

# NAVIGATING JUSTICE:

Lawyers as Human Rights Defenders in  
Ethiopia and Somalia/Somaliland

UN Declaration on  
Human Rights Defenders



**DEFENDDEFENDERS**

East and Horn of Africa Human Rights Defenders Project

## **Navigating Justice: Lawyers as Human Rights Defenders in Ethiopia and Somalia/Somaliland**

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“Human rights violations and the abuse of power are systematic and complex. Governments and non-state actors violate human rights under the guise of the law. They use the law as a shield. The root cause of rights violations and conflict are either the absence of proper law, or failure to respect existing rule of law.”

- Ethiopian Lawyer, June 2019

“We have been solving our problems very traditionally, locally. This becomes a problem when it comes to laws; chiefs, clans, and traditions come into play, which are all very important. So how do lawyers incorporate the best parts of the clan system and reject the parts that no longer work in our society?”

- Somali Lawyer, August 2019

“Conflict and human rights violations arise due to an absence of rule of law and good governance. If there is no law, there is conflict. Rule of law is spoiled when there is a problem with a law from its very inception, or when there is a problem in the implementation of a proper law. The peaceful coexistence of certain societies presupposes a level legal playing field.”

- Ethiopian Lawyer, June 2019

“Police see lawyers as a threat. They assume that if we meet our client, we’ll encourage them not to confess. If they eventually permit us in, they’ll delay us first, maybe tell us to come back tomorrow. Untrained police believe that a lawyer is interfering in their cases. They must understand the rights of lawyers and people they are accusing.”

- Somali Lawyer, August 2019

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# Table of Contents

About DefendDefenders	7
Foreword	8
Methodology	10
Executive Summary	11
Introduction	12
Ethiopia: Lands United, Laws Apart	14
Somalia/Somaliland: The Three Systems	25
Conclusion	42
Recommendations	43



## Acronyms

ACHPR	African Commission on Human and Peoples' Rights
AMISOM	African Union Mission in Somalia
ATP	Anti-Terrorism Proclamation
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CSO	Civil society organisation
EWLA	The Ethiopian Women Lawyers Association
FGM	Female genital mutilation
HRC	United Nations Human Rights Council
HRD	Human rights defender
ICCPR	International Covenant on Civil and Political Rights
IE	Independent Expert
MP	Member of Parliament
NGO	Non-governmental organisation
NHRC	Somali National Human Rights Commission
NHRI	National Human Rights Institution
RSOL	Rape and Sexual Offences Law
SGBV	Sexual and gender-based violence
UN	United Nations
UNDP	United Nations Development Programme



## About DefendDefenders

Established in 2005, DefendDefenders (East and Horn of Africa Human Rights Defenders Project) seeks to strengthen the work of human rights defenders (HRDs) throughout the sub-region by reducing their vulnerability to the risk of persecution by enhancing their capacity to effectively defend human rights. DefendDefenders focuses its work on Burundi, Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Somalia (with Somaliland), South Sudan, Sudan, Tanzania, and Uganda.

DefendDefenders serves as the secretariat of the East and Horn of Africa Human Rights Defenders Network, which represents hundreds of members consisting of individual HRDs, human rights organisations, and national coalitions that envision a sub-region in which the human rights of every citizen as stipulated in the Universal Declaration of Human Rights are respected and upheld.

DefendDefenders also serves as the secretariat of AfricanDefenders (the Pan-African Human Rights Defenders Network). AfricanDefenders aims to coordinate activities in the areas of protection, capacity building, and advocacy across the African continent, supporting the five sub-regional networks: the North Africa Human Rights Defenders Network (hosted by the Cairo Institute for Human Rights Studies in Tunis, Tunisia), the West African Human Rights Defenders Network (Lomé, Togo), the Southern Africa Human Rights Defenders Network (hosted by the International Commission of Jurists in Johannesburg, South Africa), the Central Africa Human Rights Defenders Network (Douala, Cameroon), and the East and Horn of Africa Human Rights Defenders Network (hosted by DefendDefenders in Kampala, Uganda).



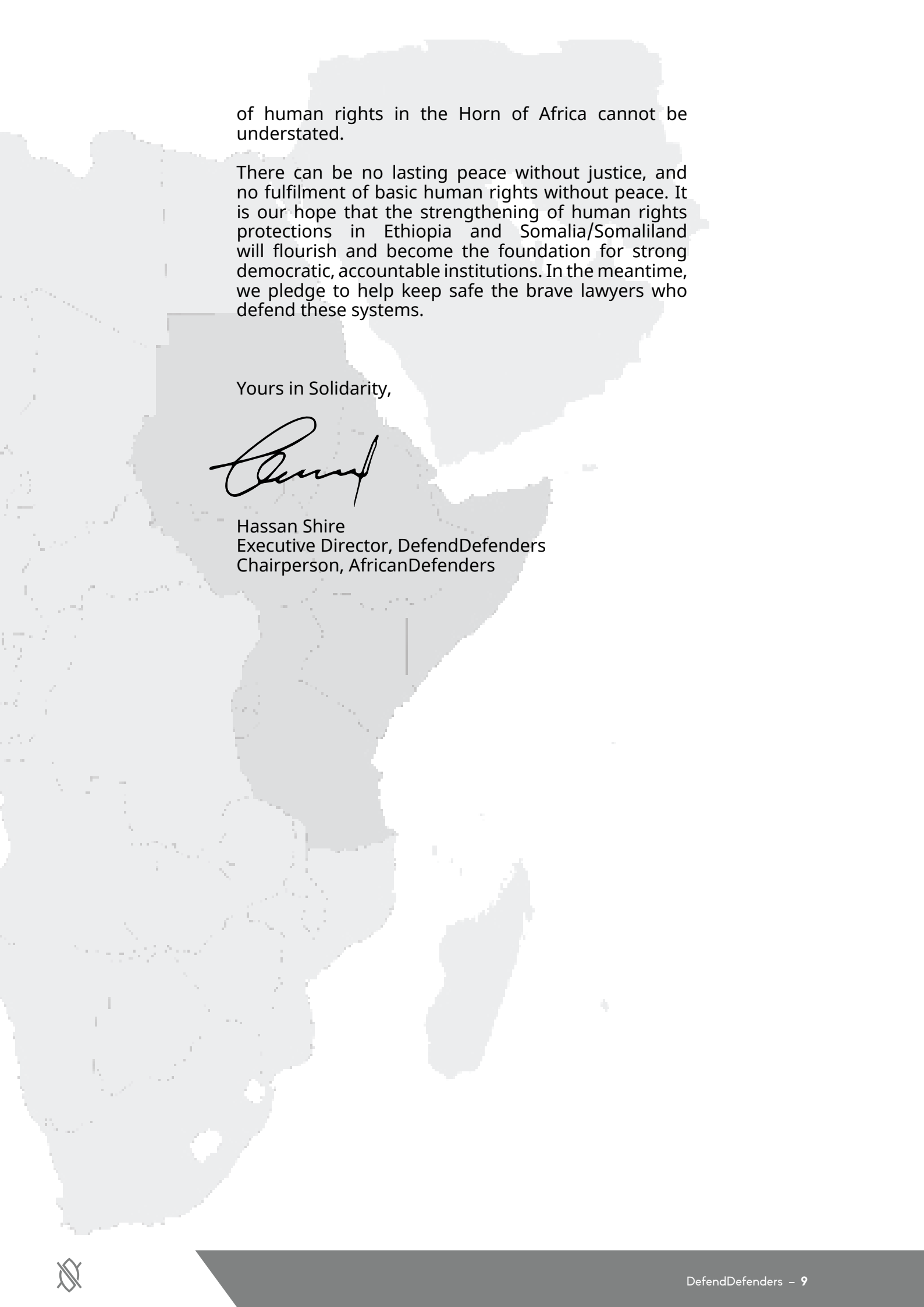
There can be no lasting peace without justice. This principle is pronounced in the East and Horn of Africa sub-region, where conflict, insecurity, dictatorship, and undemocratic institutions stifle the fulfilment of the basic rights enshrined in the Universal Declaration of Human Rights. When rights are violated and the rule of law is elusive, where do people turn for justice? The lack of a real answer to this question lies at the heart of so much of the strife and suffering we have witnessed in this sub-region, with ordinary people, particularly women, children, and other marginalised groups, bearing the brunt of those struggles.

National legislative frameworks are meant to act as a mitigator in these circumstances, with codified laws and customs as a barrier to the worst power abuses; the judiciary as a neutral fixed staple of stability. Lawyers and other legal professionals play a pivotal role in this system. The use and misuse of legal systems mark the difference between justice and injustice.

In times of injustice, lawyers help victims claim their rights, provide legal advice, represent the accused in court, follow up on cases, petition against the enactment of unjust laws, and take human rights cases to supranational institutions when those at home prove inadequate or corrupt. In the pure application of their profession, they act as the first line of defence against human rights abuses by ensuring that citizens access justice and remedies. Lawyers are the ones we call in the middle of the night when HRDs are under attack or the human rights of ordinary citizens are being violated. When they answer that call, lawyers become HRDs.

We chose to focus this study on the Horn of Africa because of the immense socioeconomic potential it offers. Not so long ago, Ethiopia's political crisis threatened the stability of the region. Today, legislators are amending unjust laws and preparing for what may be the country's first truly democratic election in decades. Somalia struggles daily to ensure stability through governance and rule of law, especially in areas controlled by non-state actors who flout laws and basic human dignity, while Somaliland struggles because it is not recognised by the international community. We will address the entity's specific challenges; however, it should be clear that DefendDefenders does not seek to engage in debates over claims to statehood. The role played by lawyers in the protection and promotion





of human rights in the Horn of Africa cannot be understated.

There can be no lasting peace without justice, and no fulfilment of basic human rights without peace. It is our hope that the strengthening of human rights protections in Ethiopia and Somalia/Somaliland will flourish and become the foundation for strong democratic, accountable institutions. In the meantime, we pledge to help keep safe the brave lawyers who defend these systems.

Yours in Solidarity,



Hassan Shire  
Executive Director, DefendDefenders  
Chairperson, AfricanDefenders

## Methodology

This report is the culmination of monitoring efforts, desk research, and field research, including interviews, conducted in-person and over the phone with 42 respondents between January and October 2019 in Ethiopia (Addis Ababa, Bahir Dar, Hawasa, Jijiga), Uganda (during a workshop for lawyers in Kampala), and Somalia/Somaliland (Hargeisa). Respondents include human rights lawyers, judges, members of civil society organisations (CSOs) and community-based organisations, and representatives from regional governments as well as national human rights institutions (NHRIs).

While attempting to be as comprehensive as possible, this report has several key limitations that must be clarified for its conclusions and recommendations to be understood in context. The findings attempt to identify broader trends in Ethiopia and Somalia/Somaliland, but are by no means exhaustive. The choice of physical research locations was based on the prevalence of lawyers in urban centres, weighed against budgetary and logistical limitations. These findings should be considered as baselines for other organisations looking to conduct more in-depth research as the specific situation in the Horn of Africa evolves over time, especially in other regions not covered in this report.

Finally, one significant research limitation must be addressed from the outset. Due to an unfolding security situation, DefendDefenders was unable to visit key sources in Mogadishu, as planned. The team therefore spent the majority of its time in Hargeisa, consequently the research findings display a much better analysis of this particular legal context. This, however, should be in no way misconstrued as a tacit endorsement or promotion of Somaliland's claims to political independence. For the international community, from a legal and political point of view, Somaliland continues to be a self-governing entity within the Federal Republic of Somalia. DefendDefenders focuses on human rights promotion and protection on the ground, irrespective of political territorial claims or claims of statehood. Therefore, we have solely focused on the roles, needs, and challenges of lawyers operating in Somaliland, in the context in which they operate, without taking any position on Somaliland's status vis-à-vis the international community.

Claims not otherwise sourced are credited to the interviews conducted by DefendDefenders, making every effort to confirm information with multiple independent sources. The names and identifying markers of all sources have been omitted to ensure their safety, independence, and protection from reprisals in the form of legal and extrajudicial harassment, acts of intimidation, threats, and/or attacks from a range of actors. All interviewees were informed about the objectives of the research and format of this report. None received any form of financial compensation for their testimony.

We would like to express our heartfelt gratitude to all the individuals who contributed their testimonies, insights, and analyses for this report.



## Executive Summary

Lawyers are essential components of legal and judicial systems and pillars of the rule of law. They help victims claim their rights, provide legal advice, represent the accused in court, follow up on cases, petition against the enactment of unjust laws, and take human rights cases to supranational institutions when those at home prove inadequate or corrupt. They act as the first line of defence against human rights abuses by ensuring that citizens access justice and remedies. When they fill these roles, lawyers act as HRDs, and their actions and challenges must be understood within that context. This report focuses on the efforts of lawyers in Ethiopia and Somalia/Somaliland in order to identify their best practices, vulnerabilities, and needs in these rapidly changing environments.

Both in Ethiopia and Somalia/Somaliland, legal and judicial institutions are considered weak and often viewed negatively by citizens, formal and informal institutions coexist, and violations of due process and related rights are frequent due to a lack of capacity and deliberate state actions. More than simple service providers, lawyers are instrumental in localities where access to formal justice systems is difficult due to physical distance or harmful social norms that marginalise women, ethnic minorities, or refugees.

Ethiopia's unique form of ethnic federalism plays an important role in people's access to, and understanding of, the legal system, further complicated by a dual system in which federal and regional jurisdictions often overlap. These systems are accompanied by informal traditional and religious dispute resolution mechanisms that do not adequately take human rights standards into consideration, which hampers the work of lawyers. Ongoing legal reform in the country seeks to address draconian legislation enacted in the last decade, but redress for human rights abuses committed during this period may be difficult without input from lawyers who currently lack capacity and funding. Lawyers in Ethiopia find themselves at a critical juncture, where decades of deliberate misuse of the legal system is potentially being reversed ahead of crucial elections scheduled for May 2020.

Somali/Somaliland society's clan-based structure, weak institutional infrastructures, and a three-tiered system (formal, traditional, and religious) used for rendering justice and settling disputes are major factors in a context characterised by grave human rights violations and insecurity. While Somaliland's security situation is more stable, people living in rural areas lack access to the formal justice system, leading to an overreliance on traditional and religious courts. Lawyers in Somalia/Somaliland struggle with handling sensitive cases when they clash with established cultural or religious norms, and protection mechanisms specifically geared towards them are largely non-existent. Lawyers continue to play a pivotal role in strengthening fragile state institutions and the rule of law, including ensuring that access to justice is a key pillar in establishing long-term peace and stability.

Since lawyers are generally regarded as members of a respected and privileged professional class, their human rights efforts are often overlooked, which sees them left out of broader protection efforts. It is imperative that CSOs, international donors, and governments begin to recognise the crucial role played by lawyers who can exert social change by promoting ideas, influencing values, and triggering change in people's behaviour over time. This report concludes with general recommendations, and others directly addressed to donors, lawyers, and the governments of Ethiopia and Somalia/Somaliland.

This report is the culmination of monitoring efforts, desk research, and field research, including interviews, conducted in-person and over the phone with 42 respondents between January and October 2019 in Ethiopia, Uganda, and Somalia/Somaliland.



# Introduction

Lawyers are an essential component of legal and judicial systems, and pillars of the rule of law. They act as practitioners of the law, watchdogs of due process, and defenders of fundamental rights and freedoms. They play a vital role in the protection of fair trial guarantees, human rights safeguards, and the independence of the judiciary. They are also instrumental in promoting the right to access effective remedies, including reparations in all its forms: restitution, financial compensation, truth, apologies, rehabilitation, and, ultimately, non-repetition. This report will focus on what lawyers do to be characterised as HRDs in the Ethiopian and Somali/Somaliland contexts. What roles do lawyers play within the legal and judicial system? To what extent, and in which situations, can lawyers be considered HRDs? What are their challenges and needs?

From a theoretical perspective, lawyers cannot be characterised as HRDs if they merely conduct administrative and legal work that does not fit with the definition contained in the United Nations (UN) Declaration on Human Rights Defenders.<sup>1</sup> However, they can act as HRDs in various situations and in various ways. First, a lawyer can be an HRD or an activist themselves. The term describes persons who, individually or with others, acts to promote or protect human rights. As the UN Special Rapporteur on the situation of HRDs put it, “what is most important in characterising a person as a human rights defender is not the person’s title or the name of the organisation he or she works for, but rather the human rights character of the work undertaken.”<sup>2</sup> Practicing law for profit is not

an obstacle to being characterised as an HRD – a key disqualifier is the use of violence, which is excluded as a means of defending human rights. Second, a lawyer can act as an HRD when they represent HRDs, journalists, and other independent or critical voices in a legal capacity. For example, in repressive contexts when independent voices face judicial harassment and need to be counselled by a lawyer. The role lawyers play in defending these voices often puts them in harm’s way. Third, a lawyer acting as a legal practitioner can still be considered an HRD insofar as they defend due process, the rule of law, and fair trial standards. This can potentially occur anywhere, but it is particularly important in contexts where institutions are weak, the judiciary lacks independence, and procedural infringements on the rights of defendants or victims are frequent.

In Ethiopia and Somalia/Somaliland, legal and judicial institutions are considered weak, formal and informal institutions coexist, and violations of due process and related rights are frequent because of a lack of capacity and deliberate state actions. The contexts studied in this report are also marked by significant gaps and divides, which make the promotion and protection of human rights challenging. First, the urban/rural divide is striking. Citizens living in rural areas face drastically reduced public services compared to urban dwellers. The gap is particularly clear when it comes to accessing legal and judicial services: lawyers, legal institutions, and courts are much less present in rural areas. Permanent courts are entirely absent in some areas, both in Ethiopia and Somalia/Somaliland, with mobile courts struggling to fill this gap. This situation adversely affects vulnerable persons, and marginalised or at-risk groups, including women, children, the elderly, refugees and asylum-seekers, internally displaced persons, and members of minority groups. Some of them (women refugees, for instance) face intersecting forms of marginalisation. Lack of human rights

1 UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Doc. A/RES/53/144, 9 December 1998, <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>, Accessed 25 October 2019.

2 Special Rapporteur on the Situation of HRDs, “Who is a defender?,” <https://www.ohchr.org/en/issues/srhrdefenders/pages/defender.aspx>, See also: “Commentary to the Declaration on Human Rights Defenders: an essential guide to

the right to defend human rights,” <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/CommentarytotheDeclarationonHumanRightsDefenders.aspx>, Both accessed 28 October 2019.



education and awareness is another challenge to the full enjoyment of rights.

In the course of its field research, DefendDefenders was inspired by some positive aspects. These include the existence of a vibrant civil society, the commitment and experience of lawyers, HRDs, journalists, and other civil society actors, the existence of a functional NHRI in Somaliland, a burgeoning of pro bono legal aid clinics in Ethiopia, and an overall increase in the use of the official judicial system, especially with regard to criminal justice matters.

Societal attitudes and values continue to strongly influence judicial and human rights issues. This holds true in any society, but a few remarks should be made regarding the Ethiopian and Somali/Somaliland contexts. Both are marked by the prevalence of informal institutions and somewhat negative attitudes towards formal state institutions, notably judicial institutions. At the same time, lawyers are positively regarded as members of an intellectual professions. Therefore, lawyers enjoy a form of prestige that can translate into an ability to exert social change by promoting ideas, influencing values, and triggering change in people's behaviour over time.

Without engaging in a legal-philosophical debate over the authority of law or its relationship to social practices and values, we should point out that societal attitudes cannot be left out of the equation. "Tradition comes back when it comes to laws,"<sup>3</sup> as one lawyer put it to DefendDefenders. In other words, there might be good written laws, but this does not ensure that they will be implemented or socially accepted. Lenient attitudes towards a number of human rights abuses, such as forced female genital mutilation (FGM) or sexual and gender-based violence (SGBV), explain why human rights advancement has encountered obstacles. Additionally, the lack of trust in legal and judicial systems poses further challenges. As evidenced in this report, this explains both why people under-report cases and under-use the official judicial system, and why judicial officials do not dedicate as much attention to these issues as would be needed to address them from a human rights perspective. This also explains why traditional justice and settlement mechanisms continue to be largely

3 DefendDefenders Interview, Somalia/Somaliland, August 2019.

used, despite a reported increase in the use of official judicial institutions by sources contacted for this report.

In Ethiopia, ethnic and religious identity, especially with regards to the country's unique form of ethnic federalism, play a pivotal role in people's access to, and understanding of, the legal system. Moreover, as each autonomous region can enact their own laws so long as they do not contradict the Constitution (1995), this creates systems whereby ancient customary practices and ethnic value systems are reflected in the judiciary and their application of the law. In Somalia/Somaliland, which are much more homogeneous in terms of ethnicity, language, and religion, clan affiliation is a social category of prime importance that defines many aspects of a person's life, both in the public and private spheres. When it comes to justice, clan influence translates into strong traditional/customary mechanisms that are built on clan affiliation and allegiance. This needs to be factored in when discussing the role of lawyers in Somalia/Somaliland.

In Ethiopia and Somalia/Somaliland, justice is rendered through several coexisting legal and judicial systems. Justice in Ethiopia rests on a complex system of overlapping federal and regional jurisdictions (statutory), and traditional/religious mechanisms. In Somalia/Somaliland, cases are adjudicated and disputes are settled through a three-tiered system: written/statutory law applied by the official judicial system; traditional, clan-based justice and settlement mechanisms (xeer); and Islamic law (sharia), which mostly applies to family matters. As a matter of principle, crimes, including murders and rapes, must be dealt with by the official judicial system. However, in practice, traditional/customary mechanisms continue to be used to settle criminal cases. This again shows the importance of considering the social context when discussing legal, judicial, and human rights matters.

In these contexts, lawyers "navigate" justice. They work not within one legal and judicial system, but within and between two or three. This report focuses on human rights protection and gaps in these systems and the roles lawyers play, and their challenges and needs as HRDs. We formulate recommendations to better protect lawyers, and ultimately to safeguard human rights in Ethiopia and Somalia/Somaliland.



## POLITICAL AND LEGAL BACKGROUND

In 2018, Ethiopia found itself at an impasse as the government could no longer balance the faltering economy with increased international attention to its political and human rights situation after years of massive protests against ethnic marginalisation brought the country to a standstill. In February 2018, then Prime Minister Hailemariam Desalegn announced his surprise resignation. In his place, Dr. Abiy Ahmed was appointed as Prime Minister. He quickly initiated sweeping national reforms aimed at opening political and civic space, releasing tens of thousands of political prisoners, closing places of detention, and removing bans on several opposition parties. Along with these changes, massive legal reform was announced in order to amend misused elements of the justice system, including several draconian laws and elements of the Criminal Code (2005)<sup>4</sup>, in order to bootstrap democratisation ahead of national elections planned for May 2020.

"In order to have a democratic government, we must have a legal system that respects the universal human rights of all individuals. If people lose faith in the justice system, those who carry justice will fail throughout the country."<sup>5</sup>

Ethiopia's legal system traces its history to the early days of the imperial Solomonic dynasty. The 1974 communist revolution and subsequent military Derg regime brought sweeping changes to the legal system, changing the feudal imperial structure of personal appeals and royal patronage to one more focused on collective rights and communal access to a more codified justice system; though this was largely abused by

the brutal regime which effectively disregarded due process.<sup>6</sup> The 1991 revolution and shift to multiparty democracy was characterised by the enactment of a new Constitution in 1995, which contained in Chapter 3, among other notable improvements, provisions relating to human rights and fundamental freedoms.<sup>7</sup>

A rare feature of the Ethiopian legal system is that, compared to nearly all other African nations, its basic framework is not rooted in colonial architecture, but rather a unique mix of indigenous customary and codified statutory law reflective of its multicultural and religious constituencies. Thus, while lawyers in other countries in the sub-region often gripe about the need to repeal colonial-era laws that criminalise vagrancy or other vaguely worded and often misused offenses against the state, Ethiopia's judiciary can be categorised as marginally influenced by European systems, rather than wholly reliant on their structures or traditions.<sup>8</sup>

The Constitution of the Federal Republic of Ethiopia guarantees the peoples, nations, and nationalities of Ethiopia their right to self-determination, under which nine autonomous states enjoy the right to determine their own affairs, and most importantly, have their own laws made by their own state councils. However, Article 9(1) underscores that the Constitution is the supreme law of the land, and that "any law, customary practice, and act of an agency of government or official act that contravenes the Constitution is invalid." Individual regional state constitutions often begin with the preamble that the Federal Constitution retains legal supremacy, and that regions are expected to enact laws in accordance with it.<sup>9</sup>

6 International Journal of Legal Information, "A Brief History of the Ethiopian Legal Systems - Past and Present," 1 January 2013, [https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID3088643\\_code1708358.pdf?abstractid=3088643&mirid=1&type=2](https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3088643_code1708358.pdf?abstractid=3088643&mirid=1&type=2), Accessed 3 November 2019.

7 Constitution of the Federal Democratic Republic of Ethiopia, 1994, <https://www.wipo.int/edocs/lexdocs/laws/en/et/et007en.pdf>, Accessed 31 October 2019.

8 DefendDefenders Interviews, Uganda, June 2019.

9 Alpha University College, "Introduction to Law and

4 "Ethiopia: Criminal Code, Proclamation No. 414/2004," 9 May 2005, <https://www.refworld.org/docid/49216b572.html>, Accessed 13 November 2019.

5 DefendDefenders Interview, Ethiopia, March 2019.



Ethiopia therefore has a two-tiered judicial system with parallel court structures: the federal courts and the state courts, each with their own independent structures and administrations. A Federal Supreme Court in Addis Ababa holds national jurisdiction, with the power to review and overturn decisions issued by lower federal courts and State Supreme Courts, which generally sit in capital cities of the respective states and have final judicial authority over matters of State law and jurisdiction. The federal cassation bench is the final in the judiciary ladder whose decisions have precedence over both regional and federal courts.

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## Federal and state level judicial power in Ethiopia is vested in two tiers of courts:

- **Tier 1:** Federal level: Federal Supreme Court, Federal High Court, and Federal First Instance Court
  - **Tier 2:** Regional level: State Supreme Court, State High Court, and State Woreda Court
- 

Articles 34(5) and 78(5) of the Constitution allow for the establishment of religious and customary courts, while making clear that this legal pluralism applies only to personal status and family law, with criminal cases being the domain of the statutory courts.<sup>10</sup> For example, sharia courts that apply Islamic law have been officially established both at the federal and state levels, yet are required to follow the procedural rules of ordinary courts, and parties must voluntarily submit to their jurisdiction, which is generally limited to family issues (marriage, divorce, child custody, and inheritance).

Customary courts, in contrast, are not established by law, despite their constitutional recognition. Their authority stems from tradition

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the Ethiopian Legal System,” June 2011, <https://chilot.me/wp-content/uploads/2011/06/introduction-to-law-and-ethiopian-legal-system.pdf>, Accessed 29 October 2019.

10 Hauser Global Law School Program, “Introduction to the Ethiopian Legal System and Legal Research,” August/September 2010, <https://www.nyulawglobal.org/globalex/Ethiopia.html>, Accessed 29 October 2019.

and local customs which have evolved from traditional elder councils, which do not have formal legal authority, but carry moral force and still operate widely as primary decision-makers and alternative dispute resolution mechanisms in rural areas throughout Ethiopia. Like sharia courts, the choice to have disputes settled in these non-official forums is left to the parties and may stem in part from a lack of physical access to statutory courts in rural areas, lack of financial resources to employ a private lawyer, lack of trust in the statutory system, or a historical cultural reliance on these traditional dispute resolution mechanisms.<sup>11</sup>

Lawyers practicing in Ethiopia operate in this plural environment, with overlapping jurisdictions which differ across the regional states, further complicated by the parallel nature of customary and religious courts. The application of federal and regional statutory law, except for criminal matters, is therefore limited to those that actively seek it out, while others may rely on more traditional customs based on their ethnic background, clan, or religion. Traditional systems are pragmatic and often oriented towards the quick resolution of disputes and can therefore help address some of the shortcomings of Ethiopia’s statutory system, which, in some regions, is critically backlogged or difficult to access physically for rural and illiterate people. However, these traditional systems sometimes contradict the formal system in application of the law and may not uphold human rights norms, standards, and safeguards.

Formal mechanisms ultimately have jurisdiction, but this is often difficult to monitor, especially in more traditional communities.<sup>12</sup> For instance, a sharia court may rule that a man accused of rape should marry his victim in order to spare the families shame and avoid jail – even in cases where the victim is under 18 years old.<sup>13</sup> While this contradicts federal laws, it will only come to the attention of authorities if the families bring

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11 Hauser Global Law School Program, “Introduction to the Ethiopian Legal System and Legal Research,” August/September 2010, <https://www.nyulawglobal.org/globalex/Ethiopia.html>, Accessed 29 October 2019.

12 Alpha University College, “Introduction to Law and the Ethiopian Legal System,” June 2011, <https://chilot.me/wp-content/uploads/2011/06/introduction-to-law-and-ethiopian-legal-system.pdf>, Accessed 29 October 2019.

13 DefendDefenders Interview, Uganda, June 2019.

the charge to police, which is often not the case when dealing with sensitive or taboo topics.

Pursuant to Article 9(4) of the Constitution, all international agreements ratified by Ethiopia are part of country's legal system. Ethiopia has ratified numerous international and regional treaties. For instance, the African Charter on Human and Peoples' Rights (ACHPR, or Banjul Charter), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of Racial Discrimination (ICERD), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and the Convention on the Prevention and Punishment of the Crime of Genocide. However, except for the CRC, these international frameworks have not all been domesticated in Ethiopia or translated into Amharic, so implementation and enforcement remain major gaps.

“Except for the Convention on the Right of the Child, which is translated in Amharic language and can be directly implemented by the court, other human rights instruments are ratified but not an integral part of the domestic law of Ethiopia. These are challenges we face as lawyers.”<sup>14</sup>

A previous report by DefendDefenders published in May 2019<sup>15</sup> examines the country's developing human rights situation in detail. However, the context in which lawyers operate is important to understand in order to ascertain their specific challenges, vulnerabilities, and needs. As previously noted, not all lawyers are HRDs, but those who engage in the defence of human rights through their profession share common ground with other HRDs in the country. “There are plenty of laws that should be

protecting people. In practice, however, this is where the problem is. Even courts lack awareness of human rights.”<sup>16</sup>

## LEGAL REFORM AND REDRESS IN ETHIOPIA

Along with reforms at the national level and the release of tens of thousands of political prisoners, swift legal reform was one of the main promises made by the Abiy Government after it came to power in April 2018.<sup>17</sup> The enactment of draconian legislation from 2007 to 2018 was the primary means used to stifle criticism, cripple civil society, and subjugate the citizenry under the previous regime, notably through the Freedom of the Mass Media and Access to Information Proclamation (2008), the Anti-Terrorism Proclamation (ATP) (2009), and the Proclamation to Provide for the Registration and Regulation of Charities and Societies (CSO Proclamation) (2009).<sup>18</sup> Under these laws, hundreds of newspapers and other local media outlets were shuttered, thousands were jailed, and nearly all Ethiopian CSOs were closed due to severe restriction on their funding and activities.

Without proper recourse to appeal or any real political will for change, the highly restrictive nature of this legislation went largely unchallenged in Ethiopia, as HRDs fled into exile or severely scaled back their work in order to comply with the legal framework. This situation also put lawyers, especially young lawyers and recent graduates, in a position where they feared being disbarred or jeopardising their careers if they advocated for amendments to these laws, or defended clients charged with terrorism in court, leading to a culture of intimidation and self-censorship. One lawyer interviewed for this report also highlighted that in 2006 they received a training for lawyers and paralegals on human rights law, but the implementing non-governmental organisation (NGO) was phased out because of the restrictions under the 2009 CSO Proclamation. This use of the law

16 DefendDefenders Interview, Ethiopia, March 2019.

17 Freedom House, “Reform in Ethiopia: Turning Promise into Progress,” 28 September 2018, <https://freedomhouse.org/article/reform-ethiopia-turning-promise-progress>, Accessed 30 October 2019.

18 DefendDefenders, “Turning the Page: Rebuilding Civil Society in Ethiopia,” May 2019, [https://www.defenddefenders.org/wp-content/uploads/2019/05/Ethiopia\\_FINAL-REPORT.pdf](https://www.defenddefenders.org/wp-content/uploads/2019/05/Ethiopia_FINAL-REPORT.pdf), Accessed 30 October 2019.

14 DefendDefenders Interview, Uganda, June 2019.

15 DefendDefenders, “Turning the Page: Rebuilding Civil Society in Ethiopia,” May 2019, [https://www.defenddefenders.org/wp-content/uploads/2019/05/Ethiopia\\_FINAL-REPORT.pdf](https://www.defenddefenders.org/wp-content/uploads/2019/05/Ethiopia_FINAL-REPORT.pdf), Accessed 30 October 2019.





as an instrument of repression deprived lawyers of their ability to effectively function within the system and adequately defend HRDs, with one lawyer noting that “procedurally, prosecution under the ATP was lawful, but the law itself was unjust.”<sup>19</sup>

In March 2019, a new CSO Proclamation was introduced, without the provisions that prohibited civil society and lawyers from engaging in human rights activities,<sup>20</sup> while a new electoral law was introduced in August 2019 which revised political party registration.<sup>21</sup> Practitioners in a pro bono legal aid clinic in Hawasa, in southern Ethiopia, expressed that the 2009 CSO law’s restrictions forced them to work primarily on issues of employment and children’s rights in order to remain licensed, noting that they “wanted to engage in human rights activities, but the legal and political situation did not allow it.”<sup>22</sup> Under the new provisions, they anticipated handling more cases related to corruption and land rights, which are critically under addressed in the Southern Nations, Nationalities, and People’s Region. Other legislative reforms are ongoing, such as amendments to the ATP, and there has thus far been increased participation from lawyers and civil society actors in drafting new legislation that complies with international standards and by extension, Ethiopia’s treaty obligations.<sup>23</sup> These legal reforms will be tested in national elections scheduled for May 2020.

"If we don't have rule of law, how are people going to accept the result of an election, even if it's fair and democratic?"<sup>24</sup>

A major avenue now open for lawyers to engage with this widening system is within ongoing

19 DefendDefenders Interview, Ethiopia, January 2019.

20 For a full analysis of the new CSO Law, see pages 20-22, DefendDefenders, “Turning the Page: Rebuilding Civil Society in Ethiopia,” May 2019, [https://www.defenddefenders.org/wp-content/uploads/2019/05/Ethiopia\\_FINAL-REPORT.pdf](https://www.defenddefenders.org/wp-content/uploads/2019/05/Ethiopia_FINAL-REPORT.pdf), Accessed 30 October 2019.

21 Africa News, “Ethiopia parliament approves new electoral bill ahead of 2020 polls,” 24 August 2019, <https://www.africanews.com/2019/08/24/ethiopia-parliament-unanimously-passes-new-electoral-law/>, Accessed 30 October 2019.

22 DefendDefenders Interview, Ethiopia, March 2019.

23 DefendDefenders Interview, Ethiopia, January 2019.

24 DefendDefenders Interview, Ethiopia, March 2019.

truth and reconciliation efforts across the country, notably in helping to secure redress for political prisoners persecuted under the previous regime. The ATP severely curtails basic civil liberties, while the two states of emergency (2016-2018) enacted during mass protests stripped what little was left, removing due process and prison oversight for the thousands arrested. These prisoners were not afforded legal representation and often held for months without charge or trial, usually in overcrowded and appalling conditions that often featured, or in themselves amounted to, torture and other forms of cruel and inhuman treatment.<sup>25</sup>

"When prisoners came out of detention, they finally saw the light – not metaphorically, but literally. These political prisons were caves."<sup>26</sup>

Broader issues over selective prosecution and credible accountability for perpetrators of crimes at the national level were covered in a previous DefendDefenders report,<sup>27</sup> but questions remain over redress for individuals who suffered under these brutal systems of repression. Since the release of most, but not all, of these prisoners since 2018, questions remain over whether they will be given compensation, or at the very least official legal recognition, for the trauma and lost income they suffered. Individual lawyers at the local level are best poised to ensure that these cases are handled properly and without delay. One lawyer in Amhara region, which bore a large portion of the protest repression, noted that his work now included not only documenting the experiences of victims, but also helping them return home and re-establish themselves professionally within the community. He said that legal redress should also include more innovative forms of psychological rehabilitation to help guarantee non-recurrence of political revenge, noting that the “cycle of violence needs to be stopped.”<sup>28</sup>

25 Oakland Institute, “Ethiopia’s State of Emergency: Authorizing Oppression,” 20 October 2016, <https://www.oaklandinstitute.org/blog/ethiopias-state-emergency-authorizing-oppression>, Accessed 30 October 2019.

26 DefendDefenders Interview, Ethiopia, March 2019.

27 DefendDefenders, “Turning the Page: Rebuilding Civil Society in Ethiopia,” May 2019, [https://www.defenddefenders.org/wp-content/uploads/2019/05/Ethiopia\\_FINAL-REPORT.pdf](https://www.defenddefenders.org/wp-content/uploads/2019/05/Ethiopia_FINAL-REPORT.pdf), Accessed 30 October 2019.

28 DefendDefenders Interview, Ethiopia, March 2019.

Therefore, any attempts at redress must first help victims deal with trauma, which several lawyers lamented they are not currently professionally equipped to undertake effectively. Regardless, lawyers may also engage proactively in this process, even at the local level, by documenting evidence for posterity or future prosecution, at the very least helping to mitigate the potential for mob or vigilante justice, with one lawyer in Jijiga noting that “this is a security threat to the region unless we can deal with this.”<sup>29</sup> Thereby, lawyers can use this opportunity to not only document cases for precedent and posterity, but also help increase faith in the judiciary among ordinary citizens who have long seen it as a state-sanctioned tool for repression and injustice.

“Transitional justice is the way countries emerge from periods of conflict and oppression, address large scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response.”<sup>30</sup>

Whether and when the judiciary will rise to adequately prosecute these cases of redress is another question entirely. Transitional justice not only means holding the powerful accountable but meeting the needs of the society in transition; the need for justice, truth, and reconciliation. As a result, in order to achieve real and effective transitional justice, new leaders must follow proper procedures and address grievances. That being said, the initiative to prosecute human rights violations is at its early stage, thus it is difficult to judge its effectiveness, impartiality, and its ability to bring justice to society.

Regardless, lawyers and civil society will play a critical role in this process. Thus, their independence and ability to work unrestricted will be of paramount importance in ensuring justice and accountability. In all senses, lawyers with human rights training and understanding of international standards must be involved with any attempts at truth and reconciliation. However, as one lawyer interviewed for this

report cautiously noted: “I would say the performance of the justice system from a human rights perspective is in its infant stage and need lots of workouts.”<sup>31</sup>

## WOMEN'S RIGHTS & WOMEN LAWYERS

Women and girls encounter resistance when they try to report human rights violations to the police, and this also frustrates or prevents efforts by lawyers to assist them, especially by women lawyers who can face this marginalisation both socially and professionally. One female lawyer noted that nearly all her pro bono clients were women seeking legal aid services for issues relating to inheritance, divorce, SGBV, and employment discrimination. The Ethiopian Women Lawyers Association (EWLA) has several offices across the country that offer women legal support, but they lamented being critically understaffed and underfunded, especially with regard to foreign funding restrictions under the 2009 CSO law, with one female lawyer noting that “in every area, we face big financial problems, but with funding we can support women’s rights.”<sup>32</sup>

Women lawyers interviewed for this report also noted that many of their cases involved issues of inheritance, where women, especially widows, were dispossessed and forced off their land, often as result of customary court rulings by community elders. Others highlighted that women were often dismissed in court, with this discrimination sometimes extending to women lawyers, as judges in Ethiopia were overwhelmingly male.

“The attitude of the society is one of the biggest challenges in my effort to secure rights and justice. There is common understanding, even in the literate community, that girls and women are blamed for the violence they face. Especially if domestic violence has occurred inside marriage, it is taboo to talk about and people don’t encourage me to get involved.”<sup>33</sup>

29 DefendDefenders Interview, Ethiopia, March 2019.

30 DefendDefenders Interview, Uganda, June 2019.

31 DefendDefenders Interview, Uganda, June 2019.

32 DefendDefenders Interview, Ethiopia, March 2019.

33 DefendDefenders Interview, Uganda, June 2019.



SGBV remains a taboo topic in Ethiopia, and women lawyers noted that attempting to bring these cases to court often put them in harm's way, with one recalling how she was physically threatened by a client's husband. Moreover, while Article 620 of the Criminal Code prohibits rape, this only applies outside the bonds of marriage,<sup>34</sup> and lawyers noted that evidentiary requirements in these cases make it difficult for women victims to obtain justice from the outset. Women who report cases of domestic violence are often economically dependent on their partners. These cases are lengthy, with little support offered to women in the interim, with one lawyer saying that she often paid out of pocket for transportation to and from court for her clients. These lawyers sometimes work in conjunction with shelters for survivors of domestic violence, acting as conduits to social services that may be otherwise unknown to women. However, these services are not always available – one frustrated lawyer who previously specialised in women's rights said she now avoided cases of SGBV: "I cannot let them stay in my home, and I cannot pay for them, but they still need my support. This causes me pain and I feel useless."<sup>35</sup>

"The first thing women request is usually somewhere to stay, alone or with kids, which neither I nor my institution can technically offer. In one specific case, my client requested protection and we failed to give her shelter or security, she decided to return home and dropped the case."<sup>36</sup>

Lawyers noted that when it came to socially sensitive topics like FGM, abduction of women for marriage, or rape, women were often pressured into withdrawing their cases from the statutory system to instead have them handled in less public customary or religious courts, much to the chagrin of lawyers interviewed for this report. This not only saves the family social shame but allows prevailing patriarchal norms to remain entrenched outside of the purview of the formal system or broader scrutiny. Police were also reluctant to properly investigate

these cases and preferred that they be settled out of official courts, with one lawyer noting that "police behaviour reflects broader cultural beliefs about violence against women."<sup>37</sup> In one instance, a lawyer noted that a case of alleged rape and abduction of a minor was moved to customary arbitration after the young girl signed a forced statement of consent after spending the night at the police station rather than a women's shelter. Her lawyer explained that "police officers together with community elders convinced the girl's parents to sit for arbitration and forced her and us to drop the case by submitting an arbitration agreement."<sup>38</sup> Several lawyers said that they struggled to properly advise clients such as these, as they knew that pushing women to use statutory courts might lead to them being ostracised by their families and communities, and even result in further physical harm.

"A 15-year-old girl was abducted from school, we managed to rescue her, but we were challenged by police officers and elders, including the family of the girl. Police officers forced the girl to plea that she was 19 years old and loved the offender."<sup>39</sup>

Lawyers, especially women lawyers, have attempted to address these issues by providing legal knowledge to women in rural areas, where these problems are more widespread. One lawyer noted that women in these areas are often "illiterate and don't know how to secure their rights, or how to fight the problem."<sup>40</sup> Moreover, there is no institutional framework to support lawyers' efforts to protect women and little financial support in this regard.

"Most people I know encourage my effort, but the challenge I face from elder people and some individuals in the community is serious. They have the potential to convince women, girls, and parents to drop any type of case."<sup>41</sup>

34 The Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, <https://www.wipo.int/edocs/lexdocs/laws/en/et/et011en.pdf>, Accessed 30 October 2019.

35 DefendDefenders Interview, Uganda, June 2019.

36 DefendDefenders Interview, Uganda, June 2019.

37 DefendDefenders Interview, Uganda, June 2019.

38 DefendDefenders Interview, Uganda, June 2019.

39 DefendDefenders Interview, Uganda, June 2019.

40 DefendDefenders Interview, Ethiopia, March 2019.

41 DefendDefenders Interview, Uganda, June 2019.



## REMAINING LEGAL GAPS AND CHALLENGES

Despite a robust legal system and meaningful legal reform ongoing at the federal level, lawyers interviewed for this research highlighted several major gaps remaining in the legal system, in relation to both procedural issues and greater questions regarding the independence of the judiciary and the vulnerabilities of defence lawyers in sensitive cases.

As previously noted, while Ethiopia has ratified a number of international human rights instruments, these remain largely unimplemented and undomesticated. These instruments cannot be properly cited or applied in court unless they are properly received in Ethiopia's domestic legal order, including by being translated into a working language of the court. Even if they are available in official Amharic translations for courts, which is only the case for the CRC, none have been officially translated into widely spoken regional languages like Oromo or Tigrinya in which relevant regional courts operate. While translations may exist for training or educational purposes, international instruments must be properly domesticated, including being officially translated by an act of Parliament in order to be applicable in Ethiopia's legal order.

“There is a gap between the law and the practice – so how do we reconcile practice and law? Legal aid and the right to have lawyers is still not respected in certain remote areas.”<sup>42</sup>

This gap also extends to law enforcement who may be unaware of their human rights obligations in line with international standards. For instance, Article 387 of the Ethiopian Civil Procedure Code (1965)<sup>43</sup> clearly establishes exceptional circumstances in which a person can be incarcerated for failing to fulfil a contractual liability.<sup>44</sup> However, this directly contradicts

42 DefendDefenders Interview, Uganda, June 2019.

43 “Civil Procedure Code of the Empire of Ethiopia,” 1965, [http://hrlibrary.umn.edu/research/Civil%20Procedure%20Code%20\(English\).pdf](http://hrlibrary.umn.edu/research/Civil%20Procedure%20Code%20(English).pdf), Accessed 13 November 2019.

44 For example, if someone intentionally obstructs the execution of the decision, and hides themselves or their property, and when this fact is clearly proved by the plaintiff who is required to present an affidavit supporting their

the ICCPR, which prohibits incarceration for inability to fulfil contractual liability. Therefore, not only is it impossible to invoke the ICCPR to challenge the court's judgement on the case, Ethiopian law itself contradicts it. This presents major challenges to lawyers who cannot utilise international instruments in cases where national legislation or precedent are insufficient to guarantee, or directly violate, basic human rights standards in court decisions.

Additionally, while federal laws are supreme in the country, unreformed regressive regional laws and biased judiciaries remain barriers to human rights in some regions, especially as they are often the first point of contact for those entering the legal system. Since each autonomous region can enact laws differing from, but not contradicting, federal laws, these regional differences create dissonant understandings of basic rights, especially with regard to marriage and land. One lawyer noted that “the law is a reflection of the culture and society, so each region understands it differently.” Lawyers described handling challenging cases which involved customs that are wildly accepted by the community but contradict basic human rights principles or the Ethiopian Constitution. Lawyers cited these overlapping and sometimes contradictory federal, regional, customary, and religious legal systems as major impediments to effectively carrying out their work.

“International human rights instruments have not been integrated in such a way that they can be directly enforced in courts at different levels. They are not translated in the national working language of the country and not published in the *Negarit Gazette*, which is the official way of publishing laws and regulations. Hence, courts are reluctant or don't want to cite or use human rights laws in their judgements.”<sup>45</sup>

Additionally, the cost of appealing a regional case at the federal level was cited as a major barrier to accessing checks and balances within the system, especially for clients who already

allegations.

45 DefendDefenders Interview, Uganda, June 2019.



struggled to afford private representation. These subtle differences in laws, and the use of regional languages in regional court proceedings, also keep lawyers across the country from working together to tackle shared issues.

Several lawyers also cited police misconduct, including torture and forced confessions, as major factors impeding the proper implementation of the justice system. They noted that handling human rights cases related to arbitrary arrest, and cruel, inhuman, or degrading treatment as particularly challenging aspects of the legal system. They highlighted that under the previous regime, physical access to their clients, even to clients in prisons, was extremely limited. This was especially pronounced in prisons notorious for ill treatment such as the Maekelawi Prison in Addis Ababa, and the Ogaden Prison in Somali Regional State. Many detainees were held here under terrorism charges, and lawyers were reluctant to involve themselves with these cases to begin with for fear of professional or personal reprisals. Several respondents said that a reliance on confession, rather than evidence-based prosecution, by courts, without adequate oversight into police practices, opened space for additional violations of basic due process in the justice system, and put the burden of proof on defence lawyers. Lawyers in two regions noted that they still had difficulty in accessing and assessing prison conditions, with many being denied access to their clients without explanation. They feared that this was due to visible marks of torture from officers attempting to coerce forced confessions.

“Courts in my locality violate clear laws and rules in their judgements. They violate bail rights, clear procedures, misinterpret laws, and these malpractices cause serious human rights violations. There are repeated complaints of corruption, incompetence, bias, and unethical conducts. Unlawful and unprecedented court decisions have resulted in serious human rights violations.”<sup>46</sup>

<sup>46</sup> DefendDefenders Interview, Uganda, June 2019.

Lawyers cited gaps in procedure as basic violations of rights and gaps that bogged down their work. For instance, while the Constitution mandates that any accused be afforded a legal counsel, this right is not specified by detailed legal provisions, and fraught with practical issues that stem in part from a lack of public defence offices at district levels where the vast majority of criminal proceedings take place.<sup>47</sup> Other fundamental procedural safeguards, even a basic one such as the presumption of innocence, were barriers which they had to surmount while representing clients.

“The right to legal representation is routinely violated. We had no access to prisons under the previous regime, so there was little legal assistance available to prisoners. Besides, most people have only a limited awareness of their rights and how to access them.”<sup>48</sup>

Corruption was also cited as a major impediment to the proper application of justice, with lawyers expressing a lack of faith in police forces who undertake the bulk of investigations in criminal cases. Moreover, small-scale corruption within local governments, where a quasi-judicial three-person board sometimes decides which cases can be assigned a pro bono lawyer, were reported. These factors are often the result of a critically overburdened and underfunded justice system with little official oversight from the federal government, especially in rural areas far from regional capitals and stationary courts. In lieu of available public defenders, many instead turn to pro bono legal aid services scattered unevenly around the country, such as the EWLA, or legal aid clinics provided by most major universities.

<sup>47</sup> Criminal Law Forum, “The Right to Representation by Criminal Defense Counsel in Ethiopia: A Critical Analysis,” September 2018, <https://link.springer.com/article/10.1007%2Fs10609-018-9349-8>, Accessed 18 November 2019.

<sup>48</sup> DefendDefenders Interview, Uganda, June 2019.



“What can a lawyer do if the public doesn’t know their rights? All the people know are guns and bullets. People need to know about the system and know that it is relevant to help.”<sup>49</sup>

However, even organisations such as these struggle to deal with more socially controversial topics, such as marital rape, which is not criminalised at the federal level. In addition, they face financial challenges which restrict their work. Several lawyers interviewed for this report noted that in cases where the statutory and customary systems are unavailable or inadequate, mob justice was common, leading them to fear intervening for their own safety.

Overreliance on customary or religious authorities by communities was another setback to lawyers, especially when defendants were pressured to do so by elders who often act as arbitrators. In other cases, victims might use family or community elders to settle disagreements and conflicts between family members outside of any formal legal structure. One lawyer noted that this reliance on customary arbitration, even when legal aid services were available, posed a challenge to their work, as “community elders highly discouraged me from taking cases to court, and they give more value to arbitration of cases and payment of compensation, which they sometimes share in.”<sup>50</sup> Lawyers also noted that police and judges also often tried to push cases to customary courts rather than handle it themselves, which was especially frustrating when they believed the case was important enough to be handled by the statutory system. Several lawyers highlighted that while they were sometimes consulted by clients using customary or religious courts, they were only nominally involved in those proceedings. This creates a gap in proper implementation of human rights standards, as some communities rely solely on this form of arbitration, which is often solved by elders even before the case comes to the acknowledgement of the formal justice system.

“Sometimes judges act as arbitrators, which is against the law and the justice system. It is a real reflection of the customary training of society.”

An overall lack of trust in the formal/statutory legal system was cited by most lawyers as the primary challenge in properly carrying out their work, especially when handling sensitive human rights cases. This is partially rooted in an overall lack of awareness about the formal legal system throughout the country. This apprehension leads citizens to take their concerns to customary or religious courts which have less federal oversight and are less likely to maintain international human rights standards. Fears of mob justice were also a concern cited by lawyers, especially with regard to cases that take on a politicised ethnic dimension, one lawyer noting that the current legal structure “does not have the strength to really settle these problems.”<sup>51</sup> In addition to being disbarred or losing their jobs, lawyers cited concern for their own safety when handling sensitive cases, with several highlighting the need for more support to legal professionals and protection mechanisms specifically designed for them.

“What scares me most is not being protected by the system – there are serious protection needs for lawyers.”<sup>52</sup>

Several lawyers noted that police often discouraged them from following up on cases, especially if they involved corruption, or taboo subjects such as rape or other forms of SGBV, with one respondent lamenting that “the system itself is a challenge.”<sup>53</sup> Some noted that this was especially prevalent in cases involving forced evictions or land grabbing, where the law provides for relocation and compensation, but this is not always done in practice. They noted that when powerful politicians or private sector actors were involved, prosecutors were often pressured into dropping cases, leaving lawyers powerless to represent vulnerable communities.

Funding was a major barrier identified, especially by those who undertake pro bono work like

49 DefendDefenders Interview, Ethiopia, March 2019.

50 DefendDefenders Interview, Uganda, June 2019.

51 DefendDefenders Interview, Ethiopia, March 2019.

52 DefendDefenders Interview, Ethiopia, March 2019.

53 DefendDefenders Interview, Ethiopia, March 2019.



legal aid services or legal consulting, with one lawyer noting that “financial constraints hinder our effort to represent the client, especially those found in a remote area. Hence, it is very difficult to cover this vast area without having enough financial means to cover transportation costs of the lawyer.”<sup>54</sup> This implies that indigent litigants will fail to benefit from the right to access justice guaranteed under human right instruments and the Constitution.

“I am not paid, and I handle things by myself, this really limits my potential to address different issues. In some cases, clients need financial support from me for shelter or food, which I cannot offer. Because of this, after a few experiences, I avoid being actively involved with such cases.”<sup>55</sup>

Some lawyers also noted that many of these challenges also apply to judges, who are under similar pressure from external political or business influences, forcing them to abstain from handing down verdict or recusing themselves from sensitive cases. A lack of judicial support mechanisms led them to lose confidence and impartiality, with one lawyer noting that “because of that longstanding repression, there is a hesitation among judges to challenge the state – which is their job.”<sup>56</sup>

## IMMEDIATE AND LONG-TERM NEEDS

Lawyers appealed for support in a variety of areas in order to continue their work or achieve loftier human rights goals in light of the ongoing reform process.

Several lawyers expressed the need for training in psychosocial support to be able to impart that knowledge onto victims of trauma or human rights abuses. Some noted that this would also benefit them, as the burden of handling difficult cases was rarely addressed and contributed to an unhealthy mental health culture among legal professionals in the country, especially in regions that saw the bulk of government repression over the last two decades.

Several respondents suggested increased

54 DefendDefenders Interview, Uganda, June 2019.

55 DefendDefenders Interview, Uganda, June 2019.

56 DefendDefenders Interview, Ethiopia, March 2019.

cooperation with university law departments, most of which have a legal aid component for students. These free legal aid programs are generally geared towards promoting fair legal proceedings and ensuring access to justice for economically disadvantaged communities and marginalised groups like women and children. Lawyers suggested more human rights modules and focus from the departments to benefit from their reach, and foster a human rights understanding for law students from the outset.

A focus on both social and legal justice could help sow the seeds for a future judiciary more in line with international legal and human rights standards, with legal aid as the backbone. This involvement could also help stimulate the founding of more legal aid centres, which all respondents agreed was necessary to help citizens better access the legal system and help alleviate their overburdened workloads. The need to have more legal aid centres inside prisons, or else conduct legal rights awareness for detainees, alongside the crucial need for lawyers to be able to access prison or closed facilities, was also raised as a proactive way to help lawyers train vulnerable communities and monitor conditions in prisons more regularly. “We formed this law firm when we left university because we are deprived of our human rights. We wanted to work to move our country forward and help our society.”<sup>57</sup>

However, while all agreed that pro bono clinics and free legal aid services were a good idea, funding for such projects remains a major obstacle. The removal of limitations on foreign funding in the new CSO law will aid in this endeavour, yet a critical gap remains, which could be filled by donors now returning to the country.

“By taking these reforms as a good advantage, our legal aid centre will now work to help the individual enjoy his or her right as clearly enshrined under the Constitution and different human rights treaties ratified by Ethiopia.”<sup>58</sup>

The need for better networking among human rights lawyers in the country was also

57 DefendDefenders Interview, Ethiopia, March 2019.

58 DefendDefenders Interview, Uganda, June 2019.



raised, with one lawyer noting that “our voice will be heard loud if we act in a group rather than struggling on an individual basis.” While regional bar associations currently partially fill this need, a broader national network would be better equipped to share expertise and support individual lawyers in the event of reprisals or other protection emergencies specifically related to their profession. Such networking is important in relation to human rights protection and promotion, as common problems and challenges exist throughout the autonomous regions, and sharing experiences can help identify potential solutions. Or, as one lawyer put it: “on top of everything, being together is power by itself.”<sup>59</sup>

Such networks could also play an important role in bringing human rights violations at the local or regional level in Ethiopia to the attention of the international community, as well as regional human right protection bodies. Moreover, this network would be better able to assist lawyers in accessing and engaging with supranational courts such as the African Court on Human and Peoples’ Rights, to which they may petition cases if national high courts prove inadequate or corrupt.

“This country has amnesia; it repeats itself over and over again. To stop that we need to create different layers of contact with different legal systems, both federally and at the African Court on Human and Peoples’ Rights.”<sup>60</sup>

Moreover, a network could provide human rights trainings to students, prosecutors, judges, police, and marginalised communities, with a specific focus on the use and misuse of the legal system from an Ethiopian perspective. These education activities could take the form of training for the application of human rights standards in the context of a professional activity. This could also increase the awareness of human rights standards among key personnel in the justice system and develop procedures to expedite the processing of cases to ease backlog. The need for similar trainings relating to issues of women’s rights was also highlighted in order to help bridge the gap in women’s access to justice.

While highlighting their needs, some respondents raised solutions that lawyers themselves can undertake to help alleviate some of their professional challenges in the pursuit of basic human rights in the current justice system. These may prove fruitful if current reform efforts stagnate or do not bring about an immediate return of donors or stakeholders. This includes more innovative approaches to community education and engagement, such as broadcast programmes or social media campaigns. More simply, a robust campaign of legal literacy could be enacted across the country, though this would require funding and the right communication tools and skills. Lawyers could work to support the justice sector reform through capacity development of personnel operating in criminal justice and empower those in conflict with the law.

“If the law is improper or not up to the right standards, the people will rebel. The people will resist that law. All improper laws that do not respect international human rights standards or do not respect the dignity of human beings will be resisted by rational people.”<sup>61</sup>

59 DefendDefenders Interview, Uganda, June 2019.

60 DefendDefenders Interview, Ethiopia, March 2019.

61 DefendDefenders Interview, Uganda, June 2019.





# SOMALIA/SOMALILAND: The Three Systems

## BACKGROUND

Somalia's human rights situation remains characterised by grave human rights violations and abuses committed with impunity in a challenging security environment. Although, in recent years, it has made gains with the support of the African Union Mission in Somalia (AMISOM) and the UN Assistance Mission in Somalia (UNSOM), the Federal Government does not enjoy effective control over the whole territory of central and southern Somalia.

Major human rights abuses include recurring terrorist attacks, targeted attacks on civilians, extrajudicial killings and other instances of excessive use of force by law enforcement and security bodies, widespread SGBV and violations of children's rights, violations of economic, social and cultural rights, torture and ill-treatment, and arbitrary arrests and detentions. Terrorist group Al-Shabaab continues to control large areas in Hirshabelle, Jubaland, and the South-West State, and to carry out terrorist attacks in Mogadishu and other cities across southern Somalia. Puntland and Galmudug also face high levels of insecurity, although this is mostly due to continued fighting and lawlessness, rather than Al-Shabaab attacks. The humanitarian situation remains alarming, with millions displaced as the historic 2020-2021 "one person, one vote" federal elections approach.

"Lawyers always stand to defend human rights and defend human rights defenders. But there is no support for us."<sup>62</sup>

Somaliland's security situation is much better than that of Somalia. Although not recognised by the international community, Somaliland's de facto authorities have managed to establish satisfactory levels of security throughout the territory they control, except in areas bordering Puntland, where armed clashes continue to occur. However, recent developments point to a deteriorating human rights situation,

62 DefendDefenders Interview, Somalia/Somaliland, August 2019.

particularly regarding online and offline freedom of expression.<sup>63</sup> The increased human rights violations over the last two years were also pointed out by a number of lawyers and civil society activists DefendDefenders interviewed for this report. This timeframe corresponds to the period since Muuse Bixi Cabdi was elected President in 2017.

Interviewees mentioned the arrest of journalists, artists, and critics, and threats to HRDs and lawyers as examples of mounting tensions that had resulted in a narrowing of civic space. Reporting or expressing views on sensitive issues, including national security, borders, torture, corruption, and inter-clan conflict, is increasingly likely to attract intimidation or reprisals. Interviewees highlighted that the government was growing intolerant of criticism and pointed to law enforcement and security bodies as the main perpetrators of violations. Lack of human rights compliance within security bodies and organs is indeed of major concern. All interviewees also mentioned that lack of capacity, in addition to deliberate state misconduct, led to human rights violations.

The main human rights issues in Somaliland include restrictions to freedoms of expression, such as judicial harassment of journalists and media houses, including the suspension of licences; arbitrary arrest and detention; torture and other forms of ill-treatment; police violence; political interference in the judiciary; violations of due process; conditions of detention that amount to torture; and multiple violations of women's and children's rights. SGBV, child, early and forced marriage, FGM, and domestic violence remain major issues. Impunity for violations and abuses is endemic.

This report does not aim to analyse the human rights situation in detail, but it is important to keep in mind the environment in which lawyers operate in Somalia/Somaliland.

63 CIVICUS Monitor, "Somalia," <https://monitor.civicus.org/country/somalia/>, Accessed 27 November 2019.

## THE LEGAL AND INSTITUTIONAL FRAMEWORK

One cannot separate the legal and institutional framework from actual legal, political, and social practices. Societal norms, attitudes, and power relationships need to be considered to get a full picture of the framework in which lawyers operate. This holds even more true in the context of Somaliland, due to the entity's lack of international recognition as a state, as many of its operations have an informal character. Somali/Somaliland society's clan-based structure, weak institutional infrastructures, and the three-tiered system used for rendering justice and settling disputes are major factors in this broader context.

“People in Somaliland often don't understand their rights, they have no legal awareness. So we try and let them know what their rights are and give them legal aid to access them.”<sup>64</sup>

### Hierarchy of norms and local specificities

Somalia continues to rely on a provisional Constitution. In May 2018, the Federal Government convened a national convention as part of efforts to adopt a permanent Constitution ahead of elections scheduled for 2020-21. At the time of writing, no breakthroughs had been reported and it remains unclear when a permanent Constitution will be ready for adoption. Many of the laws that are still in place date back to the pre-civil war period, during the repressive Siad Barre regime. Federal member states, including Hirshabelle, Jubaland, Puntland, Galmudug, and the South-West State, can adopt their own legislation.

At the top of Somaliland's hierarchy of norms is its Constitution (2000).<sup>65</sup> Part Three sets out a range of human rights and fundamental freedoms, including civil, political, economic and social rights, the rights to life, liberty, privacy, and property, as well as freedoms of peaceful assembly, association, opinion, expression, and

belief.<sup>66</sup> Some of the Constitution's provisions appear to be inconsistent with international human rights standards. For example, Article 34 contains overly broad provisions on “the duties of the citizen,” Article 25(4) outlines a broad, de-contextualised rule for restrictions to rights, and Article 33(1) unduly restricts freedom of religion or belief, including the freedom to change one's religion or belief, or Article 36(1) which expressly restricts women's rights in matters pertaining to Islamic law. However, the Somaliland Constitution provides for several fundamental rights and freedoms and due process guarantees that form a sound basis for human rights promotion and protection and may be regarded as a “Bill of Rights.”

“Constitutional rights and due process are not only good for the people – it's good for institutions themselves. Somalia itself was destroyed because of a lack of those rights.”<sup>67</sup>

International human rights law is applicable in Somaliland. Article 10(1) of the Constitution states: “The Republic of Somaliland shall observe all treaties and agreements entered into by the former state of Somalia with foreign countries or corporations provided that these do not conflict with the interests and concerns of the Republic of Somaliland.” Paragraph 2 of the same article adds: “The Republic of Somaliland recognises and shall act in conformity with the United Nations Charter and with international law, and shall respect the Universal Declaration of Human Rights.” Pursuant to Article 21, the courts must interpret laws “in a manner consistent with the international conventions on human rights” and with international law.

In practice, due to its lack of international recognition, Somaliland has been unable to join the UN and other international organisations. It is not formally a Party to international

<sup>64</sup> DefendDefenders Interview, Somalia/Somaliland, August 2019.

<sup>65</sup> Somaliland Law, “The Constitution of the Republic of Somaliland,” 30 April 2000, [http://www.somalilandlaw.com/somaliland\\_constitution.htm#Top](http://www.somalilandlaw.com/somaliland_constitution.htm#Top), Accessed 24 October 2019.

<sup>66</sup> The fundamental principles of legality and presumption of innocence are guaranteed by Articles 24(1), 25, and 26. Article 27 outlines the rights of persons deprived of liberty, including access to legal counsel (Article 27(1)), judicial review of detention (Article 27(2)), and the right of appeal (Article 27(6)). Article 28 provides for a right to “sue and defend,” which includes a right to institute proceedings in court, a right for every person to defend themselves, and access to free legal representation for the indigent.

<sup>67</sup> DefendDefenders Interview, Somalia/Somaliland, August 2019.



human rights treaties, and therefore cannot be reviewed by UN treaty monitoring bodies or participate in the work of UN or regional human rights bodies, such as the UN Human Rights Council (HRC) or the African Commission on Human and Peoples' Rights (ACHPR).

Some of the old laws of Somalia, including the Penal Code, continue to be in force in Somaliland until legislation repealing and replacing it is adopted by the Somaliland Parliament, except for provisions that conflict with the Somaliland Constitution, with one lawyer noting that "until we have a new Penal Code, this is the one we have to use; there is no other option."<sup>68</sup>

"The problem in Somaliland is that the police use the Penal Code of the Siad Barre regime, Somaliland doesn't have its own Penal Code. We have a good Constitution, a good Bill of Rights, but they still use the wrong Penal Code."<sup>69</sup>

## The challenge of implementing laws

Most lawyers consulted by DefendDefenders mentioned the lack of implementation of laws as a challenge. In Somalia, insecurity and the state's lack of effective control over parts of its territory are obvious impediments to the implementation and enforcement of legislation. In areas under the control of the federal government and/or of federal member states, several challenges explain poor law enforcement and implementation, such as societal attitudes and power dynamics within Somali society. Women's rights provide a quintessential example of such challenges. At the federal level, although the Council of Ministers adopted a Sexual Offences Bill in 2018, it has not yet been turned into law by Parliament. The bill is facing opposition from religious clerics and traditional elders, who have also opposed Somalia's adoption of CEDAW.<sup>70</sup>

68 DefendDefenders Interview, Somalia/Somaliland, August 2019.

69 DefendDefenders Interview, Somalia/Somaliland, August 2019.

70 Report of the [United Nations] Independent Expert on the situation of human rights in Somalia, Doc. A/HRC/39/72, 19 July 2018, paras. 62-63; Report of the IE on the situation of human rights in Somalia, Doc. A/HRC/36/62, 6 September 2017, para. 25. All reports by the IE are available at his

"Lawyers can change systems by emphasising the importance of the law. All people want protection, security, and rights. Lawyers can always point out that these laws do not go against religious laws. Most people confuse customary laws with religious laws. Lawyers need to emphasise that modern laws do not contravene religious edicts."<sup>71</sup>

The Somali National Human Rights Commission (NHRC), is yet to be operationalised. Despite the NHRC having been established, and prospective members having been submitted to the government, they are pending approval by Parliament. Additionally, a Judicial Services Commission is yet to be established. It will be responsible for appointing judges and for guaranteeing their independence and accountability.<sup>72</sup> In 2015, Puntland adopted a Rape Act, and in 2016, it adopted a Sexual Offences Act. Yet, the extent to which this legislation is actually implemented remains unclear. It has been reported that many cases of SGBV are still settled traditionally, outside the formal judicial system.<sup>73</sup> Similarly, despite a fatwa issued by Puntland religious leaders and Islamic scholars, declaring a complete ban on FGM, the practice continues.

The court system in South and Central Somalia has suffered from state collapse and years of insecurity. The provisional Constitution provides for a Constitutional Court, Federal Government level courts, and Federal Member State level courts. However, the actual situation is more complex, due to lack of resources, delays in the operationalisation of the Judicial Services Commission, and lack of control by the Federal Government over member state courts.

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official webpage: <https://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/SO/Pages/IESomalia.aspx>, All accessed 14 November 2019.

71 DefendDefenders Interview, Somalia/Somaliland, August 2019.

72 On these two commissions, see Report of the IE on the situation of human rights in Somalia, Bahame Tom Nyanduga, Doc. A/HRC/42/62, 16 September 2019, para. 37, and Report of the IE on Somalia (2018), op. cit., para., para. 21.

73 Report of the IE on Somalia (2017), op. cit., paras. 67-70; Report of the Independent Expert on the situation of human rights in Somalia, Bahame Tom Nyanduga, Doc. A/HRC/30/57, 28 October 2015, para. 36.

As the UN Independent Expert (IE) put it, “in some regional states, the appeals courts were the highest courts, while in others there were supreme courts and a court of appeal.” In his words, that situation “created an imbalance within the Somali justice system and people in some parts of the country were being denied justice.”<sup>74</sup>

In Somaliland, a number of interviewees mentioned the Rape and Sexual Offences Law (RSOL) as an example of legislation not being implemented. The RSOL, which was adopted by the Somaliland Parliament, is facing opposition by religious groups and elders, who allege that the law goes against Islamic precepts. As the UN IE on Somalia stated in his last report, “objections raised by religious leaders and other sections of society and the Government have delayed its implementation, indicating that it will likely be amended.”<sup>75</sup>

The Police Law is another instance of the authorities’ failure to implement legislation that gives effect to the human rights promises of the Constitution. Police officials have lobbied the President to support reviewing the law, which was passed by Parliament, scrapping the disciplinary committee, an oversight mechanism for police misconduct. This would defeat the application of the principle of accountability set out in Articles 25(3) and 27(9) of the Constitution, which applies to state agents. As of today, the situation is not satisfying: citizens who allege police misconduct must submit their complaint to a police commander. Cases are reviewed by higher echelons of the police and may ultimately be adjudicated by military courts. At the time of writing, there was no case open for alleged law enforcement misconduct against a citizen.

The Media Law (2004) is yet another example of delays in implementing legislation that includes progressive human rights elements. Despite work by Somaliland’s NHRI with Parliament committees, the law is the only piece of legislation pertaining to journalism, but it is not applied as amendments are still being discussed by Members of Parliament (MPs). The law is now 15 years old and lacks provisions pertaining to online media, but is regarded as containing provisions that protect journalists and media freedom.<sup>76</sup> At the time, it was adopted

through a consultative process that included media professionals, lawyers, and civil society. Authorities have been using provisions of the Penal Code, in particular “national security” provisions, to restrict journalists’ work and intimidate them.

For instance, prosecutors have used Criminal Code provisions on defamation to open criminal cases and charge journalists, while Article 10 of the Media Law provides for decriminalisation of defamation, stating that civil law/damages apply instead. According to one interviewee, the Attorney-General “does not want to apply Article 10; he is not enforcing the Media Law faithfully.”<sup>77</sup> It should also be noted that an Electoral Bill, which includes a quota of seats for women, has been stalled since 2005, and that Somaliland does not have any specific laws on, among other issues, domestic violence, access to information, or refugees.

“When we represent journalists, our argument is that the Constitution is the supreme law of the land, everything against the Constitution is wrong. But when we bring these arguments to the judiciary, it gets trumped by the Penal Code, which was brought in during the bad times. A charge like ‘Crime Against the State’ is not suitable for our modern times.”<sup>78</sup>

The legislative and implementation gap is also obvious regarding the formal courts system. At the top, the Supreme Court is mandated to provide guidance and authoritative interpretations of the Constitution and legislation of Somaliland. In practice, it fails to fulfil some of its roles and responsibilities. The Supreme Court is also a constitutional court, tasked with reviewing the constitutionality of laws and regulations. However, as of August 2019, no constitutional case had been adjudicated, though lawyers submitted at least one petition on behalf of journalists, in 2011, against provisions of the Penal Code that are used to target journalists’ work. The case has been pending for eight years.

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August 2019.

77 DefendDefenders Interview, Somalia/Somaliland, August 2019.

78 DefendDefenders Interview, Somalia/Somaliland, August 2019.

74 Report of the IE on Somalia (2017), op. cit., para. 43.

75 Report of the IE on Somalia (2019), op. cit., para. 88.

76 DefendDefenders Interviews, Somalia/Somaliland,





In Somaliland, interviewees had no knowledge of military courts trying civilians, which would be positive – military courts should only try members of the armed forces over strictly military matters. Conversely, in south and central Somalia, military trials of civilians continue to be practiced, with concerns over respect for due process and fair trial guarantees.<sup>79</sup>

## The “three systems”

The official court system is only part of the judicial picture. In Somalia/Somaliland, justice is rendered through a three-tiered system or “three systems,” namely: (1) statutory law applied by the official/formal judicial system; (2) traditional, clan-based justice and settlement mechanisms; and (3) Islamic law (sharia), which is applied by local courts over specific matters. Therefore, cases are adjudicated and disputes are settled in one or two of these systems. Such judicial architecture is not unique to Somalia/Somaliland, but it certainly defines the environment in which local lawyers operate. In many respects, the complexity of this architecture makes protection of human rights and due process more challenging, as lawyers must navigate these systems and the various provisions, rules, and procedures they apply.

“These three systems operate in parallel and reinforce each other. Sometimes the judicial system may feel it cannot handle the case, and defer to a traditional court, or vice versa. But it can create a loophole if you know you can switch to a system where the penalty for human rights violations like rape might be more lenient.”<sup>80</sup>

First, written/statutory law is applied by the official judicial system. Many of DefendDefenders’ interviewees also refer to the official court system as the “modern” or

<sup>79</sup> Human Rights Watch, World Report 2019 (Somalia chapter), available at: <https://www.hrw.org/world-report/2019>, Accessed on 20 November 2019; Report of the IE on Somalia (2017), op. cit., para. 45; Report of the Independent Expert on the situation of human rights in Somalia, Doc. A/HRC/33/64, 15 September 2016, para. 52; Report of the IE on Somalia (2015), op. cit., para. 30.

<sup>80</sup> DefendDefenders Interview, Somalia/Somaliland, August 2019.

the “formal” court system. Official/modern courts have jurisdiction over, and apply to, civil law, land law, commercial law, labour law, and, increasingly, criminal law. However, the following two systems often handle cases that should firmly be under the jurisdiction of the statutory system.

Second, the “traditional system” (or customary law system, known as *xeer*) includes a myriad of justice and dispute settlement mechanisms, which are based on clan affiliation and constituted along clan lines. These mechanisms are not unified or harmonised. Their composition and the rules they apply (with regard to both substance and negotiations and proceedings) vary from one region to another and from one clan to another. In Somaliland, their decisions or judgements need to be notarised by prosecutors in the official/modern judicial system to become enforceable, although societal practices often disregard this requirement. In Somalia, due to the collapse of state institutions following the outbreak of the civil war in 1991, *xeer* has been used even more consistently, filling judicial gaps and ensuring the continued presence of justice mechanisms throughout the country. *Xeer* is used to settle civil disputes, disputes over the use of natural resources and related rights, such as land, pasture, and grazing and water rights, personal matters such as dowry and widow inheritance. Traditionally, it has also been used to adjudicate and settle criminal cases, including murder and SGBV, although this practice appears to be slightly declining.

Third, Islamic law (sharia) is derived from the religious precepts of Islam, contained mostly in the Quran and Hadith (teachings and actions of Prophet Muhammad). Islamic law is used less than the first two systems, but it applies, to the exclusion of the other systems, to family matters like marriage, divorce, inheritance, and child custody, and personal damage and compensation. In practice, in Somaliland, it is local district courts that apply Islamic law over these matters (for which application of sharia is compulsory – there is no choice), but district courts are not necessarily sharia courts. In Somalia, the use of Islamic law is more widespread, socially accepted, and understood. The UN IE on Somalia has pointed out that *xeer* and sharia law enjoyed social acceptance and were widely understood by the Somali people.<sup>81</sup>

<sup>81</sup> Report of the IE on Somalia (2016), op. cit., para. 64; Report of the IE on the situation of human rights in Somalia,

	Pros	Cons
<b>Official/ modern judicial system</b>	<ul style="list-style-type: none"> <li>• Less lenient with perpetrators in criminal cases (e.g., SGBV, domestic violence)</li> <li>• More space for lawyers and legal counsels</li> <li>• More human rights guarantees and safeguards</li> <li>• More consideration for the victims and their rights, interests, and dignity (e.g., in SGBV, domestic violence, and other criminal cases)</li> <li>• Unity and consistency (although judgments may vary and precedents may not be systematically used)</li> </ul>	<ul style="list-style-type: none"> <li>• More expensive and slower for the parties</li> <li>• Judgments are not always accepted and executed</li> <li>• More susceptible to corruption and political interference</li> </ul>
<b>Traditional justice and settlement mechanisms</b>	<ul style="list-style-type: none"> <li>• Low corruption due to the strength of clan affiliation</li> <li>• Quicker to reach a decision and less costly</li> <li>• More tangible and easily understood by the people</li> <li>• - Can be helpful to mediate and avoid prison for the offenders in less serious cases. For example, fighting between youth offenders where families can reach a settlement, whereas a modern court could sentence the offenders to jail</li> </ul>	<ul style="list-style-type: none"> <li>• Gaps and weaknesses in terms of human rights protections</li> <li>• Lack of consistency/unity</li> <li>• Lack of consideration for the victims, especially in SGBV or domestic violence cases, where they do not have a voice as the settlement is between families/clans</li> <li>• Limited space for lawyers and legal counsels</li> </ul>
<b>Islamic system</b>	<ul style="list-style-type: none"> <li>• More predictable, clearer (although inconsistencies are reported in the reparations awarded)</li> <li>• Judgments are better accepted and executed</li> </ul>	<ul style="list-style-type: none"> <li>• Lack of human rights safeguards beyond basic principles of fairness</li> <li>• Lack of consideration for marginalised groups like women or children</li> <li>• Lack of formal legal training for imams who assume the functions of judges</li> </ul>

**Table 1:** Based on interviews with local actors, lawyers, and civil society organisations.



“We try to protect women who come to us, protect them from a man who may want to hurt her by putting her in a shelter while the case goes on.

Traditional courts can discriminate against women – in the official court, we’re all equal in front of the law.”<sup>82</sup>

In practice, interviewees confirmed to DefendDefenders that people tend to use “a mix” of laws, resorting to both traditional, clan-based mechanisms and other justice systems. While the use of the official court system and statutory laws seems to be increasing, especially in urban areas of Somaliland, traditional settlement is still a central part of popular visions and practices of justice.

These three systems present advantages and drawbacks. While DefendDefenders does not seek to engage in value judgment about the three systems, we must weigh their respective pros and cons, examining prospects for respect for human rights, due process, fair trial standards, and the rights, interests, and dignity of victims of violations and abuses. We also look at the space for lawyers to do their job and act as HRDs.

In Somaliland, several interviewees mentioned that many of the sheikhs and religious scholars who used to act as lawyers before Islamic courts had no human rights knowledge whatsoever, but that this has gradually changed. Graduates from Islamic law faculties are now trained in secular law. Both statutory law and Islamic law are part of the official curriculum in law schools. As a result, knowledge of, and respect for, due process, fair trial standards, and basic human rights safeguards has improved. All lawyers now receive a training in official/modern and Islamic legal traditions, however they play a more limited role in the traditional system, as negotiations and proceedings take place behind the scenes, usually among clan elders.

In his successive reports, the UN IE on Somalia listed a number of initiatives that have been taken over the years to improve respect for human rights standards and procedural safeguards by traditional elders, and to harmonise practices by traditional mechanisms. These initiatives

Bahame Tom Nyanduga, Doc. A/HRC/27/71, 4 September 2014, paras. 40-47.

<sup>82</sup> DefendDefenders Interview, Somalia/Somaliland, August 2019.

include a pilot project in 16 districts of Somalia to assess the strengths and weaknesses of the traditional justice system and the role of traditional elders; training of traditional leaders by UNSOM; UN IE-led consultations on xeer and justice delivery; UN Development Programme/Joint Human Rights Programme-supported mobile courts; an Alternative Dispute Resolution Centres initiative in Puntland, a forensic lab to enhance the investigation of SGBV cases and the delivery of justice.<sup>83</sup> The Federal Government, with donor support, has also been building a judicial complex in Mogadishu, which will hopefully provide greater security to judges, justice professionals, victims, and defendants.

“There is no difference in terms of rights, but in practice? There’s a big difference. Formal courts are the better courts. What’s in the laws are the same, but the problem is that Islamic and traditional charges are different in terms of application. Both these courts think that the official legal system of the country is against tradition or religion.”<sup>84</sup>

## THE ROLES OF LAWYERS

“Our people have no idea about the law. Sometimes they are afraid of bringing their case to the court, for lack of awareness. So, as lawyers, we would like to play a role in giving our people legal awareness, whether through media, or through seminars and workshops.”<sup>85</sup>

Lawyers are respected in Somalia/Somaliland, both for their place within the legal profession and for the role they can play in strengthening institutions and the rule of law. In an environment where institutions are weak and the level of legal education is low within the population, lawyers play an essential role in upholding human rights standards, especially in an environment where human rights organisations has struggled to

<sup>83</sup> See Report of the IE on Somalia (2016), op. cit., para. 36; Report of the IE on Somalia (2017), op. cit., paras. 59-62; Report of the IE on Somalia (2018), op. cit., para. 28 and 66-67; Report of the IE on Somalia (2019), op. cit., paras. 41-42.

<sup>84</sup> DefendDefenders Interview, Somalia/Somaliland, August 2019.

<sup>85</sup> DefendDefenders Interview, Somalia/Somaliland, August 2019.

operate for decades. Lack of legal awareness and human rights education are significant obstacles to people claiming their rights. For most Somali/Somaliland citizens, being in contact with a lawyer therefore provides them with an opportunity to improve their knowledge of the law and to claim their rights.

## Monitoring and reporting cases

Firstly, lawyers act as HRDs when they monitor and report cases of human rights violations and abuses. Lawyers may be approached by victims of abuse (for instance, domestic violence or SGBV) or may have knowledge of a case, which they report to the prosecutor or law enforcement authorities. In a context in which law enforcement and the criminal chain are weak, the very fact of reporting a case amounts to acting as an HRD. Unfortunately, even where cases are reported, many victims of SGBV end up dropping their complaint or renouncing acting within the official judicial system. A number of Somaliland lawyers DefendDefenders interviewed said that they were routinely approached by victims of such abuse and reported cases to the authorities or encouraged victims to take legal action in the official system.

Lawyers, many of whom are public figures given the size of Somaliland's legal and judicial scene, also raise attention to cases of abuse by reporting cases to the media or directly to members of the government. While ethical issues may arise in a number of cases with regard to confidentiality and victims' right to privacy, reporting cases of violations and abuses, and patterns of violations, is key to raising public awareness and pushing for appropriate legal and political action. Such advocacy falls within the definition of HRDs outlined in the UN Declaration on HRDs.

Lawyers also monitor and report on judicial proceedings and trials. All lawyers DefendDefenders interviewed reported generally having access to trials in the official/modern system and being able to observe proceedings, even when they do not officially represent a client. In Somalia, access to military courts is a challenge, and general insecurity also makes it difficult for lawyers and observers to systematically access court rooms, including civilian courts. The building of a judicial complex in Mogadishu may partly address the issue.

Monitoring and reporting violations and abuses is what HRDs do all over the world. Somalia/

Somaliland's specificity lies in the fact that the overall level of knowledge of human rights is low and lawyers probably play a much more important public awareness and advocacy role than their counterparts in other countries.

## Defending HRDs and other independent and critical actors

Secondly, lawyers act as HRDs when they defend HRDs targeted as a result of their work, like providing legal advice or defending clients in court. Lawyers are under no obligation to accept to take up such cases. In a context where HRDs under attack, accepting to defend them amounts as acting as an HRD. If lawyers do not do it, no one else will – and society as a whole will suffer the consequences, as the sentencing of an HRD for the work they do sends a chilling message that defending human rights is dangerous or a crime.

## Acting as legal practitioners: lawyers as defenders of due process, fair trial standards, and rights

Thirdly, lawyers may act as HRDs in the course of their technical work, representing clients and working within the judicial system. At first sight, lawyers carrying out legal work are not automatically characterised as HRDs. In most countries, most of the work lawyers conduct on a daily basis does not fall within the scope of the UN Declaration on HRDs. However, in the Somali/Somaliland contexts, a number of actions lawyers take may be reclassified as HRD actions due to the state of the judiciary and the overall judicial system. Without a lawyer, respect for due process and many of the rights (fair trial guarantees, safeguards for the rights of the defence) that are taken for granted elsewhere would not be ensured, because of either authorities' lack of capacity or judicial actors' lack of will to ensure respect for basic due process and fair trial rights.

“Most human rights violations here are a question of ignorance rather than intentionally violating human rights. We need more help with how to communicate to the community and parliament what their rights are.”<sup>86</sup>

<sup>86</sup> DefendDefenders Interview, Somalia/Somaliland, August 2019.





### **Victims' rights**

By their very existence and work, lawyers facilitate victims' access to justice and remedies, and increase the prospects for victims' rights to be respected. This holds particularly true for marginalised individuals and groups, including women, children, and refugees. Lawyers allow victims to access justice and claim their rights by counselling them, initiating proceedings on their behalf (starting with filing a complaint), and representing them. On their own, most victims would not have access to justice – at least through the official/modern judicial system – and would be unable to secure adequate remedies. By seeking justice for victims of rape and other forms of SGBV, lawyers can ensure action by the criminal chain. For instance, they can push the police, prosecutor, or judicial authorities to order medical examinations and record results as exhibits.

### **Defence rights**

With regard to the rights of the accused in criminal proceedings, by their very work, lawyers ensure respect for basic due process and fair trial standards, and defence rights. While it is impossible to compile an exhaustive list of actions lawyers can take in this regard, the following should be mentioned as particularly relevant to the Somali/Somaliland contexts, considering weaknesses of the criminal chain and the judicial system.

### **Lawyers:**

- **Demand access to their clients.** Many of the lawyers DefendDefenders interviewed reported that securing access to their clients was often a challenge, at least in the initial period of custody. Access to police stations is often denied during the early hours of custody. In Somaliland, when access to their clients is denied in violation of criminal procedure provisions, lawyers can file a complaint with the relevant regional court. Several interviewees reported having secured access after a judge ordered the police to grant them access to their clients. Although, given the delays, this only happened after the initial 48-hour period – the clients were being placed in pre-trial detention at a police station, not in a prison. Some interviewees also reported that inside police stations, meetings with their clients had been supervised or monitored – an illegal police practice. In Somalia, violations

of basic due process and defence rights, including access to legal counsel, are also key issues. Lawyers there face an additional issue which makes their work even more challenging: safety and security when trying to access places of custody or detention.

- **Demand access to evidence and prosecution documents.** Lawyers have the right to access the evidence available against their client. However, in practice, they often have access to the initial police report and to the final report on which the prosecutor relies at the trial stage. This deprives them of the possibility of meaningfully preparing their client's defence, all the more since judges tend to remove exculpatory evidence from the charge sheet and keep only inculpatory evidence.<sup>87</sup> In Somaliland, lawyers often request more time to prepare their client's defence, and requests are often granted, although the additional time granted is often not enough.
- **Fight against arbitrary arrests and detention, torture, and other forms of ill-treatment.** Lawyers DefendDefenders interviewed noted that most arrests and searches are conducted without a warrant, which is required in cases where the accused is not directly caught in the act. Lawyers can contest the lawful character of an arrest, first and foremost by raising the absence of a warrant, and by raising the absence of conclusive evidence to level charges against their client, or at least raise the absence of sufficient evidence to keep their client in pre-trial detention. In Somalia/Somaliland, pre-trial detention is used as the rule rather than the exception, even for minor offences. This poses questions regarding respect for the rights of the defendant. In several cases, people are detained, often in police stations, despite the fact that their dossier is nowhere to be found. In such cases, where judicial documents and evidence have disappeared, the accused should be released – but this does not seem to automatically happen. Lawyers thus play a key role in securing the release of those arbitrarily detained. The lawyers' strategy, as was reported to DefendDefenders, is often to persist in asking the police or prosecutors to act until they take action.

<sup>87</sup> DefendDefenders Interview, Somalia/Somaliland, August 2019.

- **Explain charges, judicial proceedings, the legal system, and the system of pleading to their clients.** Most Somali/Somaliland citizens have a very limited knowledge of the law and the official judicial system. Consequently, if a person is charged and needs to defend themselves, they need basic legal advice and counselling. This goes from explaining the charges against them, their rights as the accused, to explaining how the judicial system works, who the judges and prosecutors are, what “accusation” and “defence” mean, what evidence is brought to court, what “pre-trial detention” and “bail” mean, or, in Somaliland, what the system of pleading (“guilty” or “not guilty”) is. Often, magistrates do not explain to the accused basic terms and rights, including the charges against them, principles such as the presumption of innocence, or the fact that they have a right to apply for bail and to plead “guilty” or “not guilty.” Bail is rarely granted; in Somaliland an accused person can be released on bail if they have secured the support of a traditional elder, acting as guarantor. Thus, lawyers play an essential role by filling gaps that should not exist in the first place.
- **Highlight fundamental legal principles and the importance of due process.** This can start with the presumption of innocence and the rights of the defence, which tends to be disregarded or not made clear to the accused. Lawyers attempt to refer to precedents in building their clients’ defence, in what is in theory a common law system in the case of Somaliland, while Somalia mixes common law and civil law elements. Unfortunately, judges do not seem to systematically refer to precedents, and there are inconsistencies in the way criminal law is applied – a serious challenge to legal practice. In south and central Somalia, lawyers face an additional challenge, namely the overreach of military justice, as military courts tend to disregard basic due process and fair trial standards.
- **Point to procedural mistakes and miscarriages of justice.** Several examples show what Somaliland lawyers do in defence of their clients’ rights in the face of procedural mistakes. When they do so, lawyers strengthen respect for due process, fair trial standards, and the judicial system

as a whole. Lawyers reported that Hargeisa courts issued arrest warrants for persons living in areas outside of their territorial jurisdiction and alleged to have committed crimes. Consequently, lawyers can contest the validity of such warrants. In a number of cases, prosecutors also charge minors (15 years or younger) as adults. In Somaliland, a Juvenile Justice Law was adopted in 2007 but it is not implemented. No juvenile courts have been established.

- **Apply for release, bail, or dropping charges.** Based on lack of evidence or other relevant arguments, lawyers can apply for the release of their client on bail or request that charges be dropped altogether. Again, these are normal roles for a lawyer, but in the Somali/Somaliland context it is often necessary to push authorities to take action, for instance to push penitentiary authorities to release a detained person after charges have been dropped – or even after a convict served their time in jail. Lawyers can also appeal decisions to deny bail, however this has a very low rate of success. In other cases, when evidence is available and the accused is ready to stand trial, lawyers can request the court to go ahead and schedule a trial for their client. Without appropriate action, in Somaliland, trials can be unduly delayed, sometimes for years, which constitutes a violation of the “reasonable time” element of the right to a fair trial.
- **Request examinations and expert assessments.** In criminal cases, factual evidence is key. Admission of guilt should never be the only, or indeed the prime, type of evidence relied upon to sentence the accused. Lawyers therefore have an important role to play in requesting examinations (particularly, medical examinations) and expert assessments including forensic experts and interpreters. Forensic analysis is a key tool, although it is expensive, with one lawyer lamenting that “we have no resources, and the judiciary has no resources, so we need to convince experts to work for free!”<sup>88</sup> When allegations of torture have been made, examination of the accused should be conducted. If proven, ill-treatment of the accused should lead to removing evidence obtained through

88 DefendDefenders Interview, Somalia/Somaliland, August 2019.



these means, pursuant to the “exclusionary rule.”<sup>89</sup> At another level, lawyers can contest the validity of evidence, notably by raising objections as to the process or means through which evidence was collected or qualified as such. Unfortunately, witness protection is non-existent in Somalia/Somaliland, due to shortages of financial resources. This can deter defence witnesses from testifying or push the victim to withdraw their complaint. One lawyer highlighted that “everyone is afraid of revenge, because there is no guarantee of safety. How can we protect witnesses? We are not police or government, so people refuse to testify.”<sup>90</sup>

- **Plead for leniency.** This holds true for all trials and is a common part of lawyers’ work when the accused has acknowledged guilt and invokes extenuating circumstances. This also holds true in Somalia/Somaliland, with a specific focus on child offenders. Indeed, in Somaliland the judicial system tends to overlook the actual age of the offender, putting children below the age of criminal responsibility on trial and judging them as adults. Lawyers have an important role to play in ensuring that the law is applied, that minors are not judged as adults, or in pleading for leniency, using young age as an extenuating circumstance for youth offenders (persons between 15 and 18). Lawyers can raise the age of the accused and demand implementation of the Juvenile Justice Law. In Somalia, the justice system (including military justice) tends to regard youth offenders, including minors recruited by Al-Shabaab as child soldiers, as culprits and not victims, and to try them as adults – often resulting in harsh sentences and detention in units not separated from adults.
- **Apply for damages and compensation in cases of undue deprivation of liberty or miscarriage of justice.** Although no case of the state awarding compensation to a person who was arbitrarily detained has been reported in Somaliland, several of the lawyers DefendDefenders interviewed mentioned that they regarded the fact of requesting compensation as important.

Persons who have been arbitrarily detained or victims of a miscarriage of justice tend to not even try to obtain reparations, but some of the lawyers we interviewed said they encouraged their clients to do it to claim their rights. They reported having filed for reparations, of which a central part is financial compensation in such cases, in addition to a formal apology, on behalf of their clients on several occasions, pro bono.

- **In Somaliland, use the specificity of the current criminal legal framework. The entity’s peculiar legal situation opens avenues for lawyers’ creativity.** When Somaliland declared its independence, it had to rely on the legal framework of Somalia to avoid a legislative gap, but since then, Somaliland adopted a Code of Criminal Procedure, which coexists with the old pre-1991 Penal Code from the Barre regime. Since the Code of Criminal Procedure is more progressive than the Penal Code, Somaliland lawyers try and use provisions of the former, whenever possible. As part of their work, Somaliland lawyers can also attempt to raise constitutional provisions (especially the Constitution’s “Bill of Rights”) during trials, bring constitutional petitions to the Supreme Court, and invoke international standards to contest the applicability of certain legislative provisions. A petition against the Penal Code, which is alleged to violate constitutional provisions on freedom of expression, among others, has been brought, but Somaliland’s Supreme Court is yet to render a decision.

## Raising awareness and educating citizens

Lawyers directly act as HRDs whenever they engage in human rights/civic education or raise awareness of fundamental rights and freedoms. In Somaliland, they do so using several avenues including free legal aid, pro bono work, collaboration with NGOs focusing on the provision of free legal aid and representation to marginalised groups,<sup>91</sup> and participation in awareness raising and capacity building activities. These include sensitisation workshops, seminars, and radio programmes

<sup>91</sup> In Somaliland, the constitutional provision on access to free legal representation for the indigent is not implemented in practice, and private actors (NGOs, lawyers) provide free legal aid.

<sup>89</sup> See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Doc. A/HRC/25/60, 10 April 2014.

<sup>90</sup> DefendDefenders Interview, Somalia/Somaliland, August 2019.

that aim to improve knowledge of basic rights. Some of these activities target journalists and HRDs, seeking to enhance knowledge of rights and the legal system.

Lawyers also work to build the capacity of paralegals. In Somaliland, at least one paralegal support project is currently being implemented with the participation of lawyers. The project focuses on training paralegal professionals on criminal law and procedure so they can follow up on cases. The rationale is that administrative and paralegal staff are in charge of most day-to-day operations within the criminal chain and that building their capacity, competence, and professionalism will result in better respect for the rights of convicted persons. These rights include that dossiers or charge sheets are not lost anymore, that convicts are released on the due date, and that people are not “forgotten” in jail, as paralegal staff actually flag to prison directors that they are due to be released and inform their family. This sensible approach rests on the assumption that many human rights violations are attributable to a lack of capacity and resources, rather than to deliberate misconduct.

“We tell victims of rape that in the formal court her voice may be heard. In the traditional system, this will not happen. But it’s her choice. In the end, all we can do is give her legal advice.”<sup>92</sup>

Last, lawyers push victims of violations and abuses to claim their rights, including by remaining in the official judicial system and refusing traditional settlement, when crimes are involved. This is particularly true for SGBV, which should not be settled out of court, without regard for the rights, interests, and dignity of the victim. In cases when victims of SGBV contact them, lawyers can explain to them their rights and the benefits of claiming them through the official judicial system. Pressure from family and clan members can be strong, however, and a large number of SGBV cases end up being settled traditionally, despite the law being clear that crimes must be dealt with by the official, statutory judicial system.<sup>93</sup> In

92 DefendDefenders Interview, Somalia/Somaliland, August 2019.

93 A 2014 directive of the Attorney-General made clear the prohibition of xeer to deal with cases of SGBV. See Report of the IE on Somalia (2019), op. cit., para. 89.

this context, lawyers must challenge societal attitudes when they advocate for victims’ rights, which sometimes puts them in harm’s way, especially when dealing with sensitive cases. Their role is limited, as they can only advise the victims not to withdraw their complaint, and they cannot directly intervene in the handling of cases by clan members and elders in Somalia/Somaliland.

## Advocating and lobbying for the rule of law and human rights

The last category of roles performed by lawyers acting as HRDs in Somalia/Somaliland includes advocacy and lobbying with various actors and decision-makers. First, lawyers as legal practitioners stress the importance of the rule of law, including independent institutions and laws that are implemented and enforced. This role also includes pushing state institutions and agents, like police, judges, and prosecutors, to fulfil their mandate to investigate cases, implement laws that have been adopted, support victims, protect witnesses, punish perpetrators, and, for prosecutors, refuse to notarise traditional settlements of criminal cases. All of these actions have the potential to increase respect for human rights. Lawyers also speak to the media regarding specific cases, raising public attention to abuse of power, and lack of due process and human right compliance. Second, in Somaliland, many lawyers engage in advocacy on legal reform, justice, and accountability. Several lawyers DefendDefenders interviewed mentioned being active both with the media and in fora in which they meet government officials and advocate for the implementation of laws, for legal reform through amendments to existing legislation, or adoption of new legislation. Several lawyers interviewed for this report were involved in such efforts, for example instituting a total ban on FGM or establishing a disciplinary police committee with a mandate to review complaints lodged against police officers.

Third, when it comes to traditional justice and Islamic law, lawyers often play a progressive role, emphasising progressive interpretations of traditional rules and Islamic precepts (in particular regarding women’s rights), combating regressive interpretations by challenging hard-liners, and pushing victims to insist on having their case adjudicated by the official judicial system. Several of our interviewees in Somaliland





mentioned advocating for the official/modern system, but also the fact that they were doing so while insisting that modern laws “do not go against” tradition or Islamic precepts.<sup>94</sup> Some mentioned that they worked with sheikhs, which was helpful in overcoming some obstacles. As one interviewee put it: “sheikhs used to mix rape with adultery. Now we managed to convince them that they are two different things, and that rape cases should be taken to court.”<sup>95</sup> As a result, more rape cases appear to be taken to the official judicial system, although statistics are not available and there might be urban/rural disparities – traditional settlement of SGBV cases remains an ongoing practice. One women’s rights organisation mentioned to DefendDefenders that they had been working with traditional elders and sheikhs to improve awareness of women’s rights.

In south and central Somalia, a number of initiatives have sought to enhance law enforcement, in particular by facilitating the submission of SGBV cases to the formal criminal justice system, removing them from the purview of traditional mechanisms. Committees established as part of a UNDP/International Development Law Association initiative are part of such efforts. The committees refer sexual offences and crimes to the police for further investigation and deal only with civil cases.<sup>96</sup> Multi-stakeholder consultations led by UN actors, such as the IE on Somalia, have led to an emerging consensus on the need to refer criminal cases to the formal justice system.<sup>97</sup>

Additionally, several lawyers DefendDefenders interviewed mentioned some roles that they can assume if and when they are approached by clan members. These include studying cases to advise elders on the law that is applicable, whether the case should be settled traditionally or moved to the official judicial system, and, if relevant, their resolution. As one lawyer put it: “we can advise that a case is not traditional and advise to move it to the formal system.”<sup>98</sup> These also include acting as arbitrators or helping

elders draft the settlement to be submitted to the prosecutor to be notarised. Attempts at unifying traditional justice and settlement mechanisms to reach more consistency in proceedings, rules of procedure, outcomes, respect for the rights of the victims seem to have been limited at best, and attempts at uniformisation have failed.

Last, lawyers perform an important advocacy role when they highlight the dignity of persons, be they victims of SGBV (lawyers insist that they should be interrogated by female investigators), minors (who should not be judged as, or detained with, adults), or accused persons standing trial. Several lawyers interviewed for this report mentioned that they often ask judges to allow the accused to move in court without being shackled, as shackling the accused throughout their trial is standard operating procedure, even for those who do not pose any objective threat. In Somaliland, interviewees confirmed that judges regularly grant their requests to remove shackles from their clients, based on their lack of danger.

## CHALLENGES FACED BY LAWYERS

Somaliland lawyers face a number of significant challenges. These include capacity and financial issues, societal attitudes, political interferences, and a limited space that is in part due to Somaliland’s use of three different, co-existing, and often overlapping justice systems.

In Somalia, challenges are even more significant. They include, first and foremost, security challenges. Practicing law can be dangerous considering the existence of Al-Shabaab and attacks its members carry out against public institutions and practices deemed “un-Islamic.” Somali lawyers are mostly restricted to cities, and they do not have access to large parts of Somalia’s territory, which are under the control of Al-Shabaab. In these areas, official courts cannot operate. Traditional justice and settlement mechanisms and Islamic law, or Al-Shabaab’s draconian justice alone, apply. Even travelling to rural areas to give legal advice or operate mobile courts can be prohibitively expensive, leaving much of the country’s population without real access to justice. As the UN IE noted in 2018, “due to the absence of strong justice institutions, clans tend to resolve their disputes through violent

94 DefendDefenders Interview, Somalia/Somaliland, August 2019.

95 DefendDefenders Interview, Somalia/Somaliland, August 2019.

96 Report of the IE on Somalia (2019), op. cit., para. 41.

97 See for instance Report of the IE on Somalia (2017), op. cit., paras. 58-59.

98 DefendDefenders Interview, Somalia/Somaliland, August 2019.

means.”<sup>99</sup> Lawyers that skirt these hazards put themselves at great personal risk without fair financial compensation for their labour. While inspiring, the number of lawyers willing to take these risks, and push to advance justice and the rule of law in Somalia, remains understandably small.

## Lack of resources

Lack of funds and resources was cited by all respondents as a major issue for lawyers. This includes limited financial resources and lack of material resources, including computers and means of storing and safeguarding digitalised data. In Somaliland, there are no NGOs specifically focusing on supporting lawyers. Some NGOs focus on the provision of legal aid, but they lack resources to expand their work. Lawyers engaging in pro bono work should be lauded, but without adequate funding by the state or external donors, the provision of these services to vulnerable populations through projects aiming to increase access to justice, can only remain a modest part of their activities. Another practical impediment to the work of lawyers in Somaliland is the absence of an official bar association. The Somaliland Lawyers’ Association acts as a bar association, but this function is unofficial. A law on the establishment of a bar association has yet to be adopted. This overall lack of financial and material resources disproportionately affects rural areas, especially those far from Hargeisa. Most lawyers in Somaliland are based in the capital and conduct work in or around it.

“Strategic litigation is not easy: to change laws, we need the government’s willingness, but we also need support and funds to make these kinds of appeals. They cost money and time which are limited.”<sup>100</sup>

## Societal attitudes

One of the most serious challenges lawyers face in Somalia/Somaliland comes from society. Unlike funding shortfalls, unreceptive societal attitudes cannot be quickly solved. Social change takes time, and lawyers often find themselves

<sup>99</sup> Report of the IE on Somalia (2018), op. cit., para. 83.  
<sup>100</sup> DefendDefenders Interview, Somalia/Somaliland, August 2019.

caught between a rock and a hard place: while promoting human rights and respect for due process and the rule of law, they need to take into consideration the environment they and their clients operate in. As was bluntly put to DefendDefenders by one interviewee, “victims of sexual violence under-report, and they do not naturally go see a lawyer.”<sup>101</sup> For lawyers and legal professionals, the question is how to use the best of tradition while rejecting their negative elements.

Under-reporting is likely to be more pervasive when it comes to SGBV, but while more victims refuse traditional settlement, societal attitudes do not encourage resorting to the official/modern judicial system to deal with cases affecting women. In cases of domestic violence, several of our interviewees reported having faced threats from husbands or the extended family once they learned that their wife/relative had consulted them. Lawyers have been accused of inciting wives to “rebel,” bringing shame to or breaking families. In some cases, the husband’s clan got involved and tried to exert pressure on the wife’s lawyer, including through the lawyer’s clan.<sup>102</sup>

Despite an official rule for compulsory submission of crimes to the official judicial system, people in Somaliland continue to resort to xeer to settle criminal cases. This is partly because traditional mechanisms are seen as less corrupt, less expensive, and quicker, and that traditional settlements are regarded as more likely to be executed by the parties. This is also due to the fear of bringing shame to the family or clan, and to a sense of honour that trumps victims’ rights and dignity. Victims are sometimes forced to marry their rapist, due to family/clan pressure, and families (in practice: male family heads and elders) prefer to keep SGBV cases as a private matter, to be settled between the families involved.

As mentioned, in the traditional system the space for lawyers is limited. As one interviewee said, “irrespective of the law, if families agree on using traditional settlement, this supersedes the prosecutor; he cannot do anything.”<sup>103</sup> Criminal cases, including SGBV, must, according

<sup>101</sup> DefendDefenders Interview, Somalia/Somaliland, August 2019.

<sup>102</sup> DefendDefenders Interview, Somalia/Somaliland, August 2019.

<sup>103</sup> DefendDefenders Interview, Somalia/Somaliland, August 2019.



to the law, be dealt with by the official judicial system, and prosecutors should refuse to notarise xeer settlements of such cases when they are submitted to them. In the same vein, interviewees who work on women's rights insisted that there had been strong resistance to the implementation of a ban on the most extreme form of FGM (infibulation), as hard-line sheikhs and elders managed to convince part of the population that banning any form of FGM encouraged unlawful sexual intercourse.

Women lawyers face specific obstacles. Although the number of female lawyers has been increasing, they reported facing negative social attitudes, including family/social pressure not to study law in the first place, challenges to their professionalism once they have passed the exam, practical challenges such as clients preferring to hire male lawyers, and discrimination in traditional settings – only male lawyers may be consulted by traditional elders over xeer cases or matters. As one woman lawyer put it, “discrimination against women is embedded in the traditional system. It is much easier to operate in the official system.”<sup>104</sup> Another highlighted how “in religious courts, the judges just spout verses at women, and if they disagree, they are going against the word of God.”<sup>105</sup> In Somaliland, only men can be judges. Women can become lawyers, police officers, or prosecutors, but they are barred from sitting on the bench. There is no justification for this discriminatory provision.

Positive developments include, beyond a mere increase in the number of female lawyers, greater social acceptance of women lawyers – at least in Hargeisa. The first female lawyer started her work in 2008, and, in slightly over ten years, people have come to accept the existence of female lawyers. But equal respect and opportunities are still a long way off, with one female lawyer noting that “a lot of women deter from studying law, because there won't be as much work. People won't hire a female lawyer. But it is becoming more common.”<sup>106</sup> In 2019, it was reported that Somalia had six female prosecutors and one female judge.<sup>107</sup>

104 DefendDefenders Interview, Somalia/Somaliland, August 2019.

105 DefendDefenders Interview, Somalia/Somaliland, August 2019.

106 DefendDefenders Interview, Somalia/Somaliland, August 2019.

107 Report of the IE on Somalia (2019), op. cit., para. 75.

“The first time women started to be lawyers, there was discrimination from the communities. They asked, who is this person? What is she doing here? This is a man's job! But now it is more common. Women are more loyal to their clients, and especially women prefer female lawyers.”<sup>108</sup>

## Challenges in the official system

In the official system, the first challenge that was reported by interviewees is a lack of judicial independence due to political interferences in sensitive cases. These are cases involving HRDs, freedom of expression and journalists, women's rights and SGBV, or cases involving a significant imbalance of power between the parties. Sensitive issues in Somaliland include national security, the situation in eastern Somaliland, corruption, and inter-clan conflict. Lawyers representing clients in sensitive cases may face intimidation, pressure, violence, arrests, and threats.

Lack of regard for the procedure, due process, and the rights of the accused goes unpunished, and lawyers are left without any recourse if the judge himself disregards the law. Interviewees even mentioned the fact that it can be risky to challenge the judge's handling of the case as lawyers can be accused of “contempt of the court” if they raise procedural matters. Talking to the media was also flagged as dangerous with regard to sensitive cases.

In south and central Somalia, again, security is the number one issue. Beyond threats against lawyers' physical integrity, sensitive cases involving national security, freedom of expression, and journalists, pose greater challenges to lawyers – which can lead to self-censorship or refusing to take up a case in the first place. This often goes unreported.

## Challenges in the traditional and Islamic systems

The space for lawyers is limited in traditional mechanisms. Social pressure is strong, and

108 DefendDefenders Interview, Somalia/Somaliland, August 2019.

people tend to resort to traditional, clan-based mechanisms to settle disputes – even when disputes involve criminal acts such as murder or sexual violence. Lawyers may be approached by clan members/elders to provide specific services. When a settlement has been reached, no appeal is possible, unlike statutory or Islamic law cases, where an appeal can be lodged, and the case ultimately reviewed by the Supreme Court. It is not a unique body of customary law that is applied, but a myriad of laws, precepts, and traditions, which makes legal analysis of, and work on, traditional mechanisms more complex. A party that is unhappy with the settlement of a case by a traditional mechanism can attempt to bring the case to the official court system where lawyers can play a greater role, or to take it to another clan for settlement. Regarding Islamic law, lawyers interviewed mentioned both advantages, like greater clarity of the law and predictability of rulings, and drawbacks, such as unequal rights between women and men and a lack of human rights safeguards. In cases of divorce, lawyers are often accused of breaking marriages or encouraging women to “rebel,” and they face pressure from husbands. However, rulings are somewhat more predictable than traditional settlements, even if they are often discriminatory – virtually all lawyers interviewed for this report mentioned that rulings rendered on family matters were overwhelmingly favourable to men. However, some of our interviewees did mention that judges had started considering domestic violence as legitimate grounds for divorce, thus showing greater consideration for women’s rights.

## **THE NEEDS OF SOMALI/ SOMALILAND LAWYERS**

The first need of Somali lawyers is better security. If Al-Shabaab continues to control parts of the territory and carry out attacks, sustainable legal and judicial work will not be possible. Establishing long-term security that ensures that basic rights and freedoms can be enjoyed, and professional activities can be conducted without fear, will go a long way towards ensuring that lawyers can fulfil their role and advance respect for the human rights of all Somalis. Access to justice must be a primary component of any sustainable and lasting peace efforts in Somalia/Somaliland. Because they operate in a challenging

environment, Somaliland lawyers need support at several levels. External partners should carefully assess the means, objectives, and potential impact of interventions, keeping in mind that targeted, effective support to lawyers and legal/paralegal professionals can have a multiplier effect on the rule of law, due process, and fair trial rights.

### **Capacity building**

First, lawyers interviewed for this report expressed a need for technical cooperation and capacity building. This includes trainings in international human rights law, human rights methodology, international and regional advocacy, strategic litigation, and ethics and professional standards, including the lawyer-client relationship. However, access to international and regional bodies and mechanisms, such as the HRC and the ACHPR, as well as supranational courts of justice, is problematic for Somaliland given the entity’s lack of international recognition.

Trainings in human rights law and methodology could be provided by human rights organisations, with a view to building local lawyers’ and organisations’ capacity to investigate human rights violations and abuses with reference to international and regional standards, and to report on them. This would enable more accurate and timely reporting on human rights developments. As of today, very few actors conduct thorough, consistent human rights monitoring on the ground. Reporting on Somaliland by international or regional human rights groups is infrequent, due to challenges of access to and networking in Somaliland. Advocacy trainings could also be provided by human rights organisations. Last, trainings in respect for professional ethics and standards would best be offered by international or regional bar associations and lawyers’ associations. Furthermore, considering recent developments in Somaliland, lawyers need increasingly specialised knowledge of the media, social media, and journalists’ work, alongside digital security, since a number of journalists and bloggers have been targeted for exercising their right to free expression online and offline, and need legal defence.

Regarding Somalia, access and security are significant issues preventing external actors, in particular human rights NGOs, from





meeting with and meaningfully collaborating with local lawyers. Trainings and workshops sometimes take place abroad, but this makes them more expensive and less frequent. A resumption of security in the country would be a game-changer for support to Somali lawyers. Regardless, international organisations focused on long-term peacebuilding in Somalia should adequately train lawyers in international human rights standards as an integral element in helping fragile states ensure access to justice.

## Cooperation and visibility

Exposure to other legal systems, knowledge-exchange, experience-sharing programmes with HRDs and lawyers from the East and Horn of Africa sub-region, and networking were also mentioned as important needs. Somaliland lawyers remain relatively isolated due to political, financial, and practical reasons, as Somaliland remains unrecognised, underfunded, and some lawyers who travel on a Somaliland passport can only visit a limited number of countries. All interviewees mentioned a need for more regional and international attention to, and scrutiny of, Somaliland's human rights situation. The IE on Somalia systematically dedicates a section of his reports to the HRC to Somaliland, but this is not enough.

In south and central Somalia, cooperation remains limited because of security concerns. While Somali lawyers are members of regional networks and participate in trainings and workshops abroad, access to the country remains problematic. Establishment of greater security will be accompanied by more significant flows of aid and cooperation programmes. In the meantime, all options, including trainings and workshops abroad and online conferences, should be explored.

## Funding

Lawyers also face a shortage of resources. Specifically, at the pre-trial and trial stages, defence lawyers' lack of resources impedes them from hiring experts or bringing witnesses to court. Lawyers expressed a need for financial support. This can include funds to purchase digital equipment and funds dedicated to providing free legal aid, hiring experts, building the capacity of paralegals, or conducting forensic analysis in the course of judicial proceedings. All of these have the potential to enhance respect for due process, the rule of law, and

human rights. As one interviewee noted, "we have a voice, but no money."<sup>109</sup> Donors should consider providing flexible funding, as opposed to project-specific funding, in order to build the capacity of human rights organisations and lawyers over the long term.

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109 DefendDefenders Interview, Somalia/Somaliland, August 2019.

## Conclusion

All HRDs in the Horn of Africa face acute challenges in effectively carrying out their work, whether it be from states, non-state actors, corporate interests, or unfounded community hostility. However, since lawyers are generally regarded as members of a respected and privileged professional class, their efforts in the service of human rights promotion are often overlooked. Behind virtually every great HRD victory are brave lawyers working tirelessly behind the scenes, providing them with legal counsel and working to vindicate their actions in open courts of law. Sometimes, the very act of providing a citizen with access to justice, or monitoring and following up on a sensitive case, is enough to solidify lawyers' place among HRDs. This critical lack of proper reflection into their work and associated vulnerabilities has found them left out of greater protection efforts. For instance, while international donors often support projects that increase access to justice for rural communities, they often fail to take into account the potential threats lawyers themselves will face while carrying out this work.

Lawyers in Ethiopia find themselves at a critical juncture, where decades of deliberate misuse of the legal system is potentially being reversed ahead of crucial democratic elections. Their involvement in the proper rebuilding of civil society and the country's legal reform will be of paramount importance in ensuring that past human rights violations are never repeated as the country turns the page on a new chapter.

In Somalia/Somaliland, lawyers continue to play a pivotal role in putting back together the pieces of fragile state institutions and the rule of law, including by ensuring that access to justice is one of the key pillars in establishing sustainable peace. It is only by promoting statutory/formal legal systems as viable alternatives to inconsistent traditional or mob justice, that the state can effectively secure control over the country and move towards a more unified and functional political entity. This report addressed the specific situation, challenges, and needs of Somaliland lawyers who need to be supported irrespective of Somaliland's political situation and unfulfilled claims to statehood.

It is therefore imperative that CSOs, international donors, and governments begin to recognise the crucial role played by lawyers using their specialised training to exert social change by promoting ideas, influencing values, and triggering change in people's behaviour over time. In this way, lawyers transcend the bounds of their profession and become grassroots agents of change in a region of Africa that is ripe for a new beginning rooted in principles of justice, fairness, and universal human rights.



# Recommendations

## To the governments of Ethiopia and Somalia/Somaliland:

- Create and maintain, in law and in practice, a safe and enabling civil society environment in which human rights defenders, including lawyers, can operate free from hindrance, fear, or insecurity;
- Ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without discrimination;
- Ensure the provision of sufficient funding and other resources for legal services, including through state-supported and other free legal aid schemes, to the economically disenfranchised and marginalised;
- Promote programmes to inform the public, paying attention to the marginalised and economically disenfranchised, about their rights under the law and the important role of lawyers in protecting their fundamental freedoms;
- Uphold fundamental fair trial and due process rights, including procedural guarantees and safeguards, including:
  - Ensuring that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their choice upon arrest or custody;
  - Ensuring that there is no discrimination on any grounds against a person with respect to entry into or continued practice within the legal profession;
  - Ensuring that lawyers: (a) are able to perform all of their professional functions without intimidation, hindrance, harassment, or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards, and ethics;
- Ensure lawyers have access to appropriate information, dossiers, and documents in their possession or control in sufficient time to enable them to provide effective legal assistance to their clients;
- Recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential; and
- Respect lawyers' right to freedom of expression, association, and peaceful assembly, in line with regional and international standards, including the right to take part in public discussions of matters concerning the law, the administration of justice and the promotion and protection of human rights, and to join or form local, national, or international organisations, without suffering professional restrictions.

## To the Government of Ethiopia:

- Reform the judiciary, notably by increasing access to legal aid in marginalised communities, or regional states recovering from political or economic crisis, such as the Somali Regional State and the Southern Nations, Nationalities, and People's Region;
- Fully amend, or repeal, the Anti-Terrorism Proclamation to remove harmful provisions that have been used to target and repress human rights defenders; and
- Conduct a full Truth and Reconciliation Commission for massive human rights abuses committed during the states of emergency.



## To the Government of Somalia and authorities in Somaliland

- Ensure that courts and judicial institutions are safe spaces in which professionals, including lawyers, can operate without fear; to this end, allocate adequate military and law enforcement personnel to courts and other judicial institutions;
- Fully enforce relevant legislation on criminal matters, such as laws on rape and sexual violence, to ensure that such matters are referred to and adjudicated by formal/statutory judicial institutions and removed from the purview of traditional or customary mechanisms;
- Respect and recognise the roles lawyers play in building the rule of law, strengthening democratic, accountable institutions, and advancing respect for human rights;
- Conduct public awareness campaigns to promote the referral of criminal cases, including murder, rape, and other forms of sexual and gender-based violence, to the formal/statutory judicial system; and
- The Somaliland authorities should adopt a law establishing a bar association as an independent, self-regulating body in charge of matters affecting lawyers, including, where needed, disciplinary action for professional misconduct.

## To lawyers of Ethiopia and Somalia/Somaliland:

- Form and join self-governing professional associations to represent their interests, promote their continuing education and training, and protect their professional integrity. Where legislation is missing, advocate for the adoption of laws establishing a framework for bar associations, in line with the above remarks;
- Cooperate with governments to ensure effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognised professional standards and ethics; and
- Strive to uphold the rule of law, fair trial and due process rights, and procedural guarantees and safeguards, including all the roles mentioned in the present report.

## To international donors:

- Enhance support to projects aimed at increasing access to justice, such as legal aid clinics or mobile courts, while also factoring in protection needs to lawyers who handle sensitive human rights cases;
- Increase funding for legal assistance and legal aid schemes, targeting, in particular, survivors of rape and sexual and gender-based violence;
- Increase: (a) assistance programmes for lawyers, including capacity-building and technical advice programmes covering human rights law and methodology, advocacy, strategic litigation, and ethics and professional standards; (b) support for lawyers' organisations, including through the provision of equipment and safe storage tools; and
- Prioritise psychosocial support for lawyers, either as a best practice, or as a trained skill they can impart on at-risk clients where mental health needs are critically unaddressed.

## To international and regional non-governmental organisations:

- Continue to develop networks, cooperation with, and support to lawyers operating in Ethiopia and Somalia/Somaliland including through joint trainings, workshops, and programmes aiming to build lawyers' capacity in human rights law and methodology, advocacy, strategic litigation, and ethics and professional standards, and to provide them with relevant equipment, safe data storage tools, and digital security trainings and tools;
- Conduct public awareness campaigns on the roles lawyers play in building the rule of law, strengthening democratic institutions, and advancing respect for human rights; and
- Increase field visits to lawyers in Ethiopia and Somalia/Somaliland for research, networking, capacity building, cooperation, mutual learning, and exchange programmes.



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“There are a lot of women lawyers in Somaliland, but there is difficulty representing cases in court because of the challenges coming from the community. A man cannot believe a woman is a lawyer, a community cannot believe that a woman is a lawyer.”

- Somali Lawyer, August 2019

“We conduct human rights education and create awareness. In addition, if there is a violation of human rights, we provide legal aid and counselling. We also represent victims in court. We do both and should do both. Create awareness and help victims.”

- Ethiopian Lawyer, June 2019

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DefendDefenders (East and Horn of Africa Human Rights Defenders Project) seeks to strengthen the work of human rights defenders throughout the sub-region by reducing their vulnerability to risks of persecution and by enhancing their capacity to effectively defend human rights.

DefendDefenders is the secretariat of EHAHRD-Net, a network of more than 100 human rights organisations in the eleven countries of the East and Horn of Africa sub-region: Burundi, Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Somalia/Somaliland, South Sudan, Sudan, Tanzania, and Uganda.

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