

## A Critical Analysis of the Rights of an Accused Person During Trial in Somalia

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### ABSTRACT

*This study focuses on critical analysis of the rights of an accused person during trial in Somalia. The rights of accused person in Somalia have become a contentious and serious issue owing to the on-going civil war in Somalia which has now lasted for two decades. The doctrinal research methodology was used to collect and analyse the data used in the study. The relevant secondary data were collected through documentary review where relevant data was collected from different books, national and international legal statutes and scholarly publications of scholars in relation to the rights of an accused person during trial in Somalia. The study employed a systematic procedure to analyse documentary evidence and answer specific research questions in the study through repeated review, examination and interpretation of the data in order to gain meaning and empirical knowledge of the construct being studied. The study analysed the rights of an accused person under the various national laws of Somalia, the various forms of violation of the rights of an accused person in Somalia and the causes of the violation of the rights of an accused person in Somalia.*

*The main findings of the study revealed that the various and sufficient rights of an accused person during trial in Somalia, as provided by the Provisional Constitution of Somalia, 2012, and the Criminal Code Act of Somalia, 1963, include: right to liberty and security, right to be informed promptly of the offence charged, right to fair and speedy trial, right to humane treatment, the right to be presumed innocent until proven guilty, right to a fair hearing, right to defend himself or herself, right to counsel, right to be informed of the nature of the offence an accused person has committed, the right to an interpreter, the right to be present at the trial, right to be brought promptly before a capable court, the right to habeas corpus, the right to apply for bail, the right not to be compelled to testify against himself or herself, right to examine evidence or witnesses and the right to appeal. However, these rights are neither being promoted nor protected in Somalia; instead they are being violated in various ways which they encompass: violation of arrest procedures and unfair and cruel treatment of accused person, arbitrary arrest, denial of fair public trial, violation of trial procedures, unlawful treatment and detention of political prisoners and accused persons being caused by structural and legal ambiguity, the continuous practise of legal pluralism, the existence of*

*broken chain in the justice system, high level of corruption and mismanagement, military interference. The study recommended that the Federal Government of Somalia through its three organs should enact new law, promote fair and procedural arrest of accused train and sensitise the people about their rights as an accused and should initiate good policies and project that can foster the promotion and protection of human rights in the sphere of accused person's protection during and after trial in Somalia.*

**Keywords:** *Rights, accused person, trial, Somalia*

## 1. INTRODUCTION

The rights of an accused person during trial are a major principle of a democratic society and it is considered as the feature of rule of law which is part of domestic law and customary international law<sup>1</sup>. The rights of an accused person during trial have become a contentious and controversial issue in Somalia ever since the collapsed of the central government in 1991 that culminated into current on-going civil war. The rights of an accused during trial entail the rights that guarantee him or her fair trial. These rights were initially emanated from the 18th century on confined primarily to the actual trial itself, but in the second half of the 20th century many countries began to extend them to the periods before and after the trial<sup>2</sup>. Almost all the legal systems in the world including the one of Somalia guarantee the rights of an accused during trial. These rights of an accused person during trial encompass right to trial by jury (unless jury trial is waived), to representation by counsel, to present witnesses and evidence that will enable him or her to prove his innocence, and to confront or cross examine his accusers, as well as to be totally free (freedom) from unreasonable searches and seizures as well as freedom from double jeopardy<sup>3</sup>.

According to the observation by the international and regional human rights instruments, fair trial right is absolutely a multi-faceted right. One such core facet is the right of the accused to have his or her case heard by an impartial and independent tribunal.<sup>4</sup> The Universal Declaration of Human Rights, provides for rights of accused to a fair train, under Article 10 where its states as follows: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."<sup>5</sup> The right to a fair trial owes its origins to the Magna Carta.<sup>6</sup> The genesis of this right is based on the sound rationales that no person shall be deprived of life, liberty or property without the due process of law.<sup>7</sup> However, in this

twenty-first century, this basic and rudimentary right has evolved into a complex and non-exhaustive set of rights. Almost every constitution and legal systems of the world provide for the right to fair trial in varying degrees<sup>8</sup>. Such is its importance that the right to a fair trial has been touted as an important human right.<sup>9</sup>

In Somalia, the right Somalia rights of an accused person under trial are recognised. The Criminal Code of Somalia, 1963 defines an accused as a person who, even without any warrant having been issued by a judicial authority, has been placed in a state of arrest under the control of a judicial authority, or who has been served with a summons to appear before Court; such a person shall be considered as the accused during all stages of the proceedings, until such time as the judgment of conviction or acquittal has become final, or until it has been decided not to proceed further with the case, which shall be equivalent to an acquittal or until the decision to close the case is confirmed<sup>10</sup>; and that the accused is presumed innocent until the conviction has become final<sup>11</sup>. Similarly, according to Somalia Provisional Constitution 2012, it provides that the accused is presumed innocent until proven guilty in a final manner by a court of law (Presumption of innocence in trials).<sup>12</sup> Additionally, the Provisional Constitution of Somalia, every person has the right to a fair trial and the presumption of innocence until proven guilty<sup>13</sup>.

However, despite the existence of these rights of an accused person during trial that are reflected in the national law, in Somalia, the rights of accused persons during trial in Somalia have been violated in so many ways due to so many mounting causes. Reports from various human rights organizations have highlighted numerous challenges in the criminal justice system in Somalia, including lack of access to legal representation, lengthy pre-trial detention, and limited procedural safeguards for the accused.

For instance, the law provides for an independent judiciary, the government did not consistently uphold the independence and impartiality of the judiciary. Somalia's judicial system remains unstructured, significant concerns exist as to its independence, and many individuals lack meaningful access to legal services. In its Initial Report, Somalia explains that "there is currently a disparity between the de jure and de facto juridical structure<sup>14</sup>." The nation's justice system remains the subject of ongoing negotiations between the FGS and the FMS regarding the jurisdiction of the Supreme Court, the Constitutional Court, and the Judicial Services Commission<sup>15</sup>. Given that these negotiations are ongoing, the current

judiciary structure remains based on a judiciary established in the 1960s, under the Organization of the Judiciary Law and Criminal Procedure Code, which is based on a civil law inquisitorial system<sup>16</sup>. United Nations Assistance Mission in Somalia (UNSOM) has said the current unfinished justice system “lacks the minimum administrative, financial and professional capacities necessary to function. Court decisions are rendered with scant rationale, generally referring to sharia law without elaboration<sup>17</sup>.”

The civilian legal system was ineffective and inconsistently structured, especially in rural regions. Certain local courts relied on the power of the predominant local clan and related groups for their legitimacy. The judiciary was vulnerable to manipulation and corruption, and clan politics greatly influenced its operations. Court decisions were frequently not followed or were impossible to enforce. Due to a lack of defined protocols for transferring cases from military to civilian courts, only a small number of major criminal cases were prosecuted by the authorities.<sup>18</sup> Furthermore, in South Central regions, clan politics and corruption frequently hindered the ability to receive a fair trial. Legal issues such as confronting witnesses, the right to appeal court decisions, having enough time and resources to prepare a defense, and presenting evidence and witnesses were not adequately addressed by the law. Defendants facing serious criminal charges often did not have access to free legal representation, but there were two legal aid clinics at Mogadishu University and City University Law School that offered some legal services<sup>19</sup>. Military courts were responsible for handling cases involving security personnel, as well as trying some civilians, mostly individuals accused of terrorist acts. Legal representation and the right to appeal were rarely granted to defendants in military courts, leading to swift executions in cases where defendants confessed to being affiliated with al-Shabaab in court or on televised videos. In other instances, defendants were allowed up to 30 days to appeal death sentences. Some government officials argued that a state of emergency decree from 2011 gave military courts authority to prosecute crimes, even those committed by civilians, in areas once controlled by al-Shabaab. It was unclear whether this decree was still in effect, as it was originally meant to last for three months and was never formally extended<sup>20,21</sup>.

Additionally, the provisional federal constitution of Somalia 2012 provides that every person who is arrested has the right to be brought before a capable court within 48 hours of the arrest<sup>22</sup>, every person arrested or detained has the right to be informed promptly of the reason

for their arrest or detention in a language which the person understands<sup>23</sup> and every person arrested or detained has the right to be informed promptly of the reason for their arrest or detention in a language which the person understands<sup>24</sup>. Similarly, Somalia Criminal Code Act, 1963 provides that a person to be arrested shall be so informed, together with the reasons for the arrest<sup>25</sup>. However these safeguards are not being adhered to by the government in totality in as far trial of arrest and train of accused is concerned in Somalia<sup>26</sup>. According to 2022 Country Report on Human Rights Practices: Somalia, highlighted several concerning issues relating to the rights of accused persons during trials in the country which they entail: lack of due process and fair trial rights for individuals accused of crimes in Somalia for which many accused persons do not have access to legal representation or are not adequately informed of their rights during the trial process. This lack of legal representation and information can greatly impede an accused person's ability to defend themselves effectively in court<sup>27</sup>. Furthermore, the report also noted instances of arbitrary detention and prolonged pretrial detention in Somalia. Many accused persons are held in detention for extended periods of time without being formally charged or given a trial date. This violates their right to a speedy trial and contributes to overcrowding in the already overburdened Somali prison system<sup>28</sup>. Additionally, the report highlighted concerns about the independence and impartiality of the judiciary in Somalia. There have been reports of corruption and political interference in the judicial system, which can undermine the rights of accused persons to a fair trial<sup>29</sup>.

In Somalia, even though the Provisional Constitution of Somalia 2012 provides that the judiciary is independent of the legislative and executive branches of government whilst fulfilling its judicial functions; in Somalia most of the judicial system of the civilians is ineffective, dysfunctional and undeveloped especially in most rural areas. This had made most local courts in Somalia to depend on dominant local clan as well as traditional and customary law, sharia (Islamic law), and formal law to discharge their judicial duties. Furthermore, the judicial system in Somalia is highly being influenced and sabotaged by the practise of high level of corruption, lack of respect of court order by powerful authorities and lack of clear protocol and procedure which are instrumental for the transfer of military case from military courts to civilian courts to enable maximum adherence to respect and protection of the rights of accused<sup>30</sup>. Lastly, there exists continuous and serious abuse of power by many judicial officials due to lack of accountability enabled judges to abuse their power. Civilian judges also lacked the

necessary security to perform their jobs without fear. There are many cases involving security personnel or individuals accused of terrorism-related crimes that were heard by military courts. However, there is lack of comprehensive and in-depth analysis on the specific rights of an accused person during trial in Somalia. Specifically, there are limited research on the extent to which the rights of an accused person during trial in Somalia are upheld and respected in practice, the potential challenges and barriers faced by accused individuals in accessing and exercising their rights, and the impact of any deficiencies in the protection of these rights on the overall fairness and effectiveness of the judicial system in Somalia. Therefore this study intends to analyse the rights of an accused person under the various national laws of Somalia, the various forms of violation of the rights of an accused person in Somalia, the causes of the violation of the rights of an accused person during trial in Somalia and the necessary recommendations required to address the violation of the rights of an accused person during trial in Somalia.

## **2. RESEARCH METHODOLOGY**

The study utilised the doctrinal research methodology to gather and analyse data. Relevant information was obtained through a documentary review, which involved extracting data from various sources such as books, national and international legal statutes pertaining to the rights of the accused during trials, and scholarly publications discussing the right to a fair trial in Somalia. In addition, information was also gathered from websites including the United States Department of State Bureau of Democracy, Amnesty International, United Nations International Children's Emergency Fund (UNICEF), United Nations Development Programme (UNDP) Somalia, British Broadcasting Corporation (BBC), and Al Jazeera. These sources provided country profiles of Somalia and online articles related to the rights of the accused during trials in Somalia.

The study employed a systematic approach to analyse documentary evidence and address specific research questions by conducting multiple reviews, examinations, and interpretations of the data to gain insight and empirical knowledge on the rights of an accused person in Somalia. Archival data and public records pertaining to the rights of an accused person, violations of those rights, and the reasons behind such violations were utilized to meet the study's objectives. Data collection was passive, relying on secondary sources rather than active collection methods. The research process also involved a thorough review of existing

literature and prior publications related to the rights of an accused person during trial in Somalia.

### **3. THE FINDINGS AND DISCUSSION OF THE STUDY**

#### **3.1. The rights of an accused person in Somalia**

A right is a legal, social or ethical principle of freedom or entitlement. Rights are the fundamental normative roles about what is allowed of people owed to people<sup>31</sup>. While, an accused is a person who, even without any warrant having been issued by a judicial authority, has been placed in a state of arrest under the control of a judicial authority, or who has been served with a summons to appear before Court. Such a person shall be considered as the accused during all stages of the proceedings, until such time as the judgment of conviction or acquittal has become final, or until it has been decided not to proceed further with the case, which shall be equivalent to an acquittal or until the decision to close the case is confirmed<sup>32</sup>. The various rights of an accused person during trial in Somalia encompass the following:

1. Right to liberty and security.

In Somalia every person has the right to personal liberty and security<sup>33</sup>. And every person has the right to personal security, which shall be safeguarded through the prohibition of illegal detention, all forms of violence, including any form of violence against women, torture, or inhumane treatment<sup>34</sup>.

2. Right to be informed promptly of the offence charged.

According to the provisional constitution 2012, every person arrested or detained has the right to be informed promptly of the reason for their arrest or detention in a language which the person understands<sup>35</sup>.

3. Right to fair and speedy trial

The provisional constitution 2012 provides that every person brought before a court of law for an alleged criminal offence is entitled to a fair trial<sup>36</sup>. Every person who is arrested has the right to be brought before a capable court within 48 hours of the arrest<sup>37</sup>.

4. Right to humane treatment.

The Somalia Provisional Constitution 2012 provides that human dignity is given by God to every human being, and this is the basis for all human rights<sup>38</sup>. Human dignity is inviolable and must be protected by all<sup>39</sup>. State power must not be exercised in a manner that violates human dignity<sup>40</sup>.

5. The right to be presumed innocent until proven guilty.

The accused is presumed innocent until proven guilty in a final manner by a court of law (Presumption of innocence in trials)<sup>41</sup>. Similarly, Somalia Criminal Code of 1963 also provides that the accused is presumed innocent until the conviction has become final (Right to fair trial, judicial independence, right to public trial, and right to speedy trial)<sup>42</sup>.

6. Right to a fair hearing.

The provisional constitution of Somalia 2012 provides that every person has the right to a fair public hearing by an independent and impartial court or tribunal, to be held within a reasonable time, and to determine: (a) Any question of civil rights and obligations; or (b) Any criminal charge<sup>43</sup>.

7. Right to defend himself or herself

In Somalia, every person is entitled to defend him or herself from the case he or she is party to, whatever the level or stage of the proceedings may be<sup>44</sup>.

8. Right to counsel or legal representation.

The Somalia Provisional Constitution 2012 provides that every person who is arrested or detained has the right to choose and to consult with, a legal practitioner and if he or she cannot afford one, the government must appoint a legal practitioner for him or her<sup>45</sup>. The state shall provide free legal defense to the people who do not have the means of doing so themselves<sup>46</sup>. The state shall provide free legal defense to individuals or communities if they are legally pursuing the public interest<sup>47</sup>.

9. Right to be informed of the nature offense an accused person has committed

The Somalia Provisional Constitution 2012 provides that every person arrested or detained has the right to be informed promptly of the reason for their arrest or detention in a language

which the person understands<sup>48</sup>. Similarly Somalia Criminal Code Act, 1963 provides that a person to be arrested shall be so informed, together with the reasons for the arrest<sup>49</sup>.

10. The right to an interpreter.

The Somalia Provisional Constitution 2012 provides that the accused has the right to an interpreter if the accused person does not understand the language being used in the court (Trial in native language of accused)<sup>50</sup>.

11. The right to be present at the trial.

The Somalia Provisional Constitution 2012 provides that the accused has the right to be present at their trial<sup>51</sup>. An accused person who was held in custody before trial shall attend the hearing without restraints, unless restrictive measures are necessary to prevent the escape or violence<sup>52</sup>.

12. Right to be brought promptly before a capable court.

Every person who is arrested has the right to be brought before a capable court within 48 hours of the arrest<sup>53</sup>.

13. The right to Habeas Corpus.

The Supreme Court or the Court of Appeal may within its limit of jurisdiction order that a nay person held arbitrary detention or in any cases other than those provided by law may be set at liberty at once<sup>54</sup>.

14. The right to apply for bail.

According to Somalia Criminal Code Act, 1963 release on bail means (a) refraining from arresting an accused person against whom a warrant of arrest has been issued, in the cases by a Judge before whom an arrested person has been brought, or by a competent Judge up to time of commencement of proceedings in a Court of first instance; (b) releasing a person who has been lawfully arrested<sup>55</sup>. Release on bail may be granted: a) subject to the execution of a bond: i) by the accused person, or ii) by other person, or iii) by both the accused person and by other persons jointly, for the specific purpose of ensuring the appearance of the accused in the competent Court; b) subject to any other conditions which the Court may deem fit<sup>56</sup>.

However, bail shall not be granted in those cases where the issue of a warrant of arrest is mandatory<sup>57</sup>.

15. The right not to be compelled to testify against himself or herself.

The Provisional Constitution of Somalia provides that every person may not be compelled to self-incriminate, and a verdict may not be based on evidence acquired by means of coercion (Regulation of evidence collection, protection from self-incrimination)<sup>58</sup>.

16. Right to examine evidence or witnesses

The accused has the right to challenge the evidence presented against him or her<sup>59</sup>.

17. The right to appeal.

The Somalia Criminal Code Act of 1963 provides that an accused may appeal in person or through a special representative<sup>60</sup>. In cases where a sentence of death has been passed, the Counsel who defended the accused in the trial may appeal without any special mandate to do so and even against the wishes of the convicted person<sup>61</sup>. Parents of minor children and the legal representatives of wards, even though they are not entitled to notification of judgement, may appeal on behalf of such children or wards<sup>62</sup>. However, the accused may cancel an appeal made by other person on his behalf by giving notice to the Court that he does not wish such appeal to be made. If the accused is a minor or is incompetent, the parents or legal representative shall give consent for such notice to be valid<sup>63</sup>. If an accused person and other persons permitted to do so under the provisions of this Article have each lodged an appeal, and one of the appeals is invalid, it will be validated by the validity of the other, and this shall also apply to the grounds for the appeal. If there is any conflict between the appeals, the appeal lodged by the accused shall prevail<sup>64</sup>.

### **3.2. The violations of the rights of accused person in Somalia**

The various kinds of violations of the rights of accused person in Somalia encompass the following:

1. Violation of arrest procedures and unfair and cruel treatment of accused persons

The provisional federal constitution provides that arrested has the right to be brought before a capable court within 48 hours of the arrest<sup>65</sup>. The law (Criminal Code of 1963 of Somalia) requires law officials to issue warrants based on sufficient evidence before arresting or apprehending suspects, notification of the suspect of the crime he or she is suspected to have committed and the nature of charges he or she is facing and allowing an accused person to have prompt access to his or her lawyer, family members and absolute legal protection. Adherence to these safeguards was rare<sup>66</sup>. According to the Country Reports on Human Rights Practices for 2022 United States Department of State Bureau of Democracy, they reported that adherence to these safeguards by the Federal Government of Somalia (FGS) was rare owing to the fact that FGS has made arrests without warrants and detained individuals arbitrarily, they kept high-profile prisoners associated with Al-Shabaab in safe houses before officially charging them sometimes<sup>67</sup>.

The Criminal Code Act, 1963 release on bail means (a) refraining from arresting an accused person against whom a warrant of arrest has been issued, in the cases by a Judge before whom an arrested person has been brought, or by a competent Judge up to time of commencement of proceedings in a Court of first instance;( b) releasing a person who has been lawfully arrested<sup>68</sup>. Release on bail may be granted: a) subject to the execution of a bond: i) by the accused person, or ii) by other person, or iii) by both the accused person and by other persons jointly, for the specific purpose of ensuring the appearance of the accused in the competent Court; b) subject to any other conditions which the Court may deem fit<sup>69</sup>. However, some authorities within the Federal Government did not always respect these provisions provided by Criminal Code Act, 1963 in regard to granting bail to the accused person in the course of the trial in the sense that the government arrest and held some suspects under house arrest example the arrest of the high-ranking defectors from Al-Shabaab with strong clan connections and in some cases the powerful politician and judicial officials use their influence to release their favoured detainees released without facing fair and impartial trial in the court of law<sup>70</sup>.

## 2. Arbitrary arrest.

According to the Country Reports on Human Rights Practices for 2022 by the United States Department of State Bureau of Democracy, Human Rights and Labor, in Somalia the Federal and regional authorities arbitrarily arrested and detained several persons including the local

journalists, civilians accused of terrorism or supporting Al Shabaab and they frequently justify their arbitrary on the allegations of the suspects' affiliation to Al Shabaab. Media NGOs noted a marked increase in arbitrary arrests and detentions of journalists across the country. The Somali Mechanism for the Safety of Journalists, a network of seven journalist unions and media house associations, documented 66 arbitrary arrests and detentions of journalists. The network attributed the trend to authorities cracking down on protests amid public anger regarding election failures and delays. On January 30, 2022, federal police raided the offices of the independent Sooyaal TV and Radio in the Galgadud region of Galmudug State, beating and detaining the radio's director. The director was freed the following day without charges. Federal Member State authorities continued to violate the freedom of press with arbitrary arrests and unlawful detentions. On February 22 and 25, 2022, Puntland police arrested and detained two journalists in Garowe and Galkayo for reporting on President Said Deni's remarks regarding election results. The journalists were released after agreeing to desist from similar reporting. On September 28, 2022, Galmudug police in Dhusamareb arrested and detained journalist Mohamed Abdiweli Tohow regarding his reporting on the area police commissioner's decision to surrender weapons and vehicles to the Ahlu Sunnah Wal Jama (ASWJ) militia. He was released without charge<sup>71</sup>.

Furthermore, Country Reports on Human Rights Practices for 2022 by the United States Department of State Bureau of Democracy indicated that Somalia Criminal Code Act of Somalia, 1963 provides for bail application and release of an accused person on bail where an accused person may be granted bail: a) subject to the execution of a bond: i) by the accused person, or ii) by other person, or iii) by both the accused person and by other persons jointly, for the specific purpose of ensuring the appearance of the accused in the competent Court; b) subject to any other conditions which the Court may deem fit<sup>72</sup>; unfortunately most citizens were rarely aware of their right to apply for bail and hence authorities did not respect this provision provided by the Criminal Code Act, 1963 since majority of the judicial personnel lacked adequate training in criminal procedures. In some cases security force members, judicial officers, politicians, and clan elders used their influence to have favored detainees released. Government authorities frequently arbitrarily arrested and detained journalists.

According to Amnesty International 2020 report on African Censorship and Expression, reported that on 7<sup>th</sup> March, 2020, an editor for Radio Hiigis, Mr. Mohamed Abdiwahab Nur

(known as Abuja), was arbitrarily arrested twice in eight days and detained incommunicado by the National Intelligence and Security Agency (NISA) without access to his lawyers or family for almost three months. It was observed and stated by his lawyers, family members and other journalists that he was held over claim of him having criticised the Somalia National Security Forces on their conduct in Mogadishu. During the detention he was handed over to a military court on 7<sup>th</sup> June 2020 where they ordered for his transfer to Mogadishu Central Prison and allowed him to access his lawyers in the next day. He remained in detention for a further a period of two month and the authorities stated that he was detained for that longer duration owing to the fact they were investigating his alleged linked to Al Shabaab membership and his involvement in a murder. However, he was acquitted by military court of all the charges against him in August<sup>73</sup>.

### 3. Denial of fair public trial

The Provisional Constitution of Somalia 2012 provides that every person brought before a court of law for an alleged criminal offence is entitled to a fair trial<sup>74</sup>; and every person who is arrested has the right to be brought before a capable court within 48 hours of the arrest<sup>75</sup>. However, according to the Country Reports on Human Rights Practices for 2019 by the United States Department of State Bureau of democracy, human rights and labor in Somalia, in Somalia the accused persons are being denied fair public trial based on the rationales that the civilian judicial system, in Somalia remained largely non-functional across the country, some regions established local courts that depended on the dominant local clan and associated factions for their authority and the judiciary in most areas relied on a combination of traditional and customary law, sharia (Islamic law), and formal law, the judiciary was subject to influence and corruption and was strongly influenced by clan-based politics, the judicial authorities often did not respect court orders and the Civilian judges often feared trying cases, leaving military courts to try the majority of civilian cases<sup>76</sup>. Further still, Country Reports on Human Rights Practices for 2022 United States Department of State Bureau of democracy, human rights and labor: Somalia, indicated that in Somalia the accused persons have been denied fair and public trials because the judiciary was subject to influence and corruption due to lack of accountability that enabled judges to abuse their power, Civilian judges also lacked the necessary security to perform their jobs without fear, judicial officials were strongly influenced by clan-based politics, judicial authorities often did not respect court orders or

were not able to enforce the orders and due to lack of clear and effective protocols and procedures in place for the transfer of military case to civilian courts, authorities prosecuted only handful serious criminal cases that is why most cases involving security personnel or individuals accused of terrorism-related crimes were heard by military courts<sup>77</sup>.

#### 4. Violation of trial procedures

According to the country reports on human rights practices for 2022 by the United States Department of State Bureau of democracy, human rights and labor: Somalia, provided that the provisional constitution of Somalia 2012 provides that every person brought before a court of law for an alleged criminal offence is entitled to a fair trial<sup>78</sup>, but the lack of an independent functioning judiciary meant this right was often not enforced<sup>79</sup>. According to the law, individuals have the right to a presumption of innocence. They also have the right to be informed promptly and in detail of the charges against them in a language they understand, although the law is unclear on whether the right to translation applies through all appeals<sup>80</sup>. Detainees have the right to be brought before a competent court within 48 hours of arrest<sup>81</sup>, to communicate with an attorney of their choice (or have one provided at public expense if indigent), and not be compelled to self-incriminate, and a verdict may not be based on evidence acquired by means of coercion (Regulation of evidence collection, protection from self-incrimination)<sup>82</sup>. However, according to the country reports on human rights practices for 2022 by the United States Department of State Bureau of Democracy, Human Rights and Labor: Somalia, indicated that the federal and regional authorities in Somalia did not respect most rights relating to trial procedures since “clan politics and corruption often impeded access to a fair trial, the law does not address confronting witnesses, the right to appeal a court’s ruling, the provision of sufficient time and facilities to prepare a defense, or the right to present one’s own evidence and witnesses, military courts tried civilians, defendants in military courts rarely had legal representation or the right to appeal and judicial authorities sometimes executed those sentenced to death within days of the court’s verdict and some government officials continued to claim that a 2011 state of emergency decree gave military courts jurisdiction over crimes, including those committed by civilians, in areas from which Al Shabaab had retreated<sup>83</sup>.”

#### 5. Unlawful treatment and detention of political prisoners, detainees and accused persons.

It has been reported that Government and regional authorities arrested journalists as well as other persons critical of authorities, although arrests and harassment in Mogadishu substantially subsided since President Farmaajo's election in 2017 and neither government nor NGO sources provided any estimate of the number of political prisoners. In December, 2018 the candidate for South West State presidential election and prominent defector from the Al-Shabaab leadership, Mukhtar Robow, was detained by AMISOM soldiers and brought to Mogadishu, where he was placed in the custody of National Intelligence Security Agency (NISA) and later moved into house arrest<sup>84</sup>.

### **3.3. Major causes of the violations of rights of accused person in Somalia**

The major causes of violations of rights of accused person in Somalia entail the following:

#### **1. Structural and legal ambiguity**

The main cause of the prevailing and onerous violation of the rights of an accused person during trial in Somalia is the existence and practise of structural and legal ambiguity. According to the country reports on human rights practices for 2022 by the United States Department of State Bureau of democracy, human rights and labor in Somalia, provided that "the elasticity and ambiguity of the Provisional Constitution of Somalia (PCoS) are primary features of the many challenges confronting the structure of the justice system<sup>85</sup>." The Provisional Constitution of Somalia, 2012 stipulates that the "judicial structure shall be regulated by a law enacted by parliament<sup>86</sup>." However, according to the report provided in the year 2022 by the United States Department of State Bureau of democracy, human rights and labor: Somalia, for more than eight years after the constitution was drafted, the federal parliament has yet to enact laws clarifying the precise structure of the judicial branch, especially in view of the federal dispensation; and in the absence of that important legislation, the courts in the five federal member states and the Benadir Regional Administration (BRA) have adopted different structures that align with their socio-political realities<sup>87</sup>.

#### **2. The continuous practise of legal pluralism**

One of the main causes of violation of the rights of an accused person during trial in Somalia is the continuous practise of legal pluralism in Somalia with different rules and interpretations in regards to rights of an accused person during trial in Somalia. In Somalia,

each state has its own Ministry of Justice, attorney general and multiple courts in different jurisdictions. Some states are far ahead of others in terms of clarifying local laws, but the vast majority of the states in Somalia apply a mishmash of British Common Law, Italian Continental Law, Shariah and customary Xeer in their statutory courts<sup>88</sup>.” Hence, this clearly denotes that the legal kind of legal plurality that prevails in the country, which leads citizens to shop for the best justice system where they can obtain most favorable outcome and they end up pursuing justice system that does not follow rule of law and violates the rights of the accused person. Some states, like Puntland, have done comparatively well in harmonizing their local laws and ensuring consistency and integration among its judicial branch. However, states like Galmudug and Hirshabelle, are far behind in institutionalizing their judicial branch. In fact, the Galmudug president only appointed a chief justice to the Supreme Court in August 2020,<sup>89</sup> six months after he was elected. And the Supreme Court, like other courts in the state, does not even have offices.

According to study conducted by Heritage Institute on rebuilding Somalia broken justice system: Fixing the politics and procedures in the year 2020, they discovered that no state has made a concerted effort to harmonize its constitution with the federal constitution to ensure complementarity of the justice system. Most argue that they are waiting for the end of the review process before they embark on harmonization. Puntland’s constitution predates the federal constitution, but the rest of the states have been established since 2013, a year after the constitution was adopted. The justice system in the states is perhaps one aspect where this misalignment is most acutely felt by the citizens<sup>90</sup>.

### 3. The existence of broken chain in the justice system

The existence of broken chain in the justice system is affecting the upholding of the rights of an accused person and causing the violation of the rights of an accused persons during trial in Somalia. According to the Heritage Institute assessment on rebuilding Somalia Broken Justice System: Fixing the Politics and Procedures in the year, they discovered that in many states, as in the federal system, the justice chain is comprised of the police, prosecution (typically the attorney general’s office), the local bar association, statutory courts, the corrections division and the state ministry of justice; for which even though the chain works together in a horizontal fashion, there is very little interaction at the vertical level where cooperation is most imperative<sup>91</sup>. Then, practically, it means that a suspect in police custody

is likely to be prosecuted and taken to a local court with an attorney in town. If convicted, the suspect is likely to end up in a state prison facility overseen by the local ministry of justice<sup>92</sup>. However, “there is a minimal level of policy integration when it comes to standard operating procedures of the police, prosecution, courts, corrections and ministries of justice. The same crime could be prosecuted entirely differently from one district to another, and many judges use (and interpret) local laws with very minimal oversight<sup>93</sup>.”

#### 4. High level of corruption and mismanagement

Another main cause of the violation of the rights of an accused person during trial in Somalia is the existence of high level of level of corruption and mismanagement in as far as handling of judicial cases is concerned. That is why ever since 2006 Somalia has been ranked at the bottom of Transparency International’s Corruption Perceptions Index since 2006, which infuriates many Somalis.”<sup>94</sup> According to the 2023 Corruption Perception Index, Somalia is perceived to be the most corrupt country in the world, with a score of 11<sup>95</sup>. The report presented by Transparency International in the year 2019, they discovered that in Somalia “graft has become a normative practice in the justice system and the new federal justice minister conceded that endemic corruption is ruining the country’s justice system and is breeding impunity<sup>96</sup>.” The reforms by executed by the government in they installed young attorney general and chief justice have tamed overt corruption within the federal and Benadir courts, and have improved access to justice. However, almost all officials and experts interviewed as part of this research conducted by Transparency International in the year 2022, “they did not dispute that the judicial branch is suffering from endemic corruption coupled with systemic mismanagement and they have attributed that to several factors which encompass: first, as we noted above, the poor compensation of judicial officials incentivizes corruption and even outright theft. Second, many officials have noted that the plaintiff ’s habit of shopping for better results is perpetuating the problem, because many justice officials are playing along and sometimes deliberately forcing litigants to seek an appeal, where they would be forced to pay additional bribes to another set of officials. Third, the absence of an oversight mechanism, such as the Joint Security Committee (or equivalent bodies at the Federal Member States level) is making it easy for officials to steal systemically and sometimes out in the open<sup>97</sup>.”

#### 5. Military interference

In Somalia most of the criminal cases are being tried by military courts instead of civilian courts. These have led to various violations of rights of an accused which they encompass arbitrary arrest, unlawful detention, torture, cruel and inhuman treatment<sup>98</sup>. For instance, military courts tried civilians; defendants in military courts rarely had legal representation or the right to appeal; authorities sometimes executed those sentenced to death within days of the court's verdict and some government officials continued to claim that a 2011 state of emergency decree gave military courts jurisdiction over crimes, including those committed by civilians, in areas from which Al Shabaab had retreated. There were no clear indications whether this decree remained in effect according to government policy, statements, or actions, although the initial decree was for a period of three months and never formally extended<sup>99</sup>.

## 5. CONCLUSION

Based on the findings of the study, the study concludes that that the various and sufficient rights of an accused person during train in Somalia, as provided by the Provisional Constitution of Somalia, 2012, and the Criminal Code Act of Somalia, 1963, include: right to liberty and security, right to be informed promptly of the offence charged, right to fair and speedy trial, right to humane treatment, the right to be presumed innocent until proven guilty, right to a fair hearing, right to defend himself or herself, right to counsel, right to be informed of the nature offense an accused person has committed, the right to an interpreter, the right to be present at the trial, right to be brought promptly before a capable court, the right to habeas corpus, the right to apply for bail, the right not to be compelled to testify against himself or herself, right to examine evidence or witnesses and the right to appeal. However, these rights are neither being promoted nor protected in Somalia; instead they are being violated in various ways which they encompass violation of arrest procedures and unfair and cruel treatment of accused persons, arbitrary arrest, denial of fair public trial, violation of trial procedures and unlawful treatment and detention of political prisoners, detainees and accused persons. The main causes of the violation of the rights of accused person in Somalia indicate that there are many causes of the violation of the rights of accused person in Somalia that entail: structural and legal ambiguity, the continuous practise of legal pluralism, existence of broken chain in the justice system, high level of corruption and mismanagement and military interference. The Federal Government of Somalia through its three organs should enact new

law, promote fair and procedural arrest of accused train and sensitise the people about their rights during trial as an accused person and should initiate good policies and project that can foster the promotion and protection of human rights in the sphere of accused person's protection during and after trial in Somalia.

## 6. RECOMMENDATIONS

The various recommendations to improve the protection and promotion of the rights of accused person during trial in Somalia derived from the key findings of the study on the violations of the rights of an accused person and the causes of the violations encompass the following:

### 1. Transfer of civilian court cases before military courts to civilian courts

The Federal Government of Somalia through the executive organ headed by the President should transfer the existing and on-going cases of civilians being tried in military courts to the civilian criminal justice system and should further order the military attorney general to transfer future cases of civilians under military court jurisdiction to the attorney general for civilian court prosecution except cases which are mandated by law to be tried in military court and should initiate and support legislative reforms regarding the protection of the rights of an accused person during trial in Somalia.

### 2. Executing independent, impartial, and competent trials

The Federal Government of Somalia through ministry of judicial department headed by the Chief justice should take into consideration all the required measures to make sure that the judiciary is capable of conducting independent, impartial, and competent trials in accordance with Provisional Constitution of Somalia, 2012, Criminal Code Act of Somalia, 1963 as well international standards required under international law; lastly they should make sure that all detainees and accused person should have access to court within the 48 hours stipulated in the Provisional Constitution of Somalia, 2012.

### 3. Enactment of new relevant laws

The Federal Government of Somalia through legislative organ should enact immediate legislation that should give power to the supreme court of Somalia to review of military court

decisions and would specifically prohibit the trial of civilians in military courts; as required by the Provisional Constitution of Somalia, 2012, parliament should enact legislation to ensure that all human rights abuses alleged to have been committed by members of the armed forces against civilians be brought civilian court for trial; enact legal aid law that can allow a defendant facing trial in the court of law to obtain free legal assistance and lastly they should enact a law that provide for the clear role of national security agencies and should stop military court from trying offences being committed by civilians except the offenses of military nature.

#### 4. Promotion fair and procedural arrest of accused

The Federal Government of Somalia through ministry of security and interior affairs that National Intelligence and Security Agency (NISA) should conduct arrest of accused unless if mandated by the law, should expedite the process of legal drafting of a rights in relation to respecting national security law as provided in the Provisional Constitution of Somalia, 2012 with clear definition of the role of national security agencies like police and National Intelligence and Security Agency (NISA) and should ensure that all the accused and detained should have access to competent and impartial court

#### 5. Training of the masses on their rights as an accused

The federal government of Somalia through ministry of justice should provide appropriate training to the citizens, civilian court personnel, including judges and prosecutors, on Criminal law and Provisional Constitution of Somalia, 2012 provisions regulating the rights of an accused person in Somalia.

#### 6. Initiating projects in relation to the protection of human rights in the sphere of fair trial

Lastly, the local and international non-governmental organisation should advocate for and support initiatives and projects in relation to the protection of human rights in Somalia especially in the sphere protecting the rights of an accused person in Somalia.

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- <sup>7</sup> *Ibid*
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<sup>25</sup> Article 29 (1) of the Criminal Code Act, 1963.

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