back from powerful elders or even physical violence against them.<sup>119</sup>

This should not imply that the justice system exists at the behest of, or in conflict with, the customary system. Clans may bring cases to the court that cannot be resolved at a local level or that involve multiple clans (although even here, clan leaders may influence decision-making, sometimes with courts acting more as a mediator than an adjudicator). Other grievances are broadly accepted as a 'justice' issues to be dealt with by courts, such as commercial matters. Sometimes clan elders will perceive a complainant as undeserving of the clan adjudication system; a common example seems to be independent business women in contractual disputes or who have been exposed to violence.<sup>120</sup>

## Synthesis of These Deficits

### **The challenge of prosecuting sexual violence cases at court**

The power asymmetries between the clan and state system can be seen most clearly in the adjudication of sexual violence cases. While new legislation makes clear that sexual offences are to be dealt with severely and by formal law enforcement, case outcomes are difficult to secure. Where clan elders insist that a matter be returned for local adjudication, judges often find this hard to resist. But even where this is not the case, some judges are unaware of the law in place, while others feel constitutionally empowered to administer a finding in line with their interpretation of Islamic jurisprudence. Sometimes this outcome will not differ significantly than that which would be administered at the *xeer* level, despite its inconsistency with *shari'ah*.

**When taken together, these deficits mean that many marginalized members of society perceive the formal justice system as not offering a sufficiently better or different outcome to warrant them stepping out of the customary sphere and exposing themselves to new risks. Such a perception is not necessarily misplaced.** While the legal framework offers an enhanced level of protection, a rule-based outcome is not guaranteed, and complaints need to accept that a judge may apply a personal interpretation of *shari'ah* or a *xeer* solution. The result is that the complainant may be left with little or no recourse, and simultaneously face renewed challenges as a result of acting against customary expectations. There are plentiful anecdotal accounts of judges dismissing cases involving alleged rape or domestic violence without proper investigation (often due to the influence of a husband or elder), exposing victims to a new level of violence and vulnerability having embarrassed the transgressor and/or rejected her clan authority.<sup>121</sup> This said, there are some indicators that change is afoot, particularly in urban areas, where formal justice institutions are slowly strengthening. There is certainly a growing number of people who are dissatisfied with the justice provided under *xeer* and who regard the courts — whether in theory or in fact — as more likely to provide procedural safeguards, uphold the rule of law and enforce constitutionally guaranteed rights. Indeed, for those discriminated against on the basis of clan strength

<sup>117</sup> F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013).

<sup>118</sup> See further 'Seeking Justice for Rape in Somaliland: The Role of the Criminal Justice System' Horizon Institute (2018).

<sup>119</sup> 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015) 39-42.

<sup>120</sup> 'Study on Women's Access to Justice and Security in Somalia', Katuni Consult-UN Women (2017), 12.

<sup>121</sup> 'Strengthening the Quality and Scope of Justice Provision and Policing in Somaliland' Faculty of Law, the University of Hargeisa, Somaliland-UNDP (2012) 31-35

or who have been displaced from their clan, the court system may be their only possibility to escape clan bias or have their case heard at all.<sup>122</sup>

## Dispute Resolution under Xeer

Somali customary law — *xeer* — can be loosely defined as “an unwritten set of contracts that exist between clans and sub-clans, based upon the principles of peacekeeping, customary precedent and Islamic precept”.<sup>123</sup> *Xeer* governs relations between clans and clan members and concerns all aspects of governance relevant to nomadic and pastoral life, most importantly: conflict management, natural resources, domestic and gender relations, inheritance and criminal behavior. It is learned, retained and developed orally, and administered by male elders. Importantly, it draws its authority from cultural-religious values and traditions as opposed to the political authority of the state.

The influence of *xeer* in modern Somali society can be seen as sitting at the crossroads of competing tensions. As in all customary systems, influences including ecology, economics, conflict and proximity to the state system, result in rules being produced, enforced and recreated through processes of participation and contestation. These processes explain both the dynamic nature of *xeer* and the different versions of *xeer* that exist, even in geographically proximate areas. The much stronger forces at play relate to the conflict and subsequent state-building era. One the one hand, the decades-long civil war significantly weakened elder influence and the effectiveness of *xeer*; on the other, the ongoing weakness of the state means that clan leaders still wield enormous influence. These interests exist alongside, and in competition with, new influences such as that of youth (which constitute the majority demographic group and are perhaps more questioning of elder authority), business (especially as the economy recovers) and those who see a strong state system as most likely to protect their interests (minority clans and women). This all said, *xeer* remains highly relevant and resolves a high percentage of disputes either in situ – or as explained above – even at the court level. One study found that *xeer*, on average, resolves 72% of cases in South-Central Somalia, more than 50% of cases in Puntland and 32% in Somaliland.<sup>124</sup>

## Characteristics of Xeer

- The substance of *xeer* applied is specific to a clan contract, which is generally unwritten and orally maintained. What a *xeer* contract covers and what is agreed to depends, principally, on clan strength. The substance of *xeer* is strongly influenced by *shari'ah*, although it will not always comply with Islamic precepts (e.g., inheritance, rape as a sanction and forced marriage).
- Disputes are generally resolved through a hierarchy of problem-solving fora, i.e., male family leaders through to tribal elders, who exercise strong moral authority. Elders may engage *ulama* (religious leaders) to adjudicate disputes that involve family and personal status matters, such as divorce and inheritance. *Ulama* apply *shari'ah*, but are even less likely than judges to have received a strong education, and there appears to be wide variation in the school, principles and precepts that are followed.
- *Xeer* processes generally apply flexible rules and procedures, allowing for pragmatic solutions. Outcomes are usually compromises, made on a case-by-case basis through ‘light arbitration’ (*masalaxo* or *gar dawo*).
- Because wrongdoing is perceived principally in terms of social cohesion, *xeer* rarely distinguishes between criminal and civil offenses. Likewise, precepts such as treating like cases alike or having pre-determined sanctions, rarely feature in *xeer* processes. Common disputes include murder, assault, robbery, land disputes, sexual assault/rape, inter-clan disputes, divorce, inheritance and natural resource-related disputes.
- Wrongdoing and responsibility are collective concepts under *xeer*. In practice, this means that an entire *mag*-paying group will be collectively responsible for a crime committed by one or more of its members. By the same logic, compensation for a crime is owed, not to the individual aggrieved, but to the group.
- Compliance usually relies on social pressure linked to the adjudicator’s authority and notions of group harmony.<sup>125</sup>

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<sup>122</sup> Ibid, pp. 9-11; ‘Study on Women’s Access to Justice and Security in Somalia’, Katuni Consult-UN Women (2017), 11-14,

<sup>123</sup> ‘Understanding Potential Development of the Justice System in Somalia and Opportunities for Promoting Rule of Law & State and Peace Building Informed by Baseline Analysis of Formal Regional Criminal Courts in Urban Somalia’ Coffey (2017).

<sup>124</sup> ‘Legal Aid Providers Supporting Survivors of Gender Based Violence in Somalia’ UNDP, LAW, UNFPA (2014) 17.

<sup>125</sup> Taken from ‘Understanding Potential Development of the Justice System in Somalia and Opportunities for Promoting Rule of Law & State and Peace Building Informed by Baseline Analysis of Formal Regional Criminal Courts in Urban Somalia’ Coffey (2017). See further ‘Study on Women’s Access to Justice and Security in Somalia’, Katuni Consult-UN Women (2017), 8-10;

## Xeer Processes and Relationship with the Courts

The widespread use of *xeer* is a product of both political and pragmatic factors. At the most basic level, the weak penetration of the state makes *xeer* the only option for the vast majority in rural and peri-urban areas. It is also a reflection of the deficits within the state system, which can be costly, difficult to navigate, unpredictable and may expose users to community-backlash.<sup>126</sup> Third, war, lack of confidence in the state and the socio-security bonds that exist within and between clans vest *xeer* leaders with enormous authority. Finally, operating within the clan model is also pragmatic. As discussed in part 2, the clan system is the provider of social relationships, economic security and physical protection; belonging to a clan requires undivided loyalty, participation and mutual reliance, and this extends to dispute resolution.

An additional factor is the desire of clan leaders and those with vested interests in the continuity of the clan system to maintain control over certain aspects of dispute resolution. In principal, the disputes that elders most want to assert jurisdiction over are those that threaten to compromise clan strength, interrupt clan unity or spark violence. However, it cannot be denied that part of the tension concerns power and control. For some leaders, there may also be a financial incentive. Elders are almost always compensated for dispute adjudication and for many this will be their principal source of income. The level of compensation received is often linked to the outcome desired or another end, such as maintaining confidentiality.

As noted above, this is not to imply that the courts and *xeer* consistently operate in a relationship of contestation or competition. In keeping with the *raison d'être* of ending cycles of violence and maintaining stability, elders may refer on complicated disputes or those deemed (for whatever reason) more likely to be resolved with intervention by the courts. If disputes are referred to the courts, these are likely to be complex sexual violence, murder and inter-clan disputes. There is also a degree of cross-referral, with *xeer* operating alongside and/or in cooperation with courts. Courts, for example, might render a verdict in a case while the elders resolve the inter-clan dimensions of the dispute. Generally, however, clan power is so great that even if a dispute is referred to the court, it will generally be with the elders' acquiescence and involvement in the final outcome.

## Deficits and Challenges

From a rule of law and rights protection perspective, the *xeer* system's principal inherent deficits are:

- discrimination against and weak protection of women, children and minority clan members; including lesser punishments or compensation;<sup>127</sup>
- politicization of decision-making and corruption;
- youth and women having no or little voice in *xeer* processes;
- collective punishment (*diya* is usually paid by the clan not the perpetrator); and
- processes and punishments that violate constitutional/legislative provisions and/or human rights principles.

While there are deficits and inconsistencies in data, anecdotal evidence suggests that for women, the most tangible issues are:

- Bias against them in outcomes and decision-making i.e., crimes against them not taken seriously by *xeer* leaders or, in some cases, not dealt with at all.<sup>128</sup> This includes cases of rape and IPV, but also assault and murder which, although serious crimes under *xeer* for both men and women, result in lesser compensation for women vis-à-vis men.
- Crimes of sexual violence being resolved either by marriage or compensation which is not paid to the victim.<sup>129</sup> It seems clear that rape and other forms of sexual violence are becoming burning issues for

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DRC, 'Harmonization of the Legal Systems Resolving Land Disputes in Somaliland and Puntland: Report and Recommendations' UN-HABITAT (2015) 76.

<sup>126</sup> 'Study on Women's Access to Justice and Security in Somalia', Katuni Consult-UN Women (2017), 10; In theory, if *maq* is not paid, the aggrieved clan may opt to kill the criminal or members of that persons' clan.

<sup>127</sup> For identical crimes, the level of compensation payable is highest where the victim is a married woman, followed by single woman, and then a widow. Similarly, the compensation payable when the victim is a man will always be higher than that for a woman.

<sup>128</sup> 'Harmonization of the Legal Systems Resolving Land Disputes in Somaliland and Puntland: Report and Recommendations' UN-HABITAT (2015) x.

<sup>129</sup> 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 37-38.

women, and particularly the practice of clan elders or family members influencing courts to return these cases to the community level.<sup>130</sup>

- IPV not being dealt with in a way that mitigates violence to an ‘acceptable’ level; this reflects a disturbing norm among women themselves that sees violence as normalized. It should be noted that *xeer* usually permits some forms of violence and disciplinary measures by men to women and by parents/guardians to children. A *xeer* resolution will usually only be called for if the violence is either very serious or leads to permanent impairment (disability, miscarriage etc.). In such cases the outcomes might be compensation (*xaal marin*) in the form of an apology and financial remuneration and/or *maslaxo* (restoring the survivor to their previous state).<sup>131</sup>
- The rights of women to own or inherit land or property protected under *shari’ah* not being upheld at the community level or in *xeer* processes.<sup>132</sup> Land cases are often sent back to *xeer* authorities as land is held customarily and case adjudication usually requires historical knowledge possessed only by elders; elders will equally pressure women to withdraw their cases from the formal court and accept a *xeer* solution.
- A final issue, although not one usually raised by women is their participation in *xeer* processes. As non-*diya* paying members of a clan, women are considered of lesser value than men and her interests are subordinate to her adult male relatives and clansmen – the source of women’s protection. Women are thus not considered to be entitled to contribute to decisions that impact *diya* or clan outcomes. The result is that for *xeer* purposes, a woman is not an independent legal person; she is always under the jurisdiction of her *muhram* (male guardians) and is represented by them in legal proceedings.<sup>133</sup>

Because minorities exist outside the traditional clan structure, they cannot avail of the protection afforded by inter-clan *xeer*.<sup>134</sup> Minor clans will have *xeer* agreements with neighboring clans, but the terms will be weaker insofar as the rights of minor clans are devalued. Such *xeer* leaves all members more vulnerable to violence, land expropriation and other rights violations. If perpetrators are from a majority clan, minority elders usually have little bargaining power to ask for compensation. The situation is even worse for IDPs. As the basis for *xeer* is a contract between two clans, displacement means that an individual has no one to represent them in negotiations and no *diya*-paying membership to support a victim or perpetrator in the event of a conflict. The result is that IDPs have little or no clan protection, unless it is offered to them by the majority clan, which is a rare occurrence.<sup>135</sup> This exposes them to real threats of violence and rights abrogation by host communities and local authorities; moreover, their weak position means that threats of violence or eviction are highly effective at guaranteeing silence.<sup>136</sup>

Harmful practice <sup>137</sup>	Frequency
<i>Godobitir</i> , marriage of a female as compensation	Practiced
Collective payment of compensation	Widely practiced
Forced marriage of the perpetrator of rape	Practiced
<i>Dumaal</i> , forced marriage between a widow and a male relative	Practiced with consent

<sup>130</sup> F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013).

<sup>131</sup> ‘The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia’ International Committee for the Development of Peoples and International Alert, (2015) 33.

<sup>132</sup> F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013).

<sup>133</sup> ‘Study on Women’s Access to Justice and Security in Somalia’, Katuni Consult-UN Women (2017), 8-11.

<sup>134</sup> Minority Rights Group 2012 Report at <https://minorityrights.org/country/somalia/>; F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013).

<sup>135</sup> In Mogadishu, majority clans like Isaaq and Darod are regarded as minorities due to the limited physical representation they have and resolve property disputes through representation by Hawiye clans. In this case, the *shir* are represented by two groups of Hawiye, one that represents the claimant and one that represents the alleged squatters. Men, do have the opportunity to mobilize their own clan representative to lobby and protect them, if they prefer; F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013); F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013).

<sup>136</sup> ‘The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia’ International Committee for the Development of Peoples and International Alert, (2015) 37.

<sup>137</sup> ‘Study on Women’s Access to Justice and Security in Somalia’, Katuni Consult-UN Women (2017), 8-10 and ‘The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia’ International Committee for the Development of Peoples and International Alert, (2015) 24.

Xigisian, marriage between widower the sister of a deceased	Practiced with consent
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## Understanding Xeer in Current-Day Somalia

It is perhaps best to understand *xeer*, not as a justice mechanism or justice alternative, but as a peacebuilding tool. **The principal aim of *xeer* is to interrupt cycles of violence and restore intra-community harmony (unlike the state system which is supposed to deliver individualized, rule-based and predictable punishment for wrongs).** This explains why *xeer* is more likely to be used – or recourse to the state system resisted – for disputes involving inter- or intra-clan relations. It also explains why individual interests are not generally protected. Conflicts are viewed in terms of their potential disruption to clan security, thus the solution negotiated will premise around what will best restore or maintain cohesion. **In short, the *xeer* system discriminates against and fails to protect women, children and minority clans because the system is not structured to protect the rights of these groups.**<sup>138</sup>

Such insight explains the pervasiveness and durability of certain rights-abrogating *xeer* practices. For example, the negotiability inherent in decision-making and its vesting of rule setting and dispute resolution responsibilities in the same actors, clearly inhibits access to rights-based individual justice. Proponents of *xeer* would argue, however, that these factors are integral to the functioning of the system; it is the elder’s intimate knowledge of the parties, the background to the dispute and local power-sharing arrangements that facilitates the crafting of a decision that will meet popular notions of equity and ensure compliance. Other, equally violating *xeer* practices are grounded in context-specific rationale, including weak state security, the absence of state-maintained social safety nets, poverty and generalized discrimination. These dichotomies reflect complex tensions around conceptions of justice, equity and individual rights, but ones that must be acknowledged and reconciled if programming is to be impactful.

### Seeking Justice for Crimes Involving Sexual Violence

Despite strong proscriptions concerning rape in both *xeer* and *shari’ah*, Somalia’s long conflict, coupled with deeply entrenched norms of discrimination against women and minorities, has created an environment where rape is both common and normalized. Women are largely viewed, not as rights holders, but as the property of families and clans, and they are often blamed for creating the circumstances under which a rape was perpetrated. In the aftermath of sexual violence, women are pressured to refrain from involving the justice system, either by evoking cultural arguments such as the need to protect family honor and privacy, through to physical threats, intimidation and violence.<sup>139</sup>

Indeed, proceeding to the state system against the wishes of family members or elders is considered an extreme social transgression; such women may be socially excluded, discriminated against in future *xeer* decisions or otherwise punished. Against such pressure, it is not surprising that some women make an informed and considered decision to have their case resolved at the community level. At *xeer*, she will not have to face going to court without the support of her family (which will impact success); moreover, even with a poor *xeer* outcome, she can expect the clan’s protection and approbation for conforming with tradition.<sup>140</sup>

While *xeer* compensation agreements vary between clans, the basic precepts and adjudication procedures are similar across Somalia. Rape is technically prohibited under *xeer* although the crime is not recognized when it occurs between a husband and wife. Likewise, sexual abuse within a household is generally considered as falling within the private sphere and as such is not dealt with in *xeer*. Rape will often be resolved through marriage, especially if a pregnancy results and/or the parents of the victim support this option. The *xeer* of some groups protects the right of a victim to refuse such a marriage, however it is usually her representative – a father, uncle or brother – who will consent to the outcome. If marriage is not an option, compensation may be awarded, but the victim usually does not benefit wholly or sometimes even at all. Any settlement agreement will also be dependent on the perpetrator and his clan, wealth and status.<sup>141</sup>

<sup>138</sup> ‘Study on Women’s Access to Justice and Security in Somalia’, Katuni Consult-UN Women (2017), 10-11.

<sup>139</sup> F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013).

<sup>140</sup> ‘Study on Women’s Access to Justice and Security in Somalia’, Katuni Consult-UN Women (2017), 12.

<sup>141</sup> F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013). Collective or gang rape is a particular problem; marriage is not generally an option and cross-clan negotiations can be complicated.

The rationale underpinning how rape is adjudicated under *xeer* needs spelling out. As stated earlier, the clan is the basic unit of security and socio-economic protection in Somalia; the system is maintained through strict allegiance to the notion that the strength and survival of the clan is the ultimate objective and a collective obligation. Elders' decisions are an extension of this thinking; they will deliver outcomes that serve the interests of the clan and minimize inter- and intra-clan conflict, regardless of an outcome's justness or fairness.<sup>142</sup> Given that (regardless of the case is adjudicated) a woman will probably need to deal with impunity, forced marriage, and/or stigmatization,<sup>143</sup> many victims do not see the value in reporting crimes against them. This is even more the case for IDPs and minority clan members, who have little bargaining power at *xeer* and often face threats of further violence or forced eviction if they pursue their claims. This culture of impunity, resignation that authorities will not help survivors, and the threat of secondary victimization has created a cycle of violence perpetuation and normalization.<sup>144</sup>

Despite these challenges, there is an increasing number of women who see the courts as the only forum capable of providing them with impartial and rule-based justice.<sup>145</sup> Indeed, victims of sexual violence may be best protected under the hybrid shari'ah-secular law system. The obstacles at this level mainly concern the capacity of formal justice actors, an absence of enforcement mechanisms, and clan influence.<sup>146</sup> However, if courts continue to strengthen, over time it is likely that women will see themselves as better served by referring their cases to courts, and that *xeer* will come under increasing internal pressure to reform itself in ways that are less inimical to women.

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<sup>142</sup> 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 37-38.

<sup>143</sup> Ibid p. 25; F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013).

<sup>144</sup> 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015) 34-45; Somalia Gender-Based Violence Working Group Strategy (2014-2016).

<sup>145</sup> S Allen, H Idris and T Chopra, 'Women's Access to Justice and Security in Somalia's Afmadow District: A Snapshot', UN-WOMEN Briefing Paper 1: 2016, 7

<sup>146</sup> 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015) 39-42.

## 5. Expanding Access to Justice in Somalia: Key Challenges and Pathways Forward

Across Somalia, *xeer* and the state courts system co-exist in a state of mild tension, however both ultimately operate to protect the collective and individual interests of adult males from majority clans. The rights of women, children and minority groups are considered secondary and expendable at best, and at worse, irreconcilable with the status quo. Unsurprisingly, access to justice can be described as highly limited, with certain groups facing more obstacles than others. Further, within each marginalized group lies additional social, economic and political inequality, which further influences a person's ability to deal with rights violations.

Women and marginalized groups are best protected under the binary *shari'ah*-secular law norms. Marriage, divorce, protection against violence and property are all areas where the rights offered to women and other groups are stronger (regardless of whether *shari'ah* or state law is applied) when compared to *xeer*. But such protections remain largely out of reach. Judges, prosecutors, defense attorneys and police are insufficiently trained and resourced, and their relative strength compared to the clans leaves them with only perfunctory authority in many locales. **The outcome is one of uncertainty; complainants cannot be sure what law will be applied, nor whether a court will assert their jurisdiction, and if it does, whether it will make a judgement according to law or *xeer*. This recipe does not offer women and minorities a sufficiently improved alternative to encourage them to access the justice system, particularly given the backlash they may face for disrespecting social conventions.** Thus, whether by choice or lack of options, in practice, women tend to engage the *xeer* system – the system that is least structured to protect their rights. Minority clans and IDPs, however, may not even have this option. Their lack of relative power leaves them highly exposed to violence and expropriation, including by officials. At the same time, they are less likely to have their complaints taken seriously by courts and have little or no bargaining power to seek redress through *xeer*. Particularly IDPs risk punitive retaliation if they take court or police action, including arbitrary arrest, imprisonment, violence or eviction.<sup>147</sup>

The result is that seeking redress is a fragmented, precarious and non-linear process. Marginalized groups navigate power structures and justice institutions based on a rationale assessment of who to engage to reach the best outcome given their particular situation, assets and vulnerabilities.<sup>148</sup> **The takeaway is that women and other marginalized groups currently lack the tools to work the plural system to their advantage. Stripped of meaningful choice and bargaining power, many are relegated to *xeer*, where clan interest is the unabashed object of protection or forced into silence as a tool of self-preservation.** This combination of poor access to justice, denial of choice and an expectation of impunity is consolidating the polarized and unequal nature of Somali society and undoubtedly driving the increased incidence and complexity of violence. From this discussion, the principal barriers to accessing justice can be identified as follows.

Within Somalia's most vulnerable groups an evolving climate of silence is discernable; victims see themselves better served not reporting violations than exposing themselves or their families to an overall higher level of vulnerability.

### Five Principal Access to Justice Inhibitors

1. **Lack of confidence in the formal justice system:** Low confidence in the formal judicial system directly stems from weak institutional structures and lack of independence. Poor knowledge on the part of justice sector actors, coupled with low resourcing and power asymmetries vis-à-vis the clans, means that rights holders do not know what law will be applied. Thus, while marginalized groups are likely to fare better under statutory law and *shari'ah*, the lack of surety that this will be invoked means that the risks attached to stepping outside of the clan structure are often too great.
2. **Pluralism:** Pluralism is inscribed in the constitutions of the FGS, Puntland and Somaliland, but without clear tools to reconcile different provisions or bodies of law. This is complicated further by the fact that judges are poorly schooled in both *shari'ah* and secular law. This vests judges with broad liberty when

<sup>147</sup> Ibid, pp. 39-42.

<sup>148</sup> 'Study on Women's Access to Justice and Security in Somalia', Katuni Consult-UN Women (2017), 7.

resolving cases, creating opportunities for corruption and loopholes for power-holders to influence judgments.<sup>149</sup> The resulting pluralism aids those with influence, power and resources, but disadvantages women and other marginalized groups who are best served through a strict application of statutory law.

3. **Different conceptualizations of justice informed by deeply entrenched discrimination and inequality:** The patriarchy underpinning the clan system, deeply entrenched discrimination and decades of inequality have normalized certain practices to the point where they are no longer regarded as rights violations by men or women. Key examples include marital rape;<sup>150</sup> rape that is attempted but not actualized; sexual violence perpetrated by family members, relatives or friends; rape committed with a view to marriage; child marriage; and FGMC.<sup>151</sup> This manifests in crimes not being dealt with properly, or at all, and narratives that place responsibility in the hands of victims rather than perpetrators. The resulting impunity and disenfranchisement promotes violence and a culture of silence around transgressions.
4. **Exclusion from decision-making:** That women and other marginalized groups are excluded from participating in discussions and adjudication processes relating to issues that impact them permeates the entire sector, from rules requiring that women be represented at *xeer* by a male relative<sup>152</sup> through to the lack of female and minority representation in policing services, courts or governance. Not only does this abrogate constitutional provisions,<sup>153</sup> it reinforces the cycle of discrimination and rights transgression. This is because exclusion prevents minority needs, interests and priorities from informing the evolution of norms and structures.<sup>154</sup> Moreover, poor group representation in the justice and policing sectors dissuades reporting and impacts the likelihood of a successful outcome.<sup>155</sup> These challenges are normative as well as structural; integrating women into the policing and justice sectors, for example, is slowly taking place,<sup>156</sup> however the greater problem is the discrimination and workplace disempowerment they face.<sup>157</sup>
5. **Clan dominance:** To date, efforts aimed at improving marginalized groups' access to justice have centered around improving institutional reach and strengthening the capacity of the justice and policing sectors. While undoubtedly important steps, this approach overlooks principal causal factors. The challenge is that these factors are interconnected, mutually reinforcing and sit at odds with peacebuilding imperatives.

The fundamental issue is the relative strength and durability of the clan system vis-à-vis the state — a dynamic which has deeply entrenched origins that are ultimately rooted in security provision. For the purposes of this analysis, the upshot is that decades of war, political fragility and weak governance has elevated the clan unit to fundamental provider of security and protection, and it remains so to this day. Clans use this power differential to control outcomes and exercise de facto authority over jurisdictional matters, for both political ends (their vested interest in maintaining the status quo) and functional reasons. At present, *xeer* is a more powerful and sustainable tool than any sanction a court might prescribe. This is because its *raison d'être* is peacebuilding — a role that courts have no authority or mandate to play. In practical terms, this means that the courts are not able to contain violence at the clan level: “when cases are dealt with through secular law it may see the perpetrator go to jail for a few months but the potential

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<sup>149</sup> “The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia” International Committee for the Development of Peoples and International Alert, (2015) 7.

<sup>150</sup> The social norm within marriage is that a husband has the right to sex unless the wife is sick or unwell.

<sup>151</sup> “The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia” International Committee for the Development of Peoples and International Alert, (2015) 30, 36, 39-42.

<sup>152</sup> *Ibid*, pp. 39-42.

<sup>153</sup> F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013). E.g., Article 15 of the Federal Constitution “Every person has the right to personal security, which shall be safeguarded through the prohibition of illegal detention, all forms of violence, including any form of violence against women, torture, or inhumane treatment.”

<sup>154</sup> C Sweetman and J Rowlands, ‘Introduction: Working on Gender Equality in Fragile Contexts’, *Gender and Development*, 24:3, 337-351 (2016).

<sup>155</sup> There is some evidence of a correlation between the number of women lawyers and increased reporting, prosecutions and convictions for GBV offences. ‘Legal Aid Providers Supporting Survivors of Gender Based Violence in Somalia’ UNDP, LAW, UNFPA (2014) 8.

<sup>156</sup> In Puntland there are 7 women prosecutors, note however that the appointment of women judges has been resisted on *shari’ah* grounds; ‘Study on Women’s Access to Justice and Security in Somalia’, Katuni Consult-UN Women (2017), 7.

<sup>157</sup> F Musse and J Gardener ‘A Gender Profile of Somalia’ Developed for the EU Somalia Mission (2013) 44.

for conflict between communities that the incident has ignited has not been resolved and may flare up on his release”.<sup>158</sup>

It is this security imperative coupled with the aforementioned power asymmetries that explains the robustness of discriminatory and rights-abrogating *xeer* practices. Recalling that a clan’s strength and wealth are dependent on its size, the protection of *maq*-paying men is a *sine-qua-non*. Because individuals may have too few resources to make compensation payments (which can then set in place a cycle of revenge killing), it is in the best interest of the group to approach responsibility for wrongful acts collectively.<sup>159</sup> It is this basic operating logic system that sets the frame for a multitude of discriminatory and rights-limiting conventions. For example, women are excluded from decision-making because they cannot be assumed to have the undivided loyalty that is integral to clan strength and longevity. The same reasoning explains women’s limited inheritance and property rights; because clan size and strength are a product of its wealth, vesting property ownership or inheritance rights in women — who may marry or be divorced out of the clan — does not serve clan interests. To do otherwise would dilute the group’s collective strength and defensive power. Collective thinking also explains how certain acts that are inimitable to women are conceptualized — not as crimes against individual physical integrity — but as attacking the honor, integrity and/or strength of a clan.<sup>160</sup>

The conclusion that must be drawn does not bode well for marginalized groups. Practices that are inimical to and prevent them from accessing justice, are so closely integrated into the logic of the Somali socio-political system, they are unlikely to dissipate unless or until the clan system loses its influence vis-à-vis the state. A fundamental change in power dynamics, however, is unlikely to happen soon. Perhaps more importantly, prematurely pushing for a transfer of power towards the state might be unwise. Despite current stability, Somalia remains highly fragile. Power and influence are highly contested goods, and moves to dilute the status of clan elders and clan hierarchy are likely to be met with staunch resistance. Indeed, there are no tradeoffs between peace and justice; a return to conflict will expose marginalized groups to new threats that, while of a different nature, may be equally as harmful as justice denials. For the time being therefore, a ‘muddy’ sharing of control is most likely to maintain peacefulness and cohesion.<sup>161</sup>

Arguably, the largest obstacle to broader access to justice is the resilience of clan system itself. More clearly, it is not *xeer* per se, but the nature of clan functioning that is behind the structural limitations on women and marginalized groups’ rights. This explains limitations on women’s property rights through to their exclusion from decision-making and norm creation, collective thinking, and outcomes prioritizing group cohesion over individual restitution.

These complexities should not imply that the situation is intractable or that interventions geared towards a stronger and more independent justice sector are not warranted. It is simply that when planning interventions, it is critical that deficits be understood within their broader context. Insofar as the practices in question have security and socio-cultural explanations, the solutions required will need to go beyond improved access, tightened protocols and augmented capacity to encompass a broader range of development objectives.

## Pathways Forward

**Taking all this into account, the approach that will best serve the justice interests of women and marginalized groups is twofold: a) a gradual transfer of influence and power in favor a strengthened formal justice model, and b) normative and attitudinal change towards individualist-based rights in communities and among all justice actors.** In support of this end, five areas of engagement should be prioritized: strengthened courts, improved access to justice options, rights awareness, reducing violence, and attitudinal transitions in support of women and egalitarianism.

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<sup>158</sup> Ibid.

<sup>159</sup> J. Gundel, *The Predicament of the Oday: The Role of Traditional Structures in Security, Rights, Law and Development in Somalia*, Danish Refugee Council (DRC) (2006) iii, 9.

<sup>160</sup> ‘The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia’ International Committee for the Development of Peoples and International Alert, (2015) 7.

<sup>161</sup> Ibid, pp. 50.

## Strengthened Courts

Women and marginalized groups will not be sufficiently incentivized to use the courts until outcomes become more reliable and law-based, and inroads for corruption and influence are closed. This will require steady investment in the capacity of the personnel staffing the justice and policing sectors, as well as bolstering the resources made available to them. Priority actions have been outlined in several needs assessments and include:

- Training justice actors in interpreting Islamic legal tools and implementing them alongside statutory law.
- Training, advocacy and awareness raising around key legislation, particularly the Penal Code and Sexual Offences Acts (where they apply).
- Standardized protocols for receiving, processing and adjudicating cases involving SGBV, children and individuals bringing a case without the support of their clan.
- A cadre of specialist (including female) investigators, police and judges to process SGBV cases.
- Oversight mechanisms to ensure that fair trial standards are upheld, the relevant law applied, and cases are not returned to clans for adjudication.<sup>162</sup>
- Policies and mechanisms to improve the safety and privacy of rights holders, witnesses, lawyers and judges, including through standardized protocols (such as the use of screens in courts), safe houses and security.<sup>163</sup>
- Improved forensic evidence collection and storage.
- Making the justice, policing and governance sectors more inclusive of women and minorities.

## Creation of More and Better Justice Options

Even when courtroom justice is desired, many other barriers restrict women and marginalized groups from accessing it. Steps to provide women with more options start with broadening the reach of judicial and policing services into rural and peri-urban areas, for example through mobile courts, and removing cost and conceptual barriers, such as through legal aid and paralegal services. Increased options by which to uphold one's rights may also create an environment of competition for justice services. Such forces might provide the incentive needed for *xeer* leaders to initiate reforms. In certain contexts, providing a version of justice that women are likely to accept will be a sufficient sacrifice if it means that *xeer* processes remain operative and leaders retain influence. While this is not the ultimate aim, given the weak reach of the state sector, any reduction in harm caused by *xeer* processes will constitute a net benefit for at-risk groups.

## Rights Awareness

Improved rights awareness is an essential complement to improved access to judicial fora. Such knowledge extends beyond laws and procedure, to include *shari'ah* and insight into what constitutes a violation of individual rights. As discussed, a stumbling block to better justice outcomes is the disconnect between legal provisions and how Somalis — both men and women — conceptualize their rights and obligations.

## Reduced Violence

Ultimately, the most efficient approach to improving the protection of women and minorities is to reduce their exposure to violence. As previously discussed, current levels of violence are a product of the civil conflict taking place against deeply entrenched discrimination and inequality, which was then carried over into peacetime as a result of impunity, declining socio-economic conditions<sup>164</sup> and male de-emancipation. Importantly, Somali culture outlines clear standards and expectations pertaining to male identity which have come under increasing pressure as women have become breadwinners and heads of household.<sup>165</sup> These

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<sup>162</sup> Sexual Violence Oversight Committee (SVOC) in South-Central Somalia.

<sup>163</sup> 'Legal Aid Providers Supporting Survivors of Gender Based Violence in Somalia' UNDP, LAW, UNFPA (2014) 26.

<sup>164</sup> Socio-economic factors, such as illiteracy, poor/interrupted education, unemployment/limited or lack of financial means, urbanization, family breakdown, inadequate shelters, contribute to child marriage, higher risks of physical and sexual violence and deteriorations in family life such as divorce and polygamy.

<sup>165</sup> Chronic war and instability have severely curtailed the ability of men to live up to the standards set for them in Somali culture. Underscoring such standards is manhood being predicated on responsibility for family well-being as a functional contribution to clan organization. Key values that cut across area and age include responsibility, self-discipline, courage, humanity and generosity. A man should be caring, kind, consultative and responsible towards his immediate family members (wife and children), but at the same time is expected to be the principal breadwinner and represent his family in the public/clan domain. He is expected to instill in his children values of politeness, ethics, religion, self-reliance and co-existence. A man's moral qualities should be demonstrated throughout one's life, including during times of adversity such as conflict, drought, famine etc. Role fulfilment in the family sphere determines a man's reputation, status and power at the clan level. Reciprocally,

tensions spill over into violence and other means of men exercising control over women (but also against other men) at the household and societal levels.<sup>166</sup> There are two takeaways. First, that addressing the protection needs of vulnerable groups involves examining the challenges confronting men, particularly access to livelihoods, reducing inequality and finding alternate means of fulfilling their culturally-ordained roles.<sup>167</sup> Second, it provides clues to interventions that might be effective in promoting an attitudinal culture where women are better protected. An examination of male gender identity reveals the importance of partnership between spouses, a man's role in child rearing and values such as leadership, kindness and responsibility. These might inform the development of sensitization campaigns that encourage men to act out their traditional cultural responsibilities, despite the challenges posed by post-conflict economic recovery.

## Attitudinal Transformation

Equally problematic is the deeply entrenched attitudes of discrimination attached to women and minority groups. Normative and attitudinal change is a scantily understood process imbued with cultural and political sensitivities. Alongside targeted interventions, prerequisites seem to include a robust civil society sector, economic recovery and representative participation in governance. However, even legal aid and legal empowerment initiatives may not only be applied with a view to foster strengthen access to the weak formal justice system. Initiatives like legal aid or legal awareness can inflict a change of norms and attitudes among local populations as well as local justice actors and can ultimately impact xeer norms and solutions.

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a man who is deemed to be unable or unwilling to fulfil clan obligations can create serious implications (in terms of protection) at the family level. In short, although it might appear counterintuitive, it is a man's capacity to act in egalitarian and respectful ways that earns him respect and honor. Somali gender identity thus is not naturally associated with violence; it is when gender identity or roles cannot be fulfilled that can generate conditions that spill over into violence. Equally important, is that male reputation and honor is not static; over time, with his actions and decisions, a man can lose and equally regain his manhood. 'The Impact of War on Somali Men: An Inception Study' Logica (2015) 1-3, 11-18, 29.

<sup>166</sup> The conflict displaced men from traditional gender roles as women became breadwinners and heads of household. Peace, however, did not restore gender identities. Quite the contrary, women have remained in breadwinning roles, but gender attitudes have remained constant. Male dominance and patriarchy may even have been reinforced through the twin forces of clan strengthening vis-a-vis state institutional weakness and unemployment preventing men from fulfilling their traditional roles. Responses are not uniform; some turn to violence, while others look to reformist Islam or migration. 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015) 37-38, 'The Impact of War on Somali Men: An Inception Study' Logica (2015) 4-7, 47, 52.

<sup>167</sup> These struggles can also be seen in the burgeoning youth population; according to a Logica study youth from minority groups reported that during sports and game events, when youth from minority clans win a game, the young men from the majority clans use sexual violence as a way of emasculating them; 'SSF II Gender Equality and Social Inclusion Strategy', Somalia Stability Fund (2017) 7-8; 'The Impact of War on Somali Men: An Inception Study' Logica (2015) 1, 4-5, 27.

# Annex I. Key Concepts Relevant to the Somali Context

Access to justice is both a fundamental right, and a bridge to upholding other rights.<sup>168</sup> It has been defined as the ‘ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards’.<sup>169</sup> In practical terms, this means a legal framework that is fair and just; citizens have basic knowledge and confidence in the system; quality advice and representation is available; there are no physical impediment to accessing justice fora; justice mechanisms address grievances in an efficient manner; and solutions are enforced. These conditions may apply differently to different groups, in different locations and/or in different areas of law. In Somalia, for example, while men from majority clans have ready access to numerous dispute resolution fora, women, those from minority clans, the displaced and those with disabilities may find it difficult to access any dispute resolution mechanism, let alone obtain a fair outcome.

Term	Definition
Alternative dispute resolution (ADR)	A form of justice that covers a variety of non-judicial mechanisms for resolving conflict including negotiation, mediation, conciliation and arbitration. ADR is often similar to customary dispute resolution insofar as it is less formal, highly participatory, inexpensive and decision-making is driven by principles of fairness and equity. The main difference is that ADR mechanisms are usually constructs either of the state (e.g., legal aid bodies that offer diverse services), or international development assistance (e.g., non-government organizations providing legal assistance).
Customary justice	A system of customs, norms and practices that are repeated by members of a particular group for such an extent of time that they consider them to be mandatory. <sup>170</sup> Somali customary law — <i>xeer</i> — can best be understood as an unwritten set of contracts that exist between clans and sub-clans, based upon the principles of peacekeeping, customary precedent and Islamic precept. <i>Xeer</i> draws its authority from cultural, customary or religious beliefs, rather than the authority of the state. <sup>171</sup> While the civil war weakened elder influence and the effectiveness of <i>xeer</i> , it remains highly relevant and the dominant form of dispute resolution in most areas and for most Somalis.
Discrimination	Differential treatment on the basis of, inter alia, a person’s gender, race, clan or age that results in denials of rights, exposure to violence or exclusion. Particularly relevant in the Somali context is the normalization of discrimination. When discrimination becomes normalized, the result can be inaction (which can be as detrimental as overt discrimination), acceptance, or the subject of the discrimination buying into the denial of rights and opportunities to their group. A key example is the lead role of women in FGMC and their perpetuation of the notion that the practice is imperative for marriage. Equally important in Somalia is the intransience of the characteristics that lead to the principal forms of discrimination; while the discrimination felt by youths may pass as they marry and become autonomous clan members, women and individuals from minority clans are unable to shed these defining characteristics. <sup>172</sup>
Gender	The socially and culturally constructed differences between men and women; it should be distinguished from sex which relates to biological differences. These gender ‘identities’ vary across cultures and over time, and have important implications for protection, vulnerability and development. Gender identity, for example, informs how society values and allocates duties, roles, responsibilities, opportunities and freedoms to women, men, girls and boys. Expectations concerning normative behaviors manifest in gender divisions of labor, differences in access to benefits, and participation in governance and decision-making. Because such results impact allocations of power, gender identities become reinforced and eventually self-constituting. Particularly relevant to the Somalia context, female gender roles and responsibilities often expand during periods of conflict as women assume tasks usually assigned to men. Reciprocally, men who have lost assets and/or were unable protect their families, often find themselves unable to fulfil their own gender identities. This can have a variety of ramifications. In certain contexts,

<sup>168</sup> Access to justice is protected under article 14 of the International Covenant on Civil and Political Rights (1966) and articles 8 and 10 of the Universal Declaration on Human Rights (1948).

<sup>169</sup> United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner’s Guide to Human Rights-Based Approach to Access to Justice* (Bangkok: UNDP, 2005) 5.

<sup>170</sup> This definition was adapted from R. Yrigoyen Fajardo, K. Rady and P. Sin, *Pathways to Justice: Access to Justice with a Focus on Poor, Women and Indigenous Peoples*, UNDP Cambodia and Ministry of Justice, Royal Government of Cambodia (2005) 34.

<sup>171</sup> This description was adapted from International Council on Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009) 43

<sup>172</sup> These definitions pertain to the Somali context, see for global USAID definitions and policies: <https://www.usaid.gov/ads/policy/200/205>

Term	Definition
	these tensions can result in a transformation in gender relations for the betterment of women and girls. Such normative transformations, however, are generally highly contested, thus creating a risk that traditional gender stereotypes become even more deeply entrenched.
Gender analysis	The process of examining the roles and responsibilities, or any other relational dynamic, involving women, and men, boys and girls, with a view to identifying deficits, opportunities and detecting vulnerabilities and outstanding needs, and devising solutions for the entire policy and program cycle. A closely related concept is gender sensitivity, which is the recognition of gender differences, concerns, interests and inequalities, arising from men and women's different social positions and gender roles. The goal is to enable gender responsive planning and program implementation i.e., activities that respond to identified gender concerns and that promote gender equality. This differs from gender mainstreaming which is the <i>process</i> of integrating a gender equal perspective into all stages and levels of the development process with a view to attaining equality and preventing harm or the reinforcement of discrimination through gender blind actions and policies. It is generally accepted that mainstreaming alone is insufficient to bring about positive and sustainable change for women and girls affected by discrimination and marginalization by virtue of their gender. The resilience of patriarchy and entrenched nature of discrimination requires that gender-specific interventions and mainstreaming take place in concert.
Gender equality	Equal entitlements of women to rights, benefits and results as men have, but that there may have to be differential or preferential treatment for women in order for them to enjoy their entitlement to equality, which is called a substantive equality approach to the rights. In more practical terms, gender equality is the equal valuing and absence of discrimination on the basis of a person's gender in authority, opportunities, allocation of resources or benefits and access to services. Because the forces and structures that maintain inequality are often built up over time and highly resilient, measures can be set in place to compensate for the disadvantages women face and thus create a more 'level playing field'; examples used in Somalia include representational quotas, scholarships for women and priority hiring.
Legal aid	A construct designed to assist people navigate the justice system, make informed decisions and obtain justice remedies. International justice and human rights standards prescribe that states make legal aid available in criminal cases to those who require it. In development, conflict and fragile contexts, however, legal aid can be a critical tool in ensuring that persons who are poor, marginalized, or otherwise in need of special legal protection, are able to access fair legal remedies in civil, administrative and criminal matters. Legal aid can include advice, assistance drafting pleadings, or mediation/representation at little or no cost. Importantly, legal aid does not necessarily need to be provided by lawyers; paralegals or trained community representatives can equally provide services relevant to empowering disadvantaged groups to uphold their rights. <sup>173</sup>
Legal empowerment	A "process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors." <sup>174</sup> Functionally, it is about making the protections of the law accessible to ordinary people. <sup>175</sup> It is grounded in the idea that marginalization and poverty persists, at least in part, because certain groups do not enjoy legal rights or the power to exercise their rights. Breaking this cycle requires a legal and political framework that specifically addresses the needs of marginalized groups, for example through legal rights literacy, enhanced access to justice and resource protections. <sup>176</sup>
Sexual and gender-based violence (SGBV)	Violence that is directed against a person on the basis of gender. It constitutes a breach of the fundamental rights to life, liberty, security and dignity, equality between women and men, non-discrimination, and physical and mental integrity. Sexual violence was used as a tool of war during the Somali civil conflict, with the result that rape constitutes one of the most pervasive forms of abuse suffered by Somali women and girls today. Despite religious and legislative protections (albeit of varying strength between the different states) SGBV is considered a matter to be dealt with in the private sphere and violations are rarely afforded the requisite level of seriousness at both the customary ( <i>xeer</i> ) and state (police and courts) levels.
<i>Shari'ah</i>	Translated as 'the path or the road leading to the water'. <sup>177</sup> Can be broadly understood as a set of principles and norms governing the lives of Muslims including, but not restricted to, legal provisions. <sup>178</sup>

<sup>173</sup> Taken from UNDP-UNODC Global Study on Legal Aid (2016) 8-9. See further UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013).

<sup>174</sup> Making the Law Work for everyone: Vol 1 – Report of the Commission on Legal Empowerment of the Poor, UNDP (2008) 3; Report of the Secretary-General on Legal Empowerment of the Poor and Eradication of Poverty A/64/133 (2009).

<sup>175</sup> Open Society Foundations, 'Legal Empowerment: An integrated approach to justice and development (Draft Working Paper), 2012, 1; <http://www.opensocietyfoundations.org/why-legal-empowerment>.

<sup>176</sup> See further <http://www.opensocietyfoundations.org/projects/justice-and-development/background>

<sup>177</sup> Fazlur Rahman, Islam (University of Chicago Press 1979).

<sup>178</sup> Abdullahi A An-Na'im, Islamic Family Law in a Changing World: A Global Resource Book (Zed Books Ltd 2002).

Term	Definition
	The 2012 Federal Government of Somalia (FGS) Provisional Constitution states that <i>shari'ah</i> should form the basis of the justice sector and this is widely supported by users of the justice system (equivalent provisions exist in the Constitutions of Puntland and Somaliland). As a rule-based system, grounded upon the principles of justice, equality and freedom, <i>Shari'ah</i> provides a framework for overcoming extant challenges such as collective responsibility, retaliatory killing, legal inequality and SGBV, especially when compared to <i>xeer</i> .
Social exclusion	The forces, beliefs, structures and processes that prevent individuals or groups from wholly or partially participating in society, with the result that they are unable to access resources, exploit opportunities, participate in decision-making and governance, and/or assert their rights. In Somalia, social exclusion particularly impacts women, girls, members of minority clans, displaced persons, and young men. In addition to the difficulty such groups face accessing opportunity and resources, historically engrained social exclusion exposes them to violence and other rights violations, and make it difficult to obtain redress.
Women's empowerment	A modality for both thinking about gender equality, and a means to realizing its ends. It understands gender inequality as being rooted in power imbalances between males and females. Women engaging in the public sphere and private sector, enjoying equitable access to the opportunities and resources, and using their agency in meaningful and constructive ways, are all positive manifestations of women's empowerment by asserting power and control over their lives.

## Annex 2. The International Legal Context

Instrument <sup>179</sup>	Principal provisions	Somalia status	Relevance in the Somali context
Universal Declaration on Human Rights (1948)	Confirms that all human beings are born free and equal in dignity and rights and such rights and freedoms will not be limited by a person's sex.	N/A	The Constitutions of the FGS, Somaliland and Puntland each guarantee basic equality between citizens, regardless of, <i>inter alia</i> , clan and gender. These are powerful tools to underscore equality as the guiding premise of programmatic interventions. For some, the elevation of <i>Shari'ah</i> as the highest law somewhat weakens this, however, an academically informed understanding of the relevant <i>Sunna</i> and <i>Fiqh</i> , <i>Qiyas</i> and <i>Ijma'</i> confirm this not to be the case.
Convention on the Elimination of All forms of Discrimination against Women (CEDAW) (1981)	The CEDAW affirms that gender equality is a precursor for development and peace. It establishes legal standards for the attainment of gender equality through the elimination of discrimination against women in all aspects of political, social, economic and cultural life. It highlights the importance of equality and equal opportunity in political and public life as well as education, health and employment. Ratifying Governments are required to set in place measures to enable and expedite gender equality in law and fact as well as confronting the underlying social political inequalities that perpetrate asymmetrical power relations based on gender.	Although FGS is yet to ratify CEDAW, the Cabinet has approved it subject to ratification by parliament.	Somalia is not a signatory state but several of the provisions are enshrined in other pieces of legislation; irrespective the CEDAW constitutes a framework for monitoring and oversight, and its provisions base standards that can inform program development.
Declaration on the Elimination of Violence against Women (1993)	A tool that recognizes the depth of gender-based violence and its many forms; it covers physical, sexual and psychological violence, as well as violence both at home and in the public sphere. It specifically calls out violations of human rights in situations of armed conflicts. These include murder, systematic rape, sexual slavery and forced pregnancy.	N/A	A particularly relevant advocacy tool insofar as it calls out gender bias in the administration of justice; and harmful traditional or customary practices and women's vulnerability to rights violations in armed conflict

<sup>179</sup> The following conventions have also been ratified by Somalia: The ICESCR (1976) and ICCPR (1976) was ratified in 1990; the International Convention on the Elimination of All Forms of Racial Discrimination (1969) and the International convention on the suppression of and punishment of the crime of apartheid were ratified in 1975; the African [Banjul] Charter on Human and Peoples' Rights (1981) was ratified in 1985; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987) was ratified in 1990; the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol) was signed in 2006; the CRC (1989) was ratified in 2015; the Elimination of the Worst Forms of Child Labour Convention, 1999 (No. 182) was signed in 2014; the Convention on the Rights of Persons with Disabilities (2008) was signed in 2018. Note that although FGS is yet to ratify CEDAW (1981), the Cabinet has approved it subject to ratification by parliament. Note that space constraints prevent an examination of UN agency gender strategies; see particularly the UNDP Global Gender Equality Strategy 2008 – 2013 (GES), and the Eight-Point Agenda for Women's Empowerment and Gender Equality in Crisis Prevention and Recovery (BCPR-8PA).

Instrument <sup>179</sup>	Principal provisions	Somalia status	Relevance in the Somali context
Beijing Declaration and Platform for Action (1995)	Established a women's empowerment agenda for states to conform to the principles of women's equality enshrined in the UN Charter and other tools of international law. It identified 12 priority areas for the achievement of women's empowerment and advancement: <ul style="list-style-type: none"> <li>• Women and poverty</li> <li>• Education and training of women</li> <li>• Women and health</li> <li>• Violence against women</li> <li>• Women and armed conflict</li> <li>• Women and the economy</li> <li>• Women in power and decision-making</li> <li>• Institutional mechanisms for the advancement of women</li> <li>• Human rights of women</li> <li>• Women and the media</li> <li>• Women and the environment</li> <li>• The girl child</li> </ul>	N/A	A broad framework for understanding women's needs holistically and a solid methodology for the achievement of women's empowerment and gender mainstreaming across diverse sectors.
Rome Statute of the International Criminal Court (1998)	Defines rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity as a crime against humanity.	No	An important tool if international crimes committed in the context of the civil conflict were to be prosecuted. Note however that this does not preclude national or regional mechanisms; and the non-applicability of a statute of limitations pertaining to international crimes. And, care must be taken in balancing justice for international crimes and the maintenance of peace and stability.
United Nations Security Council Resolution (UNSC) 1325 (2000) <sup>180</sup>	Highlights the linkages between women, peace and security and the importance of women's important roles in conflict resolution and peacebuilding. Specifically, it calls for all actors to ensure women's participation in peace processes from the initial phase of conflict prevention to negotiations to post conflict reconstruction and development. It is a reaffirmation of "women's central role in the prevention and resolution of conflicts and in peace building". It emphasizes states' responsibility to end impunity for crimes against humanity and war crimes, including sexual and other forms of violence against women and girls.	N/A	UNSC 1325 firmly establishes the illegality of sexual violence as a tool of war and importantly recognizes male survivors of SGBV. The resolution also reiterates the importance of women in building and sustaining peace.
UN system-wide policy on gender equality and empowerment of women (2006)	Highlights the need for strategies to include a clear statement in support of gender equality; activities aimed at the production of gender equality, and the collection data are disaggregated by sex.	N/A	
United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012)	Principle 2 states that States should regard the provision of legal aid a duty and responsibility. They should consider, where appropriate, enacting specific legislation and regulations and ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible. States should allocate the necessary human and	N/A	The Constitutions of the FGS, Somaliland and Puntland each recognize the rights individuals to access the courts, as well as a defense and to forms of legal aid.

<sup>180</sup> see further UNSC Resolutions 1820, 1888, 1889, 1960, 2106, 2122, 2242.

Instrument <sup>179</sup>	Principal provisions	Somalia status	Relevance in the Somali context
	financial resources to the legal aid system. With respect to provision of legal representation in civil cases, this is considered a best practice, but one that is strongly encouraged in cases of indigent persons.		
Sustainable Development Goals (2015)	Goal 5: Achieve gender equality and empower all women and girls Goal 16: Promote just, peaceful and inclusive societies	N/A	The inclusion of goal 16 importantly recognizes the linkages between access to justice and legal empowerment, and peace, development and security. Goal 16 will likely facilitate a renewed emphasis on justice sector development as well as funding flows for such purposes.

## Annex 3. Regional Instruments

Instrument	Key provisions
African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) and Protocol	Articles 4 emphasizes women's right to security, respect for their bodily integrity, protection from exploitation, and prohibition of cruel inhuman treatment. Article 11 provides for the protection of women in armed conflicts making States responsible for the protection of populations affected by conflict, especially women and girls, with specific provision for protection from SGVB, sexual exploitations, and prohibition of girls and women from participating in hostilities.
The African Union Gender Policy (2009)	The policy establishes a vision for and commitment to gender mainstreaming and women's empowerment to accelerate progress towards gender equality, gender justice, non-discrimination and the enjoyment of fundamental human rights in Africa. The goal is to adopt a rights-based approach to development through evidence-based decision-making and the use of gender-disaggregated data.
Nairobi Forward-Looking Strategies for the Advancement of Women (1985)	Drawn from the UN Charter, UDHR, ICCPR, CEDAW and the Declaration on the Participation of Women in Promoting International Peace and Co-operation, the strategy identifies measures to eliminate gender-based discrimination and overcome the obstacles delaying women's advancement.
International Conference on Population and Development (1994)	A new strategy emphasizing the linkages between population and development, and focused on the specific needs of women and men as opposed to demographic targets. It emphasizes the importance of providing women with greater choice through expanded access to education and health services, skills development and employment.
Commonwealth Plan on Gender and Development (1995)	Outlines responses to the differential impacts of global changes and challenges on women and men, girls and boys in the realization of the MDGs and the objectives set out in the 1995 Beijing Declaration and Platform of Action. It recognizes the interconnections between human rights, democracy and gender equality.
The Solemn Declaration on Gender Equality in Africa	The Declaration commits parties to, inter alia, accelerate the implementation of gender specific economic, social, and legal measures aimed at combating the HIV/AIDS pandemic; ensure the full and effective participation and representation of women in peace processes; launch sustained public campaigns against gender-based violence and trafficking in women and girls; reinforce legal mechanisms to protect women and end impunity in crimes committed against women; ensure the active promotion and protection of women's human rights by raising awareness or by legislation; promote the implementation of legislation to guarantee women's land, property and inheritance rights including their rights to housing.
The New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (2003)	The NEPAD (endorsed by the 2002 Summit of the African Union) was established to, inter alia, accelerate women's empowerment and gender equality. The peer-review mechanism aims at fostering the adoption of policies, standards and practices to engender political stability, growth, sustainable development and accelerated regional and economic integration.

## Annex 4. Donor Instruments

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### American Bar Association Rule of Law Initiative (ABA ROLI)

ABA ROLI firmly believes that achieving gender equality and social inclusion (GESI) is essential to realizing human rights, sustainable development goals, and a better future for all. In its efforts to promote the rule of law, ABA ROLI takes a two-pronged approach to advancing GESI: it designs and implements both gender-focused programs and programs that take inclusive, gender-responsive approaches to promoting the rule of law and solving complex development challenges. ABA ROLI's targeted gender programs improve women's legal protections and enhance their access to justice; respond to sexual and gender-based violence (SGBV) through interventions focused on prevention, protection, and accountability; advance the rights of lesbian, gay, bisexual, transgender, and intersex (LGBTI) people; promote women in the legal profession; facilitate women's equal and meaningful participation in the legal reform and transitional justice processes; and measure progress on women's rights through an array of tools, including the Status of Women Assessment Tool, the Women's Economic Empowerment Barrier Assessment Tool, and the Access to Justice Assessment Tool (AJAT). In addition, ABA ROLI leads Women and Girls Empowered (WAGE)—a multi-year global programming consortium to advance the status of women and girls worldwide. These targeted strategies are complemented by a gender integration approach, ensuring that gender perspectives constitute an integral component of ABA ROLI's initiatives across all practice areas. To this end, ABA ROLI builds gender-sensitive design, research, and reporting into its programs, which facilitates ongoing analysis of these programs' gender impacts.<sup>181</sup>

### United States Agency for International Development (USAID)

USAID's Gender Equality and Female Empowerment Policy (2012)<sup>182</sup> acknowledges gender equality and female empowerment as core development objectives, fundamental for the realization of human rights, and key to effective and sustainable development outcomes. It underscores that no society can develop successfully without providing equitable opportunities, resources, and life prospects for males and females so that they can shape their own lives and contribute to their families and communities. The goal of the policy is to improve the lives of citizens by advancing equality between females and males, and empowering women and girls to participate fully in and benefit from the development of their societies. This should be promoted by integrating gender equality and female empowerment throughout a programming cycle and related processes i.e., in strategic planning, project design and implementation, and monitoring and evaluation.

Under the policy, USAID investments are aimed at three overarching outcomes. In strategic planning at the country or project level, these outcomes will be adapted and translated into specific results with associated targets and indicators. These outcomes, which are especially important for people who are marginalized or excluded due to ethnicity, gender identity, sexual orientation, lack of income, disability or other factors, reflect the gamut of activities that USAID undertakes across multiple sectors and fields:

- Reduce gender disparities in access to, control over and benefits from resources, wealth, opportunities and services.
- Reduce SGBV and mitigate its harmful effects on individuals and communities.
- Increase capability of women and girls to realize their rights, determine their life outcomes, and influence decision-making in households, communities, and societies.

Finally, the policy sets out seven guiding principles:

- Integrate gender equality and female empowerment into USAID's work.
- Pursue an inclusive approach to foster equality.
- Build partnerships across a wide range of stakeholders.
- Harness science, technology, and innovation to reduce gender gaps and empower women and girls.
- Address the unique challenges in crisis and conflict-affected environments.
- Serve as a thought leader and a learning community.
- Hold ourselves accountable.

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<sup>181</sup> ABA ROLI's Strategic Approaches to Advancing Gender Equality, forthcoming.

<sup>182</sup> [www.usaid.gov/sites/default/files/documents/1865/GenderEqualityPolicy\\_0.pdf](https://www.usaid.gov/sites/default/files/documents/1865/GenderEqualityPolicy_0.pdf); See further 'Integrating Gender Equality and Female Empowerment in USAID's Program Cycle' <https://www.usaid.gov/ads/policy/200/205>

See Also:

- US national action plan on women peace and security<sup>183</sup>
- UK national action plan on women, peace and security<sup>184</sup>
- The Netherlands National Action Plan for women, peace and security<sup>185</sup>
- The Norwegian National Action Plan for women, peace and security<sup>186</sup>
- DFID Strategic Vision on Girls and Women<sup>187</sup>
- The Swedish Aid Policy Framework<sup>188</sup>

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<sup>183</sup>[www.usaid.gov/sites/default/files/documents/1868/National%20Action%20Plan%20on%20Women,%20Peace,%20and%20Security.pdf](http://www.usaid.gov/sites/default/files/documents/1868/National%20Action%20Plan%20on%20Women,%20Peace,%20and%20Security.pdf)

<sup>184</sup> [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/385958/141211\\_-\\_FCO726\\_NAP\\_Implementation\\_Plan\\_FINAL.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385958/141211_-_FCO726_NAP_Implementation_Plan_FINAL.pdf)

<sup>185</sup> <https://wo-men.nl/wp-content/uploads/2016/05/FINAL-NAP-2016-2019.pdf>

<sup>186</sup> [https://www.peacewomen.org/assets/file/NationalActionPlans/norway-nationalactionplan\\_march2006.pdf](https://www.peacewomen.org/assets/file/NationalActionPlans/norway-nationalactionplan_march2006.pdf)

<sup>187</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/67582/strategic---vision---girls---women.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67582/strategic---vision---girls---women.pdf)

<sup>188</sup> <http://www.regeringen.se/49b737/contentassets/6eef64a9a36e48ff9a95e4d6ad97ce84/aid---policy---framework>

## Annex 5. Review of National Law Instruments

This annex provides a brief overview of the FGS, Somaliland, and Puntland Constitutions with a view to highlighting key trends and protection provisions. It is limited insofar as it does not include a review of all subsidiary legislation such as the Penal Code, Code of Criminal Procedure, Land Law, Juvenile Justice Act, as well as recent legislation (including that at the draft stage) on sexual violence. The main take away is that, despite some notable deficits, the FGS, as well as Puntland and Somaliland, have made significant progress in establishing a legal framework that protects the rights of women, children and other marginalized groups. While some major human rights treaties remain unsigned, it is clear that effort has been made to replicate international rights and entitlement provisions, as well as address some locally-specific phenomena and practices that are rights abrogating. Some key deficits have been acknowledged and attempts to close them made; these include a trend away in the law from collective responsibility towards a system that upholds individual rights, and acknowledgement that minority clans and women have historically been denied rights available to other Somalis. The key challenge remains the courts' lack the institutional capacity and resources to implement new provisions in the law.

FGS Constitution	Somaliland Constitution	Puntland Constitution
<b>Equality and Non-Discrimination</b>		
<p>11.1 All citizens, regardless of sex, religion, social or economic status, political opinion, clan, disability, occupation, birth or dialect shall have equal rights and duties before the law.</p> <p>11.2 Discrimination is deemed to occur if the effect of an action impairs or restricts a person's rights, even if the actor did not intend this effect.</p> <p>11.3 The State must not discriminate against any person on the basis of age, race, color, tribe, ethnicity, culture, dialect, gender, birth, disability, religion, political opinion, occupation, or wealth.</p> <p>11.4 All State programs, such as laws, or political and administrative actions that are designed to achieve full equality for individuals or groups who are disadvantaged, or who have suffered from discrimination in the past, shall be deemed to be not discriminatory.</p> <p>27.5 It shall be ensured that women, the aged, the disabled and minorities who have long suffered discrimination get the necessary support to realize their socio-economic rights.</p> <p>38.1 The rights set out in this Chapter may be limited by law, provided that the law is not targeted at any particular individuals or groups.</p>	<p>8.1. All citizens of Somaliland shall enjoy equal rights and obligations before the law, and shall not be accorded precedence on grounds of color, clan, birth, language, gender, property, status, opinion etc.</p> <p>8.2 Precedence and discrimination on grounds of ethnicity, clan affiliation, birth and residence is prohibited; and at the same time programs aimed at eradicating long lasting bad practices shall be a national obligation.</p> <p>8.3. Save for the political rights reserved for citizens, foreigners lawfully resident in Somaliland shall enjoy rights and obligations before the law equal to those enjoyed by citizens.</p> <p>36.1 The rights, freedoms and duties laid down in the Constitution are to be enjoyed equally by men and women save for matters which are specifically ordained in Islamic Sharia.</p>	<p>12.1. Everyone is equal before the law.</p> <p>12.2. No person shall be discriminated against on the basis of color, religion, birth, nationality, property, belief, political affiliation, language, or race.</p> <p>12.3 The Constitution shall safeguard the rights of minorities.</p> <p>35.2. Women have the same rights as men, except the distinctions made by God between the two sexes.</p>
<p><b>Challenges, threats, and opportunities:</b></p> <p>The provisions set out in the FGS and Somaliland Constitutions prohibiting inequality on the basis of gender and clan are at odds with the Puntland jurisdiction. Scope for discrimination is further embedded in articles 12.3 and 35.2 of the Puntland Constitution by referring to 'distinctions made by God' and 'minorities' without detailed explanation. The Somaliland Constitution likewise limits women's rights by exempting rights, freedoms and duties 'ordained in <i>shari'ah</i>'.</p> <p>A further deficit is the absence of mechanisms to actualize the various equality provisions in the Constitutions.</p>		

FGS Constitution	Somaliland Constitution	Puntland Constitution
<b>Children's Rights to Protection<sup>189</sup></b>		
<p>28.2 Mother and child care is a legal duty of the State.</p> <p>28.3 Every child has the right to care from their parents, including education and instruction. In instances where this care is not available from the family, it must be provided by others. This right applies to street children and children of unknown parents, the rights of whom the state has a particular duty to fulfill and protect.</p> <p>29.2 Every child has the right to be protected from mistreatment, neglect, abuse, or degradation.</p> <p>29.6 Every child has the right to be protected from armed conflict, and not to be used in armed conflict.</p>	<p>19. The state shall be responsible for the health, care, development and education of the mother, the child, the disabled who have no one to care for them, and the mentally handicapped persons who are not able and have no one to care for them</p>	<p>31.2 A minor has a right to life, name, nationality, upbringing, education and health care.</p>
<p>29.8 In this Article, the word child means a person under 18 years of age.</p> <p>28.5 No marriage shall be legal without the free consent of both the man and the woman, or if one or both of them have not reached the age of maturity.</p>		<p>31.1 A minor is any individual below the age of fifteen (15) years.</p>
<p>29.4 Every child may be detained only as a last resort, for a limited time, in appropriate conditions, and must be detained separately from adults with the exception of the child's immediate family. The child's immediate family must be informed of the child's detention as soon as practicable.</p> <p>29.5 Every child shall have the right to legal aid paid for by the State if the child might otherwise suffer injustice.</p>	<p>Under Somaliland's Juvenile Justice Act (2008) the state should establish children's courts, children's pre-trial detention centres and children's rehabilitation centres. The law sets the age of criminal liability at 15 with maximum punishment to 15 years. It prohibits corporal punishment, life imprisonment and the death penalty. The Children's Court is permitted to impose both community-based and custodial sentences.<sup>190</sup></p>	<p>Juvenile Justice Act</p>
<p><b>Challenges, threats, and opportunities:</b></p> <p>The protection of children in armed conflict and from recruitment into armed forces is not adequately provided for. An Action Plan to End the Recruitment and Use of Children in Armed Conflict has been drafted and its provisions should be provided for in legislation. The age of majority does not meet international standards in the case of Puntland and Somaliland.</p>		
<b>Representation and Participation</b>		
<p>3.5 Women must be included in all national institutions, in an effective way, in particular all elected and appointed positions across the three branches of government and in national and independent commissions.</p> <p>22.1 Every citizen has the right to take part in public affairs. This right includes: (a) The right to form political parties and to participate in the activities of political parties; and (b) The right to be elected for any position within a political party.</p>	<p>22.1 Every citizen shall have the right to participate in the political, economic, social and cultural affairs in accordance with the laws and the Constitution.</p> <p>22.2 Every citizen who fulfils the requirements of the law shall have the right to be elected (to a public office) and to vote.</p>	<p>41. Every citizen not less than 18 years of age has the right to:</p> <p>(a) participate in the processes of elections and to vote;</p> <p>(b) establish or join any political party; and</p> <p>(c) compete for public office in elections, if he/she fulfils the criteria.</p>

<sup>189</sup> FGS Constitution 30.1 Education is a basic right for all Somali citizens. (2) Every citizen shall have the right to free education up to secondary school. Somaliland Constitution 15.7 The national policy is that primary education shall be free. Puntland Constitution 32.1 Each and every person has a right to education

<sup>190</sup> In Somaliland, MOLSA is responsible for at risk children and has a role to play in preventing juvenile delinquency. MOLSA has established rehabilitation centers for street children, aimed at preventing street children from offending.

FGS Constitution	Somaliland Constitution	Puntland Constitution
22.2 Every citizen who fulfills the criteria stated in the law has the right to elect and to be elected.		44.1 All citizens who fulfil the criteria required by law have the right to vote and to be elected.
<p><b>Challenges, threats, and opportunities:</b>            Despite commitment to improved inclusion (as enshrined in the Garowe II Principles), provisions were not set out in any of the constitutional frameworks and the dominance of clan-based political representation continues to prevent women from being meaningfully included in most political and judicial structures. This said, the 2013 New Deal Compact, endorsed by the Federal Government, recognizes the vital role of women in peace-building, and commits to their participation as Somalia works to achieve stability. In Puntland, there is one female judge, while in Somaliland there is an increasing number of female law graduates, a Somaliland Women Lawyers Association, and equal gender representation the Somaliland Human Rights Commission.</p>		
<b>Inheritance and Property Rights</b>		
26.1 Every person has the right to own, use, enjoy, sell, and transfer property. 27.5 It shall be ensured that women, the aged, the disabled and minorities who have long suffered discrimination get the necessary support to realize their socio-economic rights.	31.1 Every person shall have the right to own private property, provided that it is acquired lawfully. 36.3 Women have the right to own, manage, oversee, trade in, or pass on property in accordance with the law.	17.1 Every person shall have the right to own, administer and benefit from property in accordance with the law.
<p><b>Challenges, threats, and opportunities:</b>            Constitutional provision for women's equal rights is incompatible with <i>shari'ah</i> jurisprudence concerning inheritance (under which women inherit half of what their male counterparts).</p>		
<b>Female Genital Mutilation and Cutting</b>		
15.4 Female circumcision is a cruel and degrading customary practice, and is tantamount to torture. The circumcision of girls is prohibited. 31.1 The state shall promote the positive traditions and cultural practices of the Somali people, whilst striving to eliminate from the community customs and emerging practices which negatively impact the unity, civilization and wellbeing of society.	36.2 The Government shall encourage, and shall legislate for the right of women to be free of practices which are contrary to Sharia and which are injurious to their person and dignity. 8.2 Precedence and discrimination on grounds of ethnicity, clan affiliation, birth and residence is prohibited; and at the same time programmes aimed at eradicating long lasting bad practices shall be a national obligation.	18.2 Every person has the right to the protection of his/her body and integrity.
<p><b>Challenges, threats, and opportunities:</b>            While FGMC is not mentioned explicitly in the Constitutions of Puntland or Somaliland, the Ministry of Religious Affairs in Somaliland issued a <i>fatwa</i> in 2018 banning Type III FGMC (Infibulation). In Puntland, the government passed a 2011 law also banning Type III FGMC, as well as a <i>fatwa</i> in 2013. A 2014 inter-ministerial decree developed by the Ministry of Health states that there will be no medicalization of FGMC, and further that the Ministry has the authority to close clinics and hospitals that continue the practice, and arrest perpetrators. It should be noted that the Penal Code, Law No. 05/1964, is applicable to all jurisdictions in Somalia, under which it is a criminal offence to cause hurt to another that results in physical or mental illness. Despite these provisions in the law FGMC is still widespread. Drivers include the practice's links to chastity, virginity, fidelity and dowry payments; those responsible for performing FGMC (who financially benefit) may also play a role in its continuation. The principal challenge is how to modify a deeply entrenched custom without driving the practice underground where greater harm might result.<sup>191</sup></p>		
<b>Protection Against Violence</b>		

<sup>191</sup> 'Somaliland: The law and FGM' Thomas Reuters Foundations (2018); 'Somalia: The law and FGM' Thomas Reuters Foundations (2018); 'Gender Equality and Women's Empowerment Strategy' UNDP 5. 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 25-26, 37-38; Gender and Conflict Note: Somalia', LOGICA, 2013, 6.

FGS Constitution	Somaliland Constitution	Puntland Constitution
<p>15.2 Every person has the right to personal security, and this includes: the prohibition of illegal detention, all forms of violence, including any form of violence against women, torture, or inhumane treatment.</p> <p>10.1 Human dignity is given by God to every human being, and this is the basis for all human rights.</p> <p>10.2 Human dignity is inviolable and must be protected by all.</p> <p>10.3 State power must not be exercised in a manner that violates human dignity.</p>	<p>24.1 Human life is the gift of Allah and is beyond price. Every person has the right to life, and shall only be deprived of life if convicted in a court of an offence in which the sentence laid down by law is death.</p> <p>24.2 Every person shall have the right to security of his person. Physical punishment and any other injury to the person are prohibited.</p> <p>24.3 Every person shall have the right to have his dignity, reputation and private life respected.</p> <p>24.4 Crimes against human rights such as torture, extra-judicial killings, mutilation and other similar acts shall have no limitation periods.</p>	<p>18.2 Every person has the right to the protection of his/her body and integrity.</p> <p>18.3 Crimes against the individual right to life and security such as massacre, torture, detention, and execution, unless in accordance with the law, are prohibited.</p> <p>35.1 It is the duty of the state to protect and promote the rights of women, consistent with Islamic religious norms.</p>

### Challenges, threats, and opportunities:

The Penal Code (1962), which applies in all states, criminalizes rape and other forms of sexual violence. Crimes, however, are (i) narrowly defined so as to offer insufficient protection from SGBV,<sup>192</sup> and (ii) the presence of legal gaps allows the continued relevance of customary law (*xeer*). The Criminal Procedure Code provides further guidance on the prosecution and sentencing of SGBV offences, however it is based on outdated Indian legislation. The punishments outlined are 5-15 years for rape, 1-5 years for other forms of sexual abuse, 2 months-2 years for facilitating prostitution and 2-6 years for doing so using threats or violence. In practice, however, sentences handed down are rarely as lengthy as that stipulated in the legislation. Finally, the Code contains no age of consent which leaves children particularly vulnerable to abuse. Other priority areas for reform include: removing the requirement of violence or threats and introducing the concept of consent in rape cases; widening the definition of rape to include victims of the same sex; addressing gang rape, incestuous rape, and rape in marriage; dealing with compensation for rape; and expanding the definition of sexual assault.

States have begun to make progress on closing these gaps. The FGS Sexual Offences Bill (2014) defines and addresses incidents of rape and other forms of SGBV, and outlines the role of public officials and the police in investigating and prosecuting cases. It sets out a range of crimes that relate specifically to the sexual exploitation of children and people with mental disabilities, including trafficking, sexual exploitation and the use of children or people with mental disabilities in pornography.<sup>193</sup> Importantly, it criminalizes obstruction of justice by any party and/or to offer settlement of cases outside of the judicial court, and imposes a duty on public officials to investigate and prosecute sexual offences. The Puntland Rape Act (2016) criminalizes rape in marriage and prohibits compensation as a penalty for rape and sets prison time at between 5-10 years (art 6). It also contains provisions on gang rape (art 7), sexual assault (art 8), sexual exploitation and abuse (art 10) and sexual harassment (art 11).<sup>194</sup> The Somaliland Penal Code Articles 398 to 401 deal with sexual offences including rape, honor crimes and other acts committed 'out of lust'.<sup>195</sup>

While the Government has pledged to prioritize and comprehensively address sexual violence and enhance the capacity of the judiciary to deal with such cases, there has been little commitment in practice and crimes still are resolved under *xeer* and patriarchal interpretations of *shari'ah*.<sup>196</sup>

<sup>192</sup> The Penal Code (1962) Article 298 criminalizes sexual intercourse committed through the use of threats or violence or where the second person is 'incapable of giving consent'; Article 399 criminalizes 'acts of lust other than carnal intercourse' committed through the use of threats or against a person who is incapable of giving consent; Article 409 prohibits the instigation, facilitation or aiding of prostitution, as well as the 'exploitation' of its proceeds; Article 408 prohibits compelling prostitution through violence or threats.

<sup>193</sup> 'The Complexity of Sexual and Gender-Based Violence: Insights from Mogadishu and South Central Somalia' International Committee for the Development of Peoples and International Alert, (2015) 7, 23, 49.

<sup>194</sup> See also the Sexual Offences Act Implementation Plan 2016–2019.

<sup>195</sup> Somaliland Rape and Sexual Offences Bill (draft); Discussion Paper on the Reform of the Somaliland Penal Code, Horizon Institute (2014) 15-22.

<sup>196</sup> 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 8-15, 25, 30-33; see further F Musse and J Gardener 'A Gender Profile of Somalia' Developed for the EU Somalia Mission (2013) 8. Various instruments have been developed at the national level including the Ministry of Women and Human Rights Development's National Action Plan, National Action Plan on Ending Sexual Violence in Conflict; GBV strategy (2014-2016), national gender policy (2016). Other gender related policies still under development and spear-headed by the MoWHRD, include the draft FGM policy; the draft GBV policy; the draft child protection policy; and the draft family Act. The Post-Transition Human Rights Road Map (2013-2015) and the New Deal Compact (2014-2016) and The Reconstruction and Development Programme (RDP) drawn from the New Deal Compact all mainstream gender, and the Compact specifically intends to 'address the fundamental causes of gender inequality through strategic priorities in order to transform the unequal power relations between men and women, resulting in improved status of women and broader gender equality'.

FGS Constitution	Somaliland Constitution	Puntland Constitution
<b>Protection from Exploitation and Forced Labor</b>		
<p>Article 24.5 All workers, particularly women, have a special right of protection from sexual abuse, segregation and discrimination in the work place. Every labor law and practice shall comply with gender equality in the work place</p> <p>14. A person may not be subjected to slavery, servitude, trafficking, or forced labor for any purpose.</p>	<p>20.2 The conditions of work of the young and women, night working and working establishments shall be regulated by the Labor Law.</p>	<p>37.2 Forced labor is prohibited unless in accordance with the law.</p>
<p>29.3 No child may perform work or provide services that are not suitable for the child's age or create a risk to the child's health or development in any way.</p> <p>29.7 In every matter concerning a child, the child's best interests are of paramount importance.</p>		<p>31.3. Any kind of labor that may have a negative impact on a child's life, faith, culture, up-bringing or education is prohibited.</p>
<p><b>Challenges, threats, and opportunities:</b></p> <p>There are insufficient protections against child labor, trafficking and the use of children for illicit activities leave minors vulnerable to exploitation.<sup>197</sup></p>		
<b>Access to Justice Rights</b>		
<p>33: Every person has the right to administrative decisions that are lawful, reasonable and conducted in a procedurally fair manner.</p> <p>34.1 Every person is entitled to file a legal case before a competent court.</p> <p>34 (2) Every person has the right to a fair public hearing by an independent and impartial court or tribunal, to be held within a reasonable time, and to determine: (a) Any question of civil rights and obligations; or (b) Any criminal charge.</p> <p>34 (3) Every person is entitled to defend him or herself from the case he or she is party to, whatever the level or stage of the proceedings may be.</p>	<p>28. Every person shall have the right to institute proceedings in a competent court in accordance with the law. Every person shall have the right to defend himself in a court.</p>	<p>25.1. Every person shall have the right to institute legal proceedings in a competent court.</p> <p>25.2. Every person shall have the right to defense before the court.</p>
<b>Legal Aid</b>		
<p>34.4 The state shall provide free legal defense to the people who do not have the means of doing so themselves.</p> <p>34.5 The state shall provide free legal defense to individuals or communities if they are legally pursuing the public interest.</p>	<p>28. The state shall provide free legal defense in matters which are determined by the law, and court fees may be waived for the indigent.<sup>198</sup></p>	<p>25.3. The Puntland State shall appoint a lawyer for any person who is unable to defend himself/ herself, or without the means to engage one.</p> <p>25.4. Special law shall regulate access to justice to those who cannot afford it.</p>
<b>Rights of Accused and Convicted</b>		
<p>35.1 The accused is presumed innocent until proven guilty in a final manner by a court of law.</p>	<p>26.3 3. An accused person is innocent until proven guilty in a court.</p> <p>25.1. No person shall be deprived of his liberty except in accordance with the law.</p>	<p>27.1. Any person who is charged with a criminal offence shall be presumed innocent until he/she is proven guilty by a competent court of law.</p>

<sup>197</sup> 'Implementation of the Beijing Platform for Action Beijing+20 Review: Somalia Country Report' (2014) 37-38.

<sup>198</sup> 'Gender in Somalia Brief', UNDP, 10.

FGS Constitution	Somaliland Constitution	Puntland Constitution
<p>35. (2) Every person arrested or detained has the right to be informed promptly of the reason for their arrest or detention in a language that the person understands.</p> <p>35.3 Every person arrested or detained shall have the right for his or her family and relatives to be informed of his or her situation.</p> <p>35.4 A person may not be compelled to self-incriminate, and a verdict may not be based on evidence acquired by means of coercion.</p> <p>35.5 Every person who is arrested has the right to be brought before a competent court within 48 hours of the arrest.</p> <p>35.6 Every person who is arrested or detained has the right to choose, and to consult with, a legal practitioner and if he or she cannot afford one, the State must appoint a legal practitioner for him or her.</p> <p>35.7 Every person brought before a court of law for an alleged criminal offence is entitled to a fair trial.</p> <p>35.8 The accused has the right to be present at their trial.</p> <p>35.9 The accused has the right to challenge the evidence presented against him or her.</p> <p>35.10 The accused has the right to an interpreter if the accused person does not understand the language being used in the court.</p> <p>35.11 The accused cannot be kept in an illegal detention center, and must be granted visits by his or her family, doctor or lawyer.</p> <p>35.12 Criminal liability is a personal matter and no person may be convicted of a criminal offence for an act committed by another person.</p> <p>25.14 No person may be convicted of a crime for committing an act that was not an offence at the time it was committed, unless it is a crime against humanity under international law.</p>	<p>25.2 No person may be arrested, searched, or detained, except when caught <i>in flagrante delicto</i>, or on the issue of a reasoned arrest warrant by a competent judge.</p> <p>25.3 The state shall guarantee to all citizens their rights and freedoms and the punishment for any of their infringements shall be determined by law.</p> <p>25.4 The freedoms of the person shall not override the laws protecting the public morals, the security of the country or the rights of other individuals.</p> <p>27.1 Any person who is deprived of his liberty has a right to meet as soon as possible his legal representative, relatives or any other persons he asks for.</p> <p>27.2 Any person who is deprived of his liberty because of alleged criminal offences shall have the right to be brought before a court within 48 (forty eight) hours of his arrest.</p> <p>27.3 No person shall be compelled to proffer a confession, a witness statement or testimony under oath. Any such matters (<i>evidence</i>) obtained under duress shall be void.</p> <p>27.4 No person shall be detained in a place which is not determined by law.</p> <p>27.5 The law shall lay down the maximum period in which a person can be detained in custody pending investigations.</p> <p>27.6 Any accused person who is convicted by a court shall have the right to appeal to a higher court.</p> <p>27.7 When a person is detained in custody or his detention is extended, he shall have the right to have his status communicated to any person he so chooses.</p> <p>27.8 Prisons are for reform and correction. The state is responsible for the rehabilitation and skills training of prisoners so that they can return to society with reformed characters.</p>	<p>27.2. An accused person shall have the right to protection, security and human dignity.</p> <p>27.3. An accused person shall not be detained in a facility that is not legally recognized.</p> <p>27.4. The accused shall be brought before a court of law within 48 hours.</p> <p>27.5 The offence shall be read to the accused in detail and explained to him/her by the court of law.</p> <p>27.6 The accused shall have the right to be visited by his/her relatives, lawyer, doctor, and friends; he/she shall also have the right to be released on bail if permitted by the law.</p> <p>27.7 The accused shall have the right to engage the services of a lawyer to defend him/her.</p> <p>27.8 An accused person shall not be forced to confess to the charges against him or her.</p> <p>28.1 A person sentenced by a court shall have the right to the protection of his/her security and human dignity.</p> <p>28.2 Every convict shall have the right to be visited by his/her relatives, lawyer, doctor and friends.</p> <p>28.3 Every convict shall be entitled to medical attention, food and education.</p> <p>28.4 Every convict shall be entitled to the universal rights granted to prisoners worldwide.</p> <p>28.5 Every convict shall have the right to appeal against his or her court sentence.</p>
<b>Sanctions</b>		
	<p>26.1 Crimes and (<i>their</i>) punishment shall be laid down by the law, and no punishment shall be administered in a manner which is contrary to the law.</p> <p>26.2 The liability for the punishment of any crime shall be confined to the offender only.</p>	<p>26.1 The punishment for any offence shall be imposed solely against the person who has committed the said offence.</p> <p>26.2 No one shall be detained or punished for an act, unless it is considered unlawful by the law. Penal laws may not be applied retroactively.</p>

FGS Constitution	Somaliland Constitution	Puntland Constitution
		26.3 No one may be subjected to a punishment that is not issued by a court of law.

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