**Questionnaire on violence against women (rape) in Somalia**

**Submitted by:** Maat for Peace, Development and Human Rights.

**Submitted about**: rape as a grave and systematic human rights violation and gender-based violence against women (Case Study :Somalia)

**Submitted to**: The UN Special Rapporteur on Violence against Women (SRVAW)

**Submitted on**: May 20, 2020

**The first axis of the questionnaire: definition and scope of criminal law provisions**

1. **Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.**

Because of Somalia's federal structure, there are federal and other state laws. Somalia exists in a state of legal pluralism where **customary law (Xeer), religious law (Sharia) and secular law** operate. Puntland and Somaliland are reasonably managing their own affairs according to their constitutions and laws. In Puntland, for example, there is a statutory law on sexual offences (Rape Act, 2016). Likewise, Somaliland passed its first bill against rape in August 2018.[[1]](#footnote-1)

The customary law, on the other hand, which is called “Xeer”, operates in parallel with the state law. However, "Xeer" system largely violates gender equality standards.

As for civil law, there are the Penal Code of 1962,[[2]](#footnote-2) the Personal Status Law of 1975 (Somaliland Family & Personal Law),[[3]](#footnote-3) and the Criminal procedure code (Legislative Decree No. 1 of June 1, 1963).[[4]](#footnote-4) In Puntland, there is the Sexual Offences Act of 2016.

Somalia does not have a law that specifically addresses domestic violence. Murder, battery, and assault are covered in the Penal Code of 1962, Part XIII, under “Crimes against the Life and Safety of Individuals.” There are no specific laws against spousal rape. Therefore, we will focus in this questionnaire only on the 1962 Penal Code.

With regard to rape, in some cases, the woman or girl is forced to marry the perpetrator of the violence as a form of “restitution” ordered by customary courts. Although the clan-focused customary justice system protects the victim's right to refuse to marry he perpetrator of the violence, victims usually bow to social pressure and reluctantly accept the marriage, avoiding shame. This system also tolerates revenge and honor killings, deprives women of inheritance rights, and consider domestic violence a personal rather than legal issue.

1. **Based on the wording of those provisions, is the provided definition of rape:**
	1. Gender specific, covering women only (NO)
	2. Gender neutral, covering  all persons (YES)
	3. Based on the lack of consent of victim (YES)
	4. Based on the use of force or threat  (YES)
	5. Some combination of the above.  (YES)
	6. Does it cover only vaginal rape?  (NO)
	7. Does it cover all forms of penetration? (YES). Please specify: in cases of same-sex rape involving “unnatural sex” (i.e., sodomy) with threats or violence, or rape perpetrated by a male who has unnatural sex with (i.e., sodomizes) a female with threats or violence, the punishment that applies for “carnal violence” is increased, according to Article 400 of the Penal Code.
	8. Is marital rape in this provision explicitly included? (NO)
	9. Is the law silent on marital rape? (YES)
	10. Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? (NO)
	11. Is marital rape excluded in the provisions, or is marital rape not considered as a crime?   (NO) Material rape is not considered as a crime, since the wife is obligated to obey her husband and fulfill all his sexual needs.
2. **Are there any provisions excluding criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit it.**

Such provisions do exist in honor crimes, in which the so-called (mitigating excuse) occurs. The Penal Code requires reduction of sentences for a person who kills a female relative (spouse, daughter, or sister) or her sexual partner in the sudden heat of rage “for the offence caused to his or her honor and to the honor of his or her family” after finding her involved in a sexual act.

1. **What is the legal age for sexual consent?**

Sexual consent in society is only approved by legal marriage. A marriage is not legal without the free consent of both men and women or if either party has not reached adulthood, according to Article 28 of the Federal Constitution. While the Family Law sets the minimum marriage age at 18 for both males and females, females between the ages of 16 and 18 can marry with the consent of their guardians. If the guardian refuses to provide consent, the judge may give the girl permission to marry without the guardian’s consent in exceptional circumstances, according to Articles 16 and 17 of the Family Law of 1975.

1. **Are there provisions that differentiate for sexual activity between peers? If so, please provide them.**

Yes, same-sex consensual activity between adults is criminalized under Article 409 of the Penal Code.

1. **Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.**

It depends on the case at hand, whether it is Carnal Violence, acts of Lust Committed with Violence, Unnatural Offences Committed with Violence, or Abduction for Purposes of Lust or Marriage, and they are divided as follows:

**First: Carnal Violence:**

A. According to Article 398, Para. (1) of the Penal Code, whoever with violence or threats has carnal intercourse with a person of the other sex shall be punished with imprisonment for five to 15 years

 B. According to Article 398, Para. (2) of the Penal Code, the e same punishment is imposed on anyone who has carnal intercourse with a person of the other sex who is incapable of giving consent or with a person who has been deceived by the offender personating as another person.

C. According to Article 398, Para. (3) of the Penal Code, the same punishment shall be imposed on a public officer who, by abusing his power, has carnal intercourse with a person of the other sex who is under arrest or detained in custody

**Second: Acts of Lust Committed with Violence**

According to Article 399 of the Penal Code, committing an “act of lust” (other than carnal intercourse) with violence or threats upon a person of the other sex is punished with imprisonment from one to five years.

**Third: Unnatural Offences Committed with Violence**

According to Article 400 of the Penal Code, in cases of same-sex rape involving “unnatural sex” (i.e., sodomy) with threats or violence, or rape perpetrated by a male who has unnatural sex with a female with threats or violence, the punishment that applies for “carnal violence” is increased**.**

**Fourth: Abduction for Purposes of Lust or Marriage**

A. According to Article 401, Para. (1) of the Penal Code, whoever, with violence, threat, or deceit, abducts or detains a person for the purposes of carnal violence or lust shall be punished with imprisonment from two to five years.

B. According to Article 401, Para. (2) of the Penal Code, whoever, with violence, threat, or deceit, abducts or detains for purposes of marriage an unmarried person, shall be punished with imprisonment from one to three years.

1. **What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator?**

When it comes to reparation in Somalia, it is the customary justice system, not the federal law, having the upper hand, and it works as follows:

The customary justice system is focused on clans. Justice is delivered for the clan rather than for the survivor of the sexual violence. Traditional approaches to dealing with rape seek resolution or compensation through negotiation between clan members. Restitution is paid to the clan and not to the survivor. Once restitution is paid, the perpetrator of the sexual violence is free from further punishment and the case is considered finalized. In some cases, the woman or girl is forced to marry the perpetrator of the violence as a form of “restitution” ordered by customary courts.[[5]](#footnote-5) Moreover, according to Sharia and the local traditions of blood compensation, anyone found guilty of the death of a woman pays to the victim’s family only half the amount required for a man’s death, which is totally unfair.

**The second axis of the questionnaire: Aggravating and mitigating circumstances**

1. **Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?**

As previously mentioned, in cases of same-sex rape involving “unnatural sex” (i.e., sodomy) with threats or violence, or rape perpetrated by a male who has unnatural sex with a female with threats or violence, the punishment that applies for “carnal violence” is increased.

a. Is rape by more than one perpetrator an aggravating circumstance? Yes, if they are more than 5 people according to Article 73 of the Penal Code.

B. Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference)? Yes, if the victim is under 18 years old, or is suffering from a mental illness, according to Article 73, para. (1. D).

C. Is rape by spouse or intimate partner an aggravating circumstance? No, marital rape is not criminalized.

1. **Does the law foresee mitigating circumstances for the purposes of punishment? YES/NO If yes, please specify.**

Yes. Abortion is illegal under Articles 418–422 and 424 of the Penal Code, even in cases of rape. A woman consenting to or causing her own abortion is subject to one to five years’ imprisonment. However, if an abortion is performed to safeguard one’s own honor or that of a near relative, the penalties shall be reduced by half to two thirds.

1. **Is reconciliation between the victim and the perpetrator allowed as part of a legal response?** (No)

A. Regardless of the law, is reconciliation permitted in practice? YES/NO and what is the practice in this regard?

As previously mentioned, the customary justice system focuses on reconciliation between clans. Justice is delivered for the clan rather than for the survivor of the sexual violence. Restitution is paid to the clan and not to the survivor. Once restitution is paid, the perpetrator of the sexual violence is free from further punishment and the case is considered finalized. In some cases, the woman or girl is forced to marry the perpetrator of the violence as a form of “restitution” ordered by customary courts.[[6]](#footnote-6) Moreover, according to Sharia and the local traditions of blood compensation, anyone found guilty of the death of a woman pays to the victim’s family only half the amount required for a man’s death, which is totally unfair.

Although the clan-focused customary justice system protects the victim's right to refuse to marry he perpetrator of the violence, victims usually bow to social pressure and reluctantly accept the marriage, avoiding shame and future retaliatory violence.

1. **Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? YES/NO If yes, please specify**. (Yes.) In cases of honor crimes.

According to Article 422 of the Penal Code, the penalties shall be reduced if an abortion is performed to safeguard one’s own honor or that of a near relative.

According to Article 443, Para. (1) of the Somali Penal Code, the penalties shall be reduced from ten to five years of imprisonment if a person killed a female relative (spouse, daughter, or sister) or her sexual partner in the sudden heat of rage “for the offence caused to his or her honor and to the honor of his or her family” after finding her involved in a sexual act.

According to Article 443, Para. (2), when the perpetrator, in the same circumstances, causes harm to his female relative or her partner instead of killing her or him, the penalty is reduced by a third, and if the harm results in death he is punished with imprisonment from two to eight years.

According to Article 443, Para. (3), when the perpetrator, in the same circumstances, assaults the female relative or her partner, causing them no physical or mental damages, he is acquitted (instead of facing the punishment applied to such assaults in other circumstances, which is imprisonment to a maximum of Six months and payment of a fine).

A. If the perpetrator marries the victim of rape? (NONE)

 B. if the perpetrator loses his “socially dangerous” character or reconciles with the victim? (NONE)

**The third axis of the questionnaire: Prosecution**

1. **Is rape reported to the police prosecuted ex officio (public prosecution)?** (Yes) Report, monitor and collect it.
2. **Is rape reported to the police prosecuted ex parte (private prosecution)?** (Yes)
3. **Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women?** Legally no, but it is custom having the upper hand in most cases.
4. **Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children?**

In reality, it is allowed in most cases. As some local clerics equate rape and adultery, claiming that rape is a novel idea imported from the West, with no existence or basis in the Qur’an or in the Sunnah. Friendly settlements are carried out off the record between tribesmen, and the victim’s family are silenced with some money.

Moreover, funds must be paid to police and court officials in order to formally file cases and proceed with their procedures, although the Penal Code criminalizes rape, it considers it a crime against morality not against the victim.

1. **Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood?** (No information available).
2. **Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses? YES/NO. If yes, please specify.**

Yes, and it is worth noting that the Somali courts lack the mechanisms and mandatory requirements for proof of rape. For example, there are no DNA testing devices in Somalia, and in the absence of these capabilities, the course of legal procedures to hold rapists accountable and achieve justice is impeded

1. **Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman’s sexual history during trial?** **Yes / No** (no information available).
2. **Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings? YES/NO. If yes, please specify.** (There is none).

**The fourth axis of the questionnaire: War and/or conflict**

1. **Is rape criminalized as a war crime or crime against humanity? (NO)**
2. **Is there a statute of limitations for prosecuting rape in war or in conflict contexts? (NO)**
3. **Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? (NO)**
4. **Has the Rome Statute of the International Criminal Court (ICC) been ratified? (NO)**

**The fifth axis of the questionnaire: Data**

1. **Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.**

In light of the social stigmatization of victims, and in light of the blackout by the federal government to reveal official information about the official numbers of rape cases brought before it, it can be said that numbers grow exponentially every year. However, the Somali states revealed some official figures during the past three years:

On February 19, 2017, the Puntland Public Prosecutor reported that the Puntland Public Prosecutions detected 123 cases of rape in various parts of Puntland throughout 201, and that all perpetrators of these crimes were brought to justice. While the Somaliland Police published a statistic on crimes committed in 2018, reporting that the police dealt with 101 cases of rape crimes in 2018 only.[[7]](#footnote-7)

1. أرض الصومال توقع قانون الاغتصاب والتحرش الجنسي"، اليمن العربي، 28 أغسطس 2018، على الرابط التالي: <https://bit.ly/35Ocbr5> [↑](#footnote-ref-1)
2. Somalia: Penal Code [Somalia], 3 April 1964, available at: <https://bit.ly/2Le6QA7> [↑](#footnote-ref-2)
3. Somaliland Family & Personal Law, available at: <https://bit.ly/2Leg67l> [↑](#footnote-ref-3)
4. Criminal Procedure Code (Legislative Decree No: 1 of 1 June 1963), 1963-06-01, available at: <https://bit.ly/2SSEKhY> [↑](#footnote-ref-4)
5. “Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo”, Human Rights Council, Twentieth session, 14 May 2012, available at: <https://bit.ly/35N58z2> [↑](#footnote-ref-5)
6. Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo”, Human Rights Council, Twentieth session, 14 May 2012, available at: <https://bit.ly/35N58z2> [↑](#footnote-ref-6)
7. الاغتصاب” يهدد النسيج الاجتماعي في الصومال، مركز مقديشيو للأبحاث، 15 أبريل، 2019، على الرابط التالي: <https://bit.ly/2WL6PsJ> [↑](#footnote-ref-7)