**Annex – Questionnaire on criminalization and prosecution of rape.**

**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.

The Penal Code of 1962 does not use the term rape but instead uses the term carnal intercourse.

***Article 398. (Carnal Violence)***

*1. Whoever with violence or threats has carnal intercourse with a person of the other sex, shall be punished with* *imprisonment [96 P.C.] for five to fifteen years.*

*2. The same punishment shall be 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.*

*3. The same punishment shall be imposed also on a public officer [240 a P.C.] who, by abusing his power, has carnal intercourse with a person of the other sex who is under arrest or detained in custody under the said officer by reason of his office or entrusted to him in execution of an order of the competent authority.*

*4. For purposes of penal law [398, 400 P.C.], penetration of the male sexual organ shall constitute carnal intercourse.*

***Article 399. (Acts of Lust Committed with Violence)***

*Whoever by, employing the means or under the condition specified in the preceding article, commits upon a person of the other sex acts of lust other than carnal intercourse, shall be punished with imprisonment [96 P.C.] from one to five years.*

***Article 400. (Unnatural Offences Committed with Violence)***

*Where any of the acts referred to in articles 398 and 399 is committed against a person of the same sex or a person of different sex, against nature, the punishment shall be increased [118 P.C.].*

***Article 401. (Abduction for Purposes of Lust or Marriage)***

*1. Whoever, with violence, threat or deceit, abducts or detains a person for purposes of carnal violence [398 P.c.] or lust [399 P.c.] shall be punished with imprisonment [96 P.C.] from two to five years.*

*2. Whoever, with violence, threat or deceit, abducts or detains for purposes of marriage an unmarried person, shall be punished with imprisonment [96 P.C.] from one to three years.*

*3. Whoever abducts or detain a person who is incapable of giving consent [47 P.C.], for purposes of carnal violence [398 P.C.], or lust [399 P.C.], or marriage, shall be subject to the punishments prescribed respectively in the two preceding articles.*

The Penal Code of 1962 also criminalises the compulsion or facilitation of prostitution and the exploitation of the proceeds from prostitution in the following articles:

***Article 407. (Instigation, Aiding and Exploitation of Prostitution)***

*1. Whoever instigates another to commit prostitution, or aids or in any manner facilitates prostitution, or exploits, wholly or in part, the proceeds of prostitution shall be liable to the punishment provided for in paragraph1 of article 405.*

*2. The punishment shall be increased [118 P.C.] where:*

*a. the act is committed against a person who is incapable of giving consent [47 P.C.];*

*b. the offender is an ascendant, spouse, brother, sister or guardian of the person;*

*c. the act is committed against a person entrusted to the offender for care, education, instruction, supervision or custody.*

***Article 408. (Compulsion to Prostitution)***

*1. Whoever, by violence or threats, compels another to commit prostitution shall be punished with imprisonment [96 P.C.] from two to six years and with fine [97 P.C.] from Sh. So. 5,000 to 15,000.*

*2. Where any of the conditions referred to in paragraph 2 of the preceding article exists, the punishment shall be increased [118 P.C.].*

1. Based on the wording of those provisions, is the provided definition of rape:
2. Gender specific, covering women only

**NO.** The use of wording, “…with a person of the other sex…” and/or “…the same sex or a person of different sex…” provides for all genders.

1. Gender neutral, covering all persons

**YES.** The use of the word “person” is gender neutral.

1. Based on the lack of consent of the victim

**YES.** However, it is limited the incapability to give consent and deception of the victim by impersonation and misuse of power.

1. Based on the use of force or threat

**YES.**

1. Some combination of the above. If yes, please specify.

**YES**. Use of violence or threats

1. Does it cover only vaginal rape?

**NO.** The Penal Code of 1962 covers carnal violence committed against both a person of the same sex or a person of different sex.

1. Does it cover all forms of penetration?

**NO.** It does not include all forms of penetration.

1. Is marital rape in this provision explicitly included?

**NO.**

1. Is the law silent on marital rape?

**YES.**

1. Is marital rape covered in the general provisions or by legal precedent even if it is not included? **NO.**
2. Is marital rape excluded in the provisions, or is marital rape not considered as a crime?
**YES**. It is not considered as a crime.
3. 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?

**NO.**

1. What is the legal age for sexual consent?

Article 29 (8) of the Provisional Constitution (2012) defines a “child” as any person under 18 years of age. It does not say the minimum age of sexual consent.

1. Are there provisions that differentiate the sexual activity between peers? If so, please provide them. **NO.**
2. Provide information on criminal sanctions prescribed and lengths/duration of criminal sanctions for criminalized forms of rape.

***Punishment for rape under the Penal Code 1962:***

Articles 398, 399 and 401 stipulate that “carnal intercourse”, “acts of lust committed with violence”, and “Abduction for Purposes of Lust or Marriage” are punishable with 5-15 years, 1-5 years and 2-5 years of imprisonment respectively. Article 400 provides that for “Unnatural Offences Committed with Violence” the punishment under articles 398 and 399 shall be increased (as the Penal Code indicates this as an aggravating circumstance).[[1]](#footnote-1)

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

Article 14 of the Criminal Procedure Code of 1963 provides that injured parties may claim damages from the accused through a court in relation to civil liabilities arising from an offence. Article 274 of the Criminal Procedure Code of 1963provides that in proceedings for restitution or compensating for damages a criminal conviction will serve as *res judicata* in relation to the responsibility of the accused.

**Aggravating and mitigating circumstances**

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

The Penal Code of 1962 does not have specific aggravating circumstances for rape cases, but Article 39 (Ordinary Aggravating Circumstances) provides a general list of aggravating circumstances in the commission of a crime which are applied in sentencing rape cases.

*Article 39. (Ordinary Aggravating Circumstances). The following shall be aggravating circumstances of an offence, where they are not constitutive elements thereof nor special aggravating circumstances [117123 P.C.]:*

*a) having acted for abject or futile motives;*

*b) having committed the offence in order to commit or conceal another offence, or to obtain or secure for oneself or another the benefit or impunity from another offence;*

*c) in the case of crimes committed with culpa [24 P.C.], having acted in spite of having foreseen the event;*

*d) having used inhuman means or having acted cruelly towards persons;*

*e) having taken advantage of such circumstances of time, place or person as to hinder public or private defence;*

*f) where the offender has committed the offence during the time when he was willfully evading the execution of an arrest warrant or an order of imprisonment issued for a previous offence;*

*g) in the case of crimes against property [480-504 P.C.], having caused serious damage to the property of the party injured;*

*h) having aggravated or attempted to aggravate the consequences of the crime committed;*

*i) having committed the act with abuse of power or in violation of the duties inherent in a public office or in a public service; ]) having committed the act against a public officer [240 P.C.] or a person entrusted with a public service [240 P.C.], or against a diplomatic or consular agent of a foreign State in the course of or by reason of the performance of their functions or service;*

*k) having committed the act with abuse of authority or of domestic relationship or with abuse of one's position in an office, or in connection with performance of work, dwelling together or extending or receiving hospitality.*

The Penal Code of 1962 allows an increase in punishment in the case of a single aggravating circumstance. For instance, ***Article 118. (Increase of Punishment in the Case of a Single Aggravating Circumstance). –*** *Where there occurs only one aggravating circumstance, and the increase of punishment is not fixed by law, the punishment which should be imposed for the offence committed shall be increased up to one third. However, the punishment of imprisonment for a crime to be applied by reason of the increase shall not exceed thirty years.*

***Article 109****. (****Discretionary Powers of the Judge in Imposing Punishment: Limits*)** allows judges to exercise discretionary powers to increase or reduce the punishments within the limits fixed by law and also taking into account the gravity of an offence as given in the ensuing article in the Penal Code:

***Article 110. (Gravity of the Offence: Evaluation for the Purposes of Punishment). –***

*1. In the exercise of the discretionary powers referred to in the preceding article, the Judge shall take into account the gravity of the offence, as inferred from:*

*a. the nature, character, means, object, time, place and any other circumstances of the act;*

*b. the gravity of the injury or of the danger caused to the party injured by the offence) the intensity of criminal intent, or the degree of culpa.*

*2. The Judge shall likewise take into account the offender's criminal capacity, as inferred from:*

 *a. the motives to commit delinquency and the character of the offender;*

*b. the criminal record of the offender and, in general, the conduct and life of the offender prior to the offence;*

*c. the conduct at the time of, or subsequent to the offence;*

*d. the individual, domestic, and social conditions of life of the offender*

1. Is rape by more than one perpetrator an aggravating circumstance?

**NO.**

1. Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between the alleged perpetrator and the victims? (for example, doctor/patient; teacher/student; age difference)

**YES.** Article 39(i) of the Penal Code makes abuse of power in the commission of a crime an aggravating circumstance.

**Article 398.3 (Carnal Violence)** of the Penal Code states that imprisonment of five to fifteen years shall also 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 under the said officer by reason of his office or entrusted to him in the execution of an order of the competent authority.

Under Article 240, a public officer includes a private person who practices legal and medical professions, or any other profession with the prescribed State qualification.; or who performs a service which declared to be a public necessity.

In addition, under **Article 407. (Instigation, Aiding and Exploitation of Prostitution) and Article 408. (Compulsion to Prostitution)** of the Penal Code:

*2. The punishment shall be increased up to one third where:*

* + *the act is committed against a person who is incapable of giving consent;*
	+ *the offender is an ascendant, spouse, brother, sister or guardian of the person;*
	+ *the act is committed against a person entrusted to the offender for care, education, instruction, supervision or custody.*
1. Is rape by spouse or intimate partner an aggravating circumstance?

**NO.**

1. Does the law foresee mitigating circumstance for the purpose of punishment?

**NO.**

1. Is reconciliation between the victim and the perpetrator allowed as part of a legal response? If so, at what stage and what are the consequences?

**NO.**

1. Regardless of the law, is reconciliation permitted in practice? and what is the practice in this regard?

**YES.** The practice is that reconciliation is done through the Somali customary *Xeer* system (the main traditional dispute resolution mechanism) where clan elders (exclusively male) representing the victim and the perpetrator reach an agreement which includes monetary compensation by the perpetrator or marriage of the victim to the perpetrator, in some cases, without the necessary consent of the victim.

1. Is there any provision in the criminal code that allows the non-prosecution of perpetrator? if yes, please specify.

**NO.**

1. If the perpetrator marries the victim of rape?

**NO.**

1. If the perpetrator loses his “socially dangerous” character or reconciles with the victim?

**NO**.

**Prosecution**

1. Is rape reported to the police prosecuted ex officio (public prosecution)?

**YES.**

***Provisional Constitution of the Federal Republic of Somalia, Adopted 1 August 2012:***

***Article 34 (2). Access to Courts and Legal Defence***

*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.*

***Provisional Constitution of the Federal Republic of Somalia, Adopted 1 August 2012:***

***Article 107(1).*** ***Judicial Procedure***

*Judicial proceedings shall be open to the public, but the courts may decide, in the interests of ethics, national security, the protection of witnesses, in cases involving juveniles, or concerning rape, that the proceedings be held in private.*

***The Criminal Procedure Code, 1963***

***Article 96. Proceedings to be Public: Exceptions***

*Court proceedings shall be open to the public, but the court may, in the interests of:*

*a) public decency;*

*b) public health;*

*c) public order;*

*order that the proceedings shall be closed to the public.*

1. Is rape reported to the police prosecuted ex parte (private prosecution)?

**YES.**

The Provisional Constitution and the Criminal Procedure Code allow courts to hold proceedings of the sensitive cases, including rape, to be held in private.

1. Are plea bargain or “ friendly settlement” of a case allowed in cases of rape of women?

**NO.**

1. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children?

**NO.**

1. Please provide information on the statute of limitations for prosecuting rape.

There is no specific provision on the statute of limitations for prosecuting rape at the national level, but the Criminal Procedure Code also has general time-limits for the commencement of criminal proceedings, as shown in the following paragraph:

***The Criminal Procedure Code, 1963***

***Article 73 Time-Limits for the Commencement of Criminal Proceedings***

1. *For the purposes of this Code, unless the context indicates otherwise, criminal proceedings shall be considered to have commenced against a person as soon as that person becomes an accused under the terms of paragraph 1 of Article 13.[[2]](#footnote-2)*
2. *Criminal proceedings:*
3. *may be commenced at any time in cases in which the issue of a warrant of arrest is mandatory, in accordance with the provisions of paragraph 1 of Article 42[[3]](#footnote-3),*
4. *shall not be commenced in any other case, subject to the provisions of the following paragraph, after the expiry of the following time-limits from the date of offence:*

*i) 6 years, in the case of offences for which the maximum punishment is more than 5 years;[[4]](#footnote-4)*

*ii) 4 years, in the case of offence for which the maximum punishment is more than 3 years;*

*iii) 2 years, in the case of offences for which the maximum punishment is not more than 3 years;*

*iv) 6 months, in the case of offences punishable with fine only.*

1. *The time-limits prescribed in sub-paragraph b) of the preceding paragraph shall begin from:*
	1. *the day of the commission of the offence, in the case of offences described in Article 16 of the Penal Code as “Offences Committed”.*
	2. *the day on which the act or omission on the part of the offender has ceased in the case of attempted offences;*
	3. *from the day on which the offender ceased committing the offence in the case of permanent or continuing offences, provided that, in the case of offences committed by public officers in the course of their duty, the time-limit shall begin from the day of the termination of their service in such capacity*
2. Which are provisions allowing a child who was the victim of rape and to report it after reaching adulthood, if any?

**NONE.**

1. Are there mandatory requirements for proof of rape, such as a medical evidence or the need for witnesses?

**NO.**

1. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman’s sexual history during trial?

**NO.**

The Penal Code of 1962 categorises sexual violence under the headings of “Crimes Against Morals and Decency,” rather than as an offence against the right to personal liberty and security and the right to the physical integrity of the victims.

In addition, the Criminal Procedure Code (1963) gives courts the authority to allow defence lawyers of a man accused of sexual violence to present evidence on the moral character of the female victim during the trial under section d of article 197.

**Article 197 (d). Impeaching the Credit of a Witness**

*The credit of a witness may be impeached by the party other than the party calling him or, with the consent of the court, by the party who has called him:*

*d) When a man is prosecuted for:*

1. *a crime or attempted crime of sexual violence, or*
2. *a crime or attempted crime against modesty or sexual honour;*

*on a woman over 16 years of age, evidence may be given to show that the woman was of generally immoral character.*

1. Are there procedural criminal law provisions aimed to avoid re-victimization during the prosecution and court hearings?

**NO.**

Same as above.

**War and/or conflict**

1. Is rape criminalized as a war crime or crime against humanity?

**NO.**

There are no specific national laws or provisions criminalising rape as a war crime or crime against humanity. However, Article 35.13 of the Provisional Constitution of the Federal Republic of Somalia allows the conviction of persons who committed a crime against humanity under international law.

1. Is there a statute of limitations for prosecuting rape in war or conflict contexts?

**NO.**

1. Are there explicit provisions excluding statute of limitation for rape committed during war and armed conflict?

**NO.**

1. Has the Rome Statute of the International Criminal Court (ICC) ratified?

**NO.**

**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.

Data on the number of cases of rape reported, prosecuted and sanctioned could not be obtained.

**Other**

1. Please explain any particular and additional barriers to the reporting and prosecuting of rape and to the accountability of perpetrators in your legal and social context not covered by the above.

**Challenges and gaps include:**

* Outdated legal system and the absence of strong and specific legal provisions for rape cases, including the key definitions of sexual crimes.
* Access to the formal justice system is limited in most of the places in the country as the state authority is not fully extended.
* Prolonged insecurity and absence of state protection for victims of rape, relatives and witnesses particularly those from minority and marginalised clans and groups.
* Shame, stigmatization, revictimization and the fear of reprisals discourages victims to report rape cases and seek justice through formal courts.
* Heavy reliance on the male-dominated traditional *xeer* system in which the clan elders take the criminal responsibility of the offense instead of the individual perpetrator.
* Limited accountability and impunity for perpetrators of sexual crimes.
* Limited support services for victims of rape including filing complaints, psychosocial support, protection against reprisals and financial support.
* Absence of legal provisions to define, criminalise and prosecute rape as a war crime.
1. *See Article 118. (Increase of Punishment in the Case of a Single Aggravating Circumstance): Where there occurs only one aggravating circumstance, and the increase of punishment is not fixed by law, the punishment which should be imposed for the offence committed shall be increased up to one third. However, the punishment of imprisonment for a crime to be applied by reason of the increase shall not exceed thirty years.* [↑](#footnote-ref-1)
2. *The Criminal Procedure Code, 1963, Article 13 The Accused: 1. An accused is a person who, even without any warrant having been issued by a judicial authority, has been placed in a state of arrest under the control of a judicial authority, or who has been served with a summons to appear before Court. Such a person shall be considered as the accused during all stages of the proceedings, until such time as the judgment of conviction or acquittal has become final, or until it has been decided not to proceed further with the case, which shall be equivalent to an acquittal, or until the decision to close the case is confirmed.* [↑](#footnote-ref-2)
3. *The Criminal Procedure Code, 1963, Article 42 Cases in Which the Issue of a Warrant of Arrest is Mandatory 1. A warrant of arrest shall be issued against a person accused of:*

 *a) any of the offences referred to in Article 35 (see below);*

*b) an offence for which the maximum punishment is imprisonment for not less than 10 years, or a heavier penalty;*

*c) any other offence for which a warrant of arrest is mandatory by law*

***Article 35 Mandatory Arrest of Persons caught in the Act of committing a Crime (in Flagrante Delicto):*** *A person shall be arrested without a warrant if caught in the act of committing (in flagrante delicto): a) any offence, attempted or committed, against the Personality of the State for which the punishment is imprisonment or a more serous punishment; b) any offence, attempted or committed, of: i) escape from lawful custody; ii) devastation and pillage; iii) slaughter; iv) knowingly causing epidemics, poisoning of water or foodstuff; v) carnal violence, acts of lust committed with violence, unnatural offences committed with violence, abduction for purposes of lust; vi) abortion without consent; vii) murder, infanticide, death caused to a person with his own consent with aggravating circumstances, grievous or very grievous hurt, pre intentional homicide, affray with aggravating circumstances; viii) insult with aggravating circumstances in respect of which proceedings are initiated by the State. ix) Reduction to slavery, dealing and trading in slaves, enforced subjection; x) Seizure of a person; xi) Theft in respect of which proceedings are initiated by the State, robbery, extortion, killing or injuring of animals belonging to another in respect of which proceedings are initiated by the State. c) any other offence for which the law prescribes mandatory arrest of a person caught in flagrante delicto.* [↑](#footnote-ref-3)
4. The punishment for rape is between five and 15 years as per Article 398. (Carnal Violence) of the Penal Code). [↑](#footnote-ref-4)