Do our children have rights?

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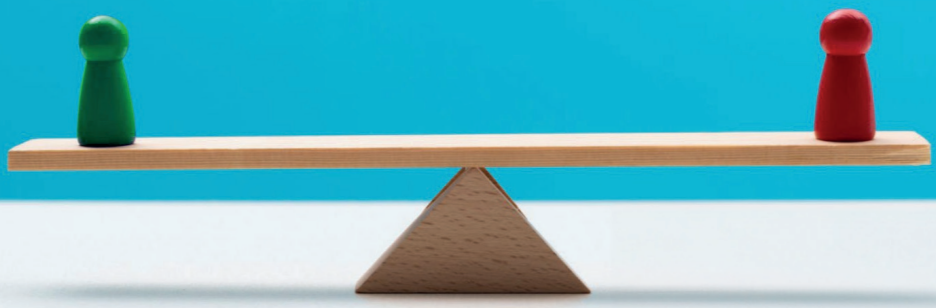
Children's Rights in the Unrecognised State of Somaliland



Guleid Jama

Do Our Children Have Rights?
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DISSERTATION

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To all stateless children all over the world.

Abbreviations

AU:	African Union
CEDAW:	Convention on the Elimination of all Forms of Racial Discrimination
CPA:	Child Rights Protection Act of Somaliland
CRC:	UN Convention on the Rights of the Child
CtRC:	Committee on the Rights of the Child
FGM:	Female Genital Mutilation
HRC:	Human Rights Committee
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICJ:	International Court of Justice
ID:	Identity Card
IMF:	International Monetary Fund
IMT:	International Military Tribunal
INGOs:	International Nongovernmental Organisations
JJL:	Juvenile Justice Law of Somaliland
MRT:	Moldavian Republic of Transdniestria
NEA:	National Education Act of Somaliland
NGOs:	Nongovernmental Organisations
NSA:	Nonstate actors
POSL:	Public Order and Security Law of Somaliland
SADR:	Sahrawi Arab Democratic Republic
SNM:	Somali National Movement
TFG:	Transitional Federal Government (Somalia)
TNCs:	Transnational Corporations
TNG:	Transitional National Government (Somalia)
UAE:	United Arab Emirates
UDHR:	Universal Declaration of Human Rights
UN:	United Nations

UNMIK:	United Nations Mission in Kosovo
UNSC:	United National Security Council
UPR:	Universal Periodic Report
USA:	United States of America

Glossary of Somali terms

The Somali "c" has a sound similar to the Arabic "ع," while the "x" is similar to the Arabic "ح". The Somali term Caaqil, which is a subclan chief, can be roughly pronounced by English speakers as aqil. *Xeer* (the clan laws) can also be pronounced in English as heer. These are the closest but not similar pronunciations in English.

Caaqil	The head (chief) of the smallest kinship of a clan.
Gudi	A committee of elders assigned to hear and decide a case. It is also called *xeerbeegti*.
Guurti	The elders assigned to hear and decide a case through *Xeer*. This differs from the Golaha Guurti (the House of Guurti), the upper house of Somaliland's parliament.
Jinsiyad	Citizenship. It is derived from the Arabic term جنسيه.
Jilib	The smallest kinship of a clan.
Qoon	Wound that was inflicted by another person.
Qudh	Homicide.
Xeerbeegti	A committee of elders assigned to hear and decide a case.
Xeer	A "set of norms and rules that govern inter and intra-clan relationships; not a static legal code, but differs across communities…based solely on precedent and varies with the different agreements, norms, and outcomes of disputes among the Somali clans as they have evolved over time; mainly an oral tradition and only legitimate elders who have memorised its history can facilitate customary processes of dispute resolution."[1]

[1] The Expanding Access to Justice Program in Somalia (EAJ), report June 2020

Glossary of Latin terms

de facto	Existing as a matter of fact.[2]
de jure	Existing as a matter of law.[3]
erga omnes	In international law, "obligations in whose fulfilment all states have a legal interest because their subject matter is of importance to the international community as a whole. It follows from this that the breach of such an obligation is of concern not only to the victimized state but also to all the other members of the international community. Thus, in the event of a breach of these obligations, every state must be considered justified in invoking (probably through judicial channels) the responsibility of the guilty state committing the internationally wrongful act."[4]
ex aequo et bono	From equity and goodness. It is "a manner of deciding a case pending before a tribunal with reference to the principles of fairness and justice in preference to any principle of positive law. A decision *ex aequo et bono* may be sought especially when the law governing a dispute is unclear (*non liquet)* or might fail to resolve the dispute adequately for other reasons".[5]
jus cogens	The peremptory norms (compelling law). It is "a rule or principle in international law that is so fundamental that it binds all states and does not allow any exceptions."[6]
jus sanguinis	The child's citizenship is determined by the parent's citizenship (by blood).
jus soli	The child's citizenship is determined by the place of birth (by soil).
nullem crimen sine lege	No crime without law.
opinio juris	The opinion of the law. It is the second element needed for the establishment of customary international law (State practice and *opinio juris*).
pacta sunt servanda	Agreements must be kept. It means treaties must be observed in good faith.
ratione personae	By reason of the person.
res judicata	"The principle that a cause of action may not be relitigated once it has been judged on the merits."[7]

[2] John P. Grant et al., *Encyclopaedic Dictionary of International Law* 3rd ed. Oxford University Press. Retrieved 25 Apr. 2023.
[3] Ibid
[4] https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095756413
[5] Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*, Oxford: Oxford University Press, Retrieved 25 April 2023.
[6] Jonathan Law, *A Dictionary of Law*, Oxford University Press. Retrieved 25 Apr. 2023
[7] https://www.law.cornell.edu/wex/res_judicata#:~:text=Generally%2C%20res%20judicata%20is%20the,final%20judgment%20on%20the%20merits.

status quo ante	The previously existing state of affairs.
uti possidetis	"As you possess". In international law, it is a principle that entails States emerging from decolonisation to retain the colonial set borders.

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Chapter 1 Introduction

1.1 Introduction

Somaliland is a very special place. Historian Gérard Prunier gave his new book about Somaliland a provocative title: "The country that does not exist: a history of Somaliland,"[8] and Rebecca Richards introduces Somaliland, similarly, as a "place that does not exist".[9] Iqbal Jhazbhay, a supporter of Somaliland's independence, categorises it as "Africa's Best Kept Secret, A Challenge to the International Community?"[10] What these authors depict is the unconventional nature of the political context and the status of Somaliland. From the international human rights law perspective, Somaliland's situation is arguably very complex and challenging to the existing international human rights system.

When I started advocating for human rights in Somaliland a decade ago, it became difficult to use international human rights law to defend human rights in Somaliland. The Constitution of Somaliland, approved in 2001, contains human rights provisions that cite international human rights law, particularly the Universal Declaration of Human Rights, and provides that human rights clauses in the Constitution shall be interpreted in accordance with international human rights law.[11] However, how do you make international human rights instruments meaningful and applicable in Somaliland, a place recognised as part of another State, Somalia - yet, a place that has achieved *de facto* independence, and that has the authority and control over its territory and population?[12]

To give an example: on 29 June 2017, I submitted a complaint to the African Commission on Human and Peoples' Rights on behalf of a man who was facing execution in Somaliland. At the time, I was the head of the Human Rights Centre Somaliland, a local human rights advocacy group. It was the first case submitted to the Commission to address an issue in Somaliland. The Emergency Complaint requested, *inter alia*, provisional measures to stay the execution until all due processes had been carried out. The Commission found "that even though the Complaint is addressed against Somalia, it alludes to Somaliland which is *de facto*, not a region within Somalia, as it has a completely separate existence and therefore, in reality, Somalia has no effective control over Somaliland nor the courts of Somaliland in which the Victim is being tried. The Commission therefore does not have jurisdiction to entertain the Communication because Somaliland is not recognised by the African Union."[13]

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[8] Gérard Prunier, *The country that does not exist: a history of Somaliland* (London: Hurst, 2021).

[9] Rebecca Richards, *Understanding Statebuilding: Traditional Governance and Modern State in Somaliland*, (London: Routledge, 2014): 1.

[10] Iqbal Jhazbhay, "Somaliland: Africa's best kept secret, A challenge to the international community?", African Security Review, 12:4, 2003 77-82.

[11] Somaliland Constitution, 2011: art. 21.

[12] John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*, (Hague: The Pocket Books of the Hague Academy of International Law, 2012): 178; Bryden Matt, "The "Banana Test": is Somaliland ready for recognition?" Annales d'Ethiopie. Volume 19, année 2003: 341; Deon Geldenhuys, *Contested States in World Politics* (New York: Palgrave Macmillan, 2009):137; Sarah G. Philips, *When There Was No Aid: War and Peace in Somaliland* (New York: Cornell University Press, 2020): 62; Rebecca Richards, *Understanding Statebuilding: Traditional Governance and Modern State in Somaliland*, (London: Routledge, 2014): 13.

[13] The African Commission on Human and Peoples' Rights, Abdullahi Ali Ismail v The Federal Republic of Somalia, Communication 663/17, the 22nd Extra-Ordinary Session, 29 July to 7 August 2017: paragraph 14, page 3.

International/regional human rights bodies are often the last resort when domestic remedies are exhausted. They play a part in holding States accountable for violating their international human rights obligations. The African Commission's rejection of the case meant that the international legal accountability framework deals with Somaliland as an anomaly. Unlike our colleagues in recognised States in Africa, human rights defenders in Somaliland cannot successfully file a complaint with the African Commission of Human and Peoples' Rights against Somaliland or Somalia. Nor is it clear how to hold the government of Somaliland to account. It does not submit reports to the UN Human Rights Council through the mechanism of the Universal Periodic Report. And as an unrecognised State, it is not legally obligated to do so.

Human rights advocacy and academia embark on the subject of international human rights law from the prism of the legal obligation of [recognised] States.[14] According to John Dugard, "the State is the centre of the international legal order."[15] Even when some legal scholars and human rights activists stretch international human rights law to explore the obligation of non-State actors, the take-off is often the State.[16]

Keeping this in mind, what does it mean to say that children in Somaliland have rights? And against whom can these rights be claimed in terms of fulfilment of legal obligations? My assumption as an (idealist) human rights activist was that human rights, as stated in international human rights instruments, belong to all. However, the legal obligations under a treaty are not so idealistic. After all, treaties primarily gain their legal applicability from the State's consent.[17] There is no higher government or parliament to legislate for the world's States.

These conflicting realities have always confronted me. On the one hand, I advocated for the defence of human rights from the understanding of how they are stipulated in international human rights instruments. On the other hand, I work in a jurisdiction with a constitution and a procedure to determine which law is applicable in its territory. The jurisdiction I work in is not like most other jurisdictions. The fact that Somaliland is not recognised as a State challenges the assumption of universal human rights applicable to all territories and the notions of sovereignty and State

[14] Rebert McCorquodale, "Non-state actors and international human rights law", in *Research Handbook on International Human Rights Law*, edited by Sarah Joseph and Adam McBeth (Cheltenham, UK: Edward Elgar Publishing, 2010):100; August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in *Non-State Actors and Human Rights"*, edited by Philip Alston (Oxford: Oxford University Press, 2005): 38; Sir Nigel Rodely, "Non-state actors and human rights" in *Routledge Handbook of International Human Rights Law,* edited by Scott Sheeran and Sir Nigel Rodley (Abingdon, Oxon: Routledge, 2013): 523; Manisuli Ssenyonjo, "The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?", The International Journal of Human Rights, 12:5 (2008): 726; Yael Ronen, "Human Rights Obligations of Territorial Non-State Actors", Cornell International Law Journal 46, no. 1 (Winter 2013): 22; Dinah Shelton, *Remedies in International Human Rights Law* 3rd ed. (New York: Oxford University Press, 2015): 13; Committee on the Rights of the Child, General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child: paragraph 1.

[15] John Dugard, *The Succession of State and their Recognition in the Wake of Kosovo*. (Hague: The Pocket Books of the Hague Academy of International Law, 2013): 17.

[16] August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in *Non-State Actors and Human Rights*, edited by Philip Alston (Oxford: Oxford University Press, 2005): 82; Rebert McCorquodale, "Non-state actors and international human rights law" in *Research Handbook on International Human Rights Law*, edited by Sarah Joseph and Adam McBeth (Cheltenham, UK: Edward Elgar Publishing, 2010): 109.

[17] Hugh Thirlway, *The Sources of International Law* (New York: Oxford University Press, 2019): 37; Malcolm Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008): 94.

jurisdiction. As the case before the African Commission above demonstrates, the existing human rights framework in relation to unrecognised States is unique. This dissertation investigates the rights of children in Somaliland, an unrecognised State.

Becoming a State Party to the CRC requires States to consent through signing, ratifying and acceding expressly. Lack of recognition hinders a State from ratifying or acceding the CRC. Moreover, Somaliland cannot, as a sovereign State, provide periodic reports to the United Nations Committee on the Rights of the Child to assess the extent to which they meet the protection stipulated in the CRC. The legal obligations under the CRC are limited to the extent of the scope of the jurisdiction of the State Party. This poses a question on the scope of the Convention and the extent to which the rights of children in unrecognised States are protected and respected. Somaliland made a declaration on the restoration of independence from Somalia in 1991.[18] Since then it is an unrecognised State. It has not been able to become a member of any international body, such as the United Nations or the African Union. Moreover, it did not sign or ratify the UN Convention on the Rights of the Child or, indeed, any other human rights treaties. However, Somaliland has *de facto* control over the territory. It has an administrative government, military forces, security agencies, currency, schools, healthcare facilities, judiciary, and legislative bodies. It even issues passports and identity papers to the population living in the territory under its control.

In contrast, Somalia, which is the State recognised internationally as the *de jure* government over a larger territory that includes the territory of Somaliland, has ratified the Convention on the Rights of the Child.[19] However, Somalia does not have physical control over Somaliland, which impacts its capacity to protect children's rights in Somaliland and to enforce the rights and freedoms enshrined in the Convention.

In the absence of recognition of Somaliland and Somalia's lack of effective control, the question of legal obligation vis-à-vis Somaliland is not straightforward. Who has the legal obligation to protect, respect and fulfil the rights of children enshrined in the CRC regarding the rights of children in the territory under the control of the government of Somaliland? Normally, the application of human rights in a treaty is connected to the jurisdiction of the State Party. The unrecognised States are, however, anything but normal. They do not fit the dichotomy of State and non-State entities.

The study of the applicability of human rights treaties on unrecognised States is limited. The prevailing narrative concerning child (human) rights is centred on (recognised) States, the implementation of human rights obligations, and the role of non-State actors. Campaigners and researchers often examine if a particular State has signed a particular treaty and, if the answer is yes, if the obligations therein have been fulfilled.

The unrecognised States are often (with few exceptions)[20] situated within a recognised State, and their existence as a separate State, as well as the narrative underlying their separateness, is contested.[21] Some are recognised by a considerable number of States, such as Kosovo, which is recognised by more than half of the UN Member States. Others, like Somaliland, are not

[18] Mark Bradbury, *Becoming Somaliland* (London: Progressio, 2008): 82.
[19] Somalia ratified the CRC on 1st October 2015. See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en.
[20] Irene Fernández-Molina and Matthew Porges, "Western Sahara" in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 376.
[21] Deon Geldenhuys, *Contested States in World Politics* (New York: Palgrave Macmillan, 2009): 7.

recognised by any UN Member State. This dissertation focuses on the applicability of international children's rights law in Somaliland as an unrecognised State and on understanding how formal national law protects children's rights. It investigates both the international human rights law perspective and domestic law from a legal doctrinal approach. I will study these difficulties based on the case study of Somaliland. Although the focus of the discussion is on Somaliland's situation, its case study may teach us a thing or two also about the situation of other unrecognised States and the children who live there, now and in the future.

The introduction chapter starts with a brief presentation of the contested history of Somaliland and Somalia to establish the context (section 1.2). Section 1.3 is about the research questions and the methodology, and in section 1.4, the structure of the dissertation is presented.

1.2 Somalia and Somaliland: a contested history

1.2.1 **Introduction**

During the scramble for Africa by the European colonists, the continent was divided without the presence, consent or opinions of the Africans. The Horn of Africa,[22] which is located at the very eastern tip of the continent, came under the rule of the United Kingdom (UK), France and Italy.[23] Somaliland was a British Protectorate, and Somalia was under Italian colonial rule. On 26 June 1960, Somaliland got independence from the UK to join a union with Somalia. Somalia gained its independence on 1 July 1960, and the union of the two took place on the same day. These events are, to a certain extent, agreed by pro-independent Somaliland and unionists, but what happened after the union and how the union took place are disputed. In the context of contested territories, history itself is often contested.[24] It is imperative to avoid telling history from one perspective. Here, I discuss both narratives briefly and separately.

1.2.2 **The perspective of Somaliland**

The union between Somaliland and Somalia was between two independent and separate States, and the objective was to unite all Somalis in the Horn of Africa into the Somali Republic.[25] The five-point star of the Somali flag represents the irredentist aspiration of the Somalis.[26] After the union on 1 July 1960, Somalia took all key decision-making powers, namely, the president, the prime minister, the heads of the military and the police, and two-thirds of the members of the

[22] In here, I mean the Horn of Africa Sudan, South Sudan, Eretria, Djibouti, Ethiopia, Somalia and Somaliland.
[23] The role of Ethiopia, which was never colonised, is contested. Some contend that Ethiopia took part in the colonisation by taking territories belonging to Somalis. For a debate about this, see AbdiRizak M. Warfa, *Cries in the Hinterland: Untold Stories of the Somali Region in Ethiopia: 1948-2018* (Minneapolis: Riverfront Pond Press, 2022).
[24] Markus Hoehne, *Between Somaliland and Puntland: Marginalization, Militarization and Conflicting Political Vision* (London: Rift Valley Institute, 2015): 43-44; Marieke J. Hopman, *Looking at Law through Children's Eyes* (Maastricht: Proefschriftmaken, 2019): 259.
[25] Deon Geldenhuys, *Contested States in World Politics* (Palgrave, 2009): 130; Hussein A. Bulan, *Politics of Cain: One hundred years of crises in Somali politics and society* (Maryland: Tayosan, 2008): 113.
[26] Hussein A. Bulan, *Politics of Cain: One hundred years of crises in Somali politics and society* (Maryland: Tayosan, 2008): 113; Hussein M. Adam, *From Tyranny to Anarchy: the Somali Experience* (Asmara: The Red Sea Press, Inc., 2008): 7.

parliament.[27] The merger was illegal because an Act of Union was not approved.[28] In 1961, a referendum held for the Somali Constitution was rejected by 52% of the people in Somaliland.[29] In that same year, an Act of Union was retroactively approved by the Somali parliament without the presence of the members of parliament elected from Somaliland. In 1961, an attempted coup took place in the regions of Somaliland.[30] The failed coup demonstrates the dissatisfaction of the people of Somaliland concerning how the union was handled.[31] The coup leaders were arrested and tried for treason. The court freed them because, in the absence of an act of union, the court found that they could not be tried for treason.[32]

In 1969, the military overthrew the democratically-elected civilian government. The military government committed serious human rights violations in Somaliland, including war crimes and crimes against humanity.[33] In 1981, the Somali National Movement (SNM) was formed to liberate the people of Somaliland from the military regime.[34] In 1991, the military regime was defeated, and in that same year, the independence of Somaliland was declared by delegates representing all the clans living in Somaliland.[35]

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[27] Hussein M. Adam, *From Tyranny to Anarchy: the Somali Experience* (Asmara: The reads Sea Press, Inc., 2008): 43; Scott Pegg, *International society and the De Facto Stat*e (New York: Routledge, 1998): 88; *Hussein A. Bulan, Politics of Cain: One hundred years of crises in Somali politics and society* (Maryland: Tayosan, 2008): 118, 121; Government, the Republic of Somaliland Country Profile, 2021: 41; Michael Walls, *A Somalia Nation-State: History, Culture and Somaliland's Political Transition* (Pisa: Ponte Invisible 2014); 132.

[28] Michael Walls, *A Somalia Nation-State: History, Culture and Somaliland's Political Transition* (Pisa: Ponte Invisible 2014); 131; Government, the Republic of Somaliland Country Profile, 2021: 2; Gérard Prunier, *The country that does not exist: a history of Somaliland* (London: Hurst, 2021): 20; Scott Pegg, *International Society and the De Facto State* (New York: Routledge, 1998): 87; Hussein M. Adam, *From Tyranny to Anarchy: the Somali Experience* (Asmara: The Red Sea Press, Inc., 2008): 43.

[29] Government, the Republic of Somaliland Country Profile, 2021: 27; Gérard Prunier, *The country that does not exist: a history of Somaliland* (London: Hurst, 2021): 21; Scott Pegg*, International Society and the De Facto State* (New York: Routledge, 1998): 87-88.

[30] Michael Walls, *A Somalia Nation-State: History, Culture and Somaliland's Political Transition* (Pisa: Ponte Invisible 2014): 133.

[31] Government, the Republic of Somaliland Country Profile, 2021: 27.

[32] Gérard Prunier, *The country that does not exist: a history of Somaliland* (London: Hurst, 2021): 22; Hussein A. Bulan, *Politics of Cain: One hundred years of crises in Somali politics and society* (Maryland: Tayosan, 2008): 123; Muxamed Ibraahim Muxamed "Liiq-liiqate," *Taariikhda Soomaaliya: Dalkii Filka Waynaa ee Punt* (Muqdisho, 2000): 141; Michael Walls, *A Somalia Nation-State: History, Culture and Somaliland's Political Transition* (Pisa: Ponte Invisible 2014): 133; Scott Pegg, *International Society and the De Facto State* (New York: Routledge, 1998): 88; Hussein M. Adam, *From Tyranny to Anarchy: the Somali Experience* (Asmara: The Red Sea Press, Inc., 2008): 43.

[33] Hussein M. Adam, *From Tyranny to Anarchy: the Somali Experience* (Asmara: The Red Sea Press, Inc., 2008): 43; Government, the Republic of Somaliland Country Profile, 2021: 28-31; Hussein A. Bulan, *Politics of Cain: One hundred years of crises in Somali politics and society* (Maryland: Tayosan, 2008): 349; Gérard Prunier, *The country that does not exist: a history of Somaliland* (London: Hurst, 2021): 103; Markus Hoehne, *Between Somaliland and Puntland: Marginalization, Militarization and Conflicting Political Vision* (London: Rift Valley Institute, 2015: 41.

[34] Bobe Yusuf Duale, *The SNM Liberation Struggle: 1981-1993* (Hargeisa: Hema Books, 2022): 3; Scott Pegg, *International Society and the De Facto State* (New York: Routledge, 1998): 88-89.

[35] Judy el Bushra and Judith Gardner, (eds), *Somalia - the Untold Story: The War Through the Eyes of Somali Women* (Pluto Press, 2004), https://doi.org/10.2307/j.ctt184qq8n.: 5; Michael Walls, *A Somalia Nation-State: History, Culture and Somaliland's Political Transition* (Pisa: Ponte Invisible 2014): 166; Marleen Renders and Ulf Terlinden, "Negotiating Statehood in a Hybrid Political Order: The Case of Somaliland", Institute of Social Studies, 41(4): 723–746 (2010): 730.

The decision to withdraw from the union was taken by the Grand Conference of Clan Elders held in Burao from 27 April to 15 May 1991.[36] In the words of the Somaliland government, "it was later supported by the Somaliland Public after the referendum was held that affirmed Somaliland's reinstating sovereignty from Somalia as a separate independent sovereign state where 97.1 % voted in favour of the reclaimed sovereignty."[37] Since then, Somaliland has been enjoying relative peace and democracy.[38] Somaliland never partook in any peacebuilding and/or State-building initiatives held for Somalia after 1991. Therefore, Somaliland is not part of the Federal Government of Somalia and is an independent State.

1.2.3 **The perspective of Somalia**

The colonial powers divided the Somali people.[39] The Somaliland British Protectorate and Somalia united voluntarily upon gaining independence.[40] The union resulted in a civilian democratic administration.[41] On 26 July 1961, the first constitution of the Somali Republic was ratified. While some voters in both the North (Somaliland) and the South rejected the constitution, the majority accepted and "collectively, a narrow majority of the voters in the central areas of the two northern regions voted for the constitution, while an overwhelming majority of the people in the eastern and western zones voted in favour."[42] In 1969, the military took over the power in a coup after the assassination of President Abdirashid Ali Sharmarke. Because it was a dictatorship, the military's rule was cruel and committed atrocities across Somalia, including the Northern Regions (Somaliland).[43]

Rebel groups, formed along clan lines, fought the military government, which collapsed in 1991.[44] As a result of the collapse of the central government, the central authority disintegrated, and several clan-based administrations were formed. The government of Somalia states: "while Somaliland has declared an intention to secede, the rest of Somalia including some regions in Somaliland and

[36] Government, the Republic of Somaliland Country Profile, 2021: 2.
[37] Government, the Republic of Somaliland Country Profile, 2021: 2.
[38] Government, the Republic of Somaliland Country Profile, 2021: 38-39.
[39] Mohamed Haji Ingiriis, *The Suicidal State in Somalia: The Rise and Fall of the Siad Barre Regime, 1969–1991* (Lanham, Maryland: UPA, 2016): 37; Omar Abdulle Alasow. *Violations of the Rules Applicable in Non-International Armed Conflicts and Their Possible Causes: The Case of Somalia.* International Humanitarian Law Series. (Leiden: Brill | Nijhoff, 2010): 10; Markus Hoehne, *Between Somaliland and Puntland: Marginalization, Militarization and Conflicting Political Vision* (London: Rift Valley Institute, 2015: 14
[40] Abdi Ismail Samatar, *Africa's First Democrats: Somalia's Aden A. Osman and Abdirazak H. Hussen* (Bloomington: Indiana University Press, 2016): 87; Muxamed Ibraahim Muxamed "Liiq-liiqate," *Taariikhda Soomaaliya: Dalkii Filka Waynaa ee Punt* (Muqdisho, 2000): 136.
[41] Omar Abdulle Alasow, *Violations of the Rules Applicable in Non-International Armed Conflicts and Their Possible Causes : The Case of Somalia.* International Humanitarian Law Series. (Leiden: Brill | Nijhoff, 2010): 12.
[42] Abdi Ismail Samatar, *Africa's First Democrats : Somalia's Aden A. Osman and Abdirazak H. Hussen* (Bloomington: Indiana University Press, 2016): 100.
[43] Omar Abdulle Alasow, *Violations of the Rules Applicable in Non-International Armed Conflicts and Their Possible Causes : The Case of Somalia.* International Humanitarian Law Series. (Leiden: Brill | Nijhoff, 2010): 28-30.
[44] Afyare Abdi Elmi*, Understanding the Somali Conflagration: Identity, Political Islam and Peacebuilding* (New York: Pluto Press, 2010): 17; Omar Abdulle Alasow. *Violations of the Rules Applicable in Non-International Armed Conflicts and Their Possible Causes : The Case of Somalia*. International Humanitarian Law Series. (Leiden: Brill | Nijhoff, 2010): 1.

Puntland do not consent to the separation but support the unity, integrity and sovereignty of Somalia."[45]

After a protracted civil war, a Transition National Government (TNG) was formed in Djibouti in 2000.[46] The TNG was replaced in 2004 by the Transitional Federal Government (TFG).[47] In 2012, the era of the transitional governments came to an end after a permanent central government with international recognition was formed.[48] Somaliland is an integral part of Somalia and members selected from Somaliland include the parliament and the cabinet of Somalia. To restore unity, "the Federal Government of Somalia is currently engaged in a dialogue with Somaliland".[49]

1.3 Research questions and research methodology

The main research question of this dissertation is: how do international and national laws protect the rights of children living in Somaliland? The following are sub-questions:

1. What type of entity is Somaliland? (Chapter 2)
2. What obligations does Somaliland, as an unrecognised State, have under international human rights laws to protect the rights of children living in Somaliland? (Chapter 3)
3. What is the obligation of Somalia – the recognised State – to protect the rights of children living in Somaliland? (Chapter 4)
4. What rights do children have in Somaliland's formal national laws? (Chapter 5)
5. What is the meaning of a child's right to nationality for children living in Somaliland? (Chapter 6)
6. What is the meaning of a right to protect children in Somaliland from sexual abuse? (Chapter 7)

To test whether international human rights law protects the rights of children living in Somaliland, I will analyse whether there is a duty-bearer who can be argued under international human rights law to have an obligation to protect children's rights (chapters 2-4). To determine whether national formal laws in Somaliland protect children's rights, I will analyse the different applicable laws of different relevant legal orders to see to what extent they are in conformity with international human rights law, particularly with the UN Convention on the Rights of the Child (chapters 5-7). In this dissertation, to 'protect' means that Somaliland's law contains legal safeguards that protect children's rights in a manner that is in conformity with the CRC. If the formal law lacks legal protection or contains provisions that contradict children's rights under the CRC, the dissertation assumes that the formal law does not protect children's rights. Moreover, the dissertation looks at how international human rights law approaches Somaliland. It examines whether international human rights law safeguards afford protection to children living in Somaliland and whether the

[45] National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, Somalia, A/HRC/WG.6/11/SOM/1, 11 April 2011: paragraph 15 page 4.
[46] Omar Abdulle Alasow, *Violations of the Rules Applicable in Non-International Armed Conflicts and Their Possible Causes : The Case of Somalia.* International Humanitarian Law Series. (Leiden: Brill | Nijhoff, 2010): 2.
[47] National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, Somalia, A/HRC/WG.6/11/SOM/1, 11 April 2011: paragraph 15, page 5.
[48] National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, Somalia, A/HRC/WG.6/11/SOM/1, 11 April 2011: paragraph 15, page 5.
[49] Human Rights Committee, Initial report submitted by Somalia under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2021, CCPR/C/SOM/1, received: 18 October 2020: paragraph 26, page 8.

international human rights system includes or excludes children living in Somaliland in its protection and accountability legal frameworks.

In light of the research questions, I employ a research methodology that is a combination of descriptive and evaluative approaches. Using legal doctrinal and legal analytical methods, I evaluate or assess whether Somaliland's domestic laws are in conformity with international children's (human) rights law. Moreover, I study international human rights law to examine who has legal obligations vis-à-vis the children living in Somaliland. The legal systems offer the concepts needed to study the subject of the research questions, but also the system itself leads "the theoretical perspective from which that object is studied".[50] This deals with the law as a separate and autonomous system of norms and examines the present applicable law.[51]

The approach taken, whereby the legal system is both the subject of inquiry and the conceptual framework, is not a unanimously agreed methodology.[52] Nor do I argue that legal doctrinal methodology is the only or the best methodology to employ in all legal research.[53] The methodologies to research law or about law vary.[54] From the traditional legal doctrinal methodology to law and economics and empirical research, one might choose from a pool of paradigms to research about a legal question. A debate exists concerning whether the legal doctrinal methodology is appropriate or sufficient to investigate a legal problem. Important criticism is presented by the Global South scholarship that views law from postcolonial perspectives.[55] It is crucial to note that all approaches are essential and that no single methodology can monopolise legal research.[56] The nucleus of the research is the UN Convention on the Rights of the Child (CRC). In State and non-State dichotomy, researchers often overlook the child (human) rights of people living in unrecognised States. This research aims to fill this gap by making contributions from a legal doctrinal perspective.

The study employed treaty interpretation to research the legal obligation in international human rights treaties. The treaty interpretation is based on Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969. Article 31 lays down the "general rules of interpretation" and Article 32 sets out "supplementary means of interpretation". How judicial bodies, treaties and UN Charted

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[50] Pauline C. Westerman, "Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law" in *Methodologies of Legal Research: Which Kind of Methods for What Kind of Discipline?.* Edited by Mark van Hoecke (London: Hart Publishing, 2011): 90.

[51] Jan M. Smits, "What Is Legal Doctrine?: On The Aims and Methods of Legal-Dogmatic Research" in Van Gestel, Rob, Hans-W. Micklitz, and Edward L. Rubin, (eds). *Rethinking Legal Scholarship: A Transatlantic Dialogue*. (Cambridge: Cambridge University Press, 2017): 212.

[52]Jan Vranken, "Methodology of Legal Doctrinal Research: A Comment on Westerman" in *Methodologies of Legal Research: Which Kind of Methods for What Kind of Discipline?.* Edited by Mark van Hoecke (London: Hart Publishing, 2011): 114; Eliav Lieblich, "How to do research in international law: A basic guide for beginners", Harvard International Law Journal Online, Volume, 62/2021: 4.

[53] Fons Coomans, Fred Gunfeld and Menno Kamminga, "Methods of Human Rights Research: A Primer", (2010) 32 Human Rights Quarterly 179.

[54] Mark Van Hoecke "Legal Doctrine: Which Method(s) for What Kind of Discipline?" in Mark Van Hoecke, (ed.) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing Ltd, 2011): 11.

[55] Eliav Lieblich, "How to do research in international law: A basic guide for beginners", Harvard International Law Journal Online, Volume, 62/2021: 15.

[56] Elliave Eliav Lieblich, "How to do research in international law: A basic guide for beginners", Harvard International Law Journal Online, Volume, 62/2021: 15.

based bodies interpreted treaties was also viewed as an important means of interpreting and understanding articles.

The dissertation focuses on three broad categories of laws. First, international human rights laws are studied to understand better the application of international human rights laws in Somaliland. The following are the sources of international law stipulated in Article 38 of the International Court of Justice Statute:

- international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
- international custom, as evidence of a general practice accepted as law;
- the general principles of law;
- subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

In this dissertation, the sources of international law are classified as follows:

i. normative sources, such as treaties, customary international law, general principles of law, and binding court/commission decisions. In this regard, the research accentuated international and regional human rights treaties, customary law and cases from the African Commission on Human and People's Rights, the European Court of Human Rights, the International Court of Justice, and the Permanent Court of International Justice and Security Council Resolutions. The main treaty studied in the dissertation is the UN Convention on the Rights of the Child (CRC). Moreover, the following treaties, which are all relevant to the subjects analysed in the dissertation, included those I examined:
    - African Charter on Human and Peoples' Rights
    - African Charter on the Rights and Welfare of the Child
    - International Covenant on Civil and Political Rights
    - International Covenant on Economic, Social and Cultural Rights
    - Convention on the Reduction of Statelessness
    - Convention relating to the Status of Stateless Persons
    - Montevideo Convention on the Rights and Duties of States
    - Vienna Convention on the Law of Treaties
    - The Arab Charter on Human Rights.

ii. authoritative sources, which include resolutions, declarations, concluding observations, non-binding case law and general comments from international human rights bodies relevant to the subject of research, are studied. In this context, the jurisprudence, resolutions/declarations, concluding observations, reports and comments of the following bodies were studied:

- The Committee on the Rights of the Child
- The Human Rights Committee
- The Committee on Economic, Social and Cultural Rights
- The Human Rights Council
- General Assembly resolutions
- Advisory opinions of the International Court of Justice
- Advisory opinions of the Permanent Court of International Justice.

The selection of the authoritative sources was determined by their relevance to the subject in question. For instance, I reviewed all reports Somalia submitted to human rights bodies, charter or treaty based, and the jurisprudence of the Committee on the Rights of the Child. When, for example, the issue of State jurisdiction is the subject, the general comments/reports and other statements from human rights bodies were analysed.

The legal nature of the Universal Declaration of Human Rights (UDHR) is disputed. Some argue that the UDHR or some of its provisions now constitute customary international law.[57] Without making a judgment on whether the UDHR is a legally binding document or not, the dissertation studies it as a vital international instrument that plays a crucial role in international human rights law.

Scholarly legal writings of books and articles are studied as well. Legal jurists and other scholars have written about the areas examined in the dissertation and offer essential contributions to understanding concepts and notions.

Second, the formal national laws of Somaliland were researched to examine the protection, or lack of it, of children's rights in Somaliland and the status of the CRC in Somaliland. Somaliland has a legal system that is a blend of *Xeer* (clan laws), Sharia law and formal national law. The formal national law does not have a monopoly normative force. Multiple bodies of laws, institutions and different sources of legitimacy exist. Sharia and *Xeer* committees' judgements are not based on codified national laws but on religious texts and unwritten *Xeer*, respectively. Albeit not written (in the case of the *Xeer*) and not codified in a document (Sharia), *Xeer* and Sharia are applied in Somaliland and shape the social life of its inhabitants. The three legal systems interact (see Chapter 5). For example, the *Xeer* is part of determining a person's Somaliland nationality, and there is the House of Elders (the *Guurti*), which is part of the bicameral parliament. In enacting formal law by the Parliament, the *Guurti*'s role includes taking *Xeer* and Sharia into account. *Xeer* and Sharia are incorporated into the formal system. They are part of the formal law in different laws, and I analysed them in that approach. The actual distinction does not hold. In researching nationality law, I have to look at the *Xeer,* which defines who should become a citizen. To argue that the legal doctrinal method applies only to State law is problematic. I was born and raised in Somaliland. So, I test findings with my experience as a lawyer and human rights advocate. Moreover, I use qualitative research done by others.

The dissertation examined the following formal national law:

- the 2001 Constitution of Somaliland
- laws passed by the Parliament of Somaliland and signed by the president under the law-making process stipulated in the Constitution. Somaliland has a bicameral legislative process consisting of the House of Representatives and the House of *Guurti*. The law-making power rests with the parliament. When the two houses of the parliament pass a law, it goes to the president to sign it into law or revert it to the parliament. A law becomes legally binding 30 days after the president signs it.

[57] John P. Humphrey, "The International Bill of Rights: Scope and Implementation", 17 Wm. & Mary L. Rev. 527 (1976): 529; Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 3rd ed. (Cambridge: Cambridge University Press, 2019): 59; Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff, 1991): 337; Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* 8th ed. (New York: Routledge, 2019): 353.

- Somalia's applicable laws before Somaliland declared independence in 1991, unless they are expressly repealed or repudiated by subsequent legislation. According to Article 130(5) of the Somaliland Constitution (2001): "all the laws which were current and which did not conflict with the Islamic Sharia, individual rights and fundamental freedoms shall remain in force in the country of the Republic of Somaliland until the promulgation of laws which are in accord with the Constitution of the Republic of Somaliland. At the same time, laws which conform to the Constitution shall be prepared, and each such law shall be presented within minimum time scales set by the House."

Third, the research looked at the Provisional Constitution of Somalia (2012) and reports submitted by Somalia to international human rights bodies, particularly the Committee on the Rights of the Child. The dissertation examines Somalia's legal obligations concerning the rights of children in Somaliland. Is there a legal obligation on Somalia under the CRC and general international human rights law in relation to the children in the territory under the control of the government of Somaliland? Does the lack of effective control over the territory mean Somalia has no jurisdiction over this territory? The interrelated notions of jurisdiction (*de facto* and *de jure* jurisdiction), territorial sovereignty, and State obligation are examined. It investigates Somalia's actions under the implementation obligation required by the CRC to understand if Somalia has assumed an obligation over the territory. In this regard, the Constitution of Somalia and the reports of Somalia to the Committee on the Rights of the Child are reviewed. Moreover, it studies the Committee's approach as to who has the legal obligation under the territory that the government of Somaliland controls.

The research looks at children living in Somaliland with the goal of locating (how) rights of children living in unrecognised States can be realised better. The research explains from a legal perspective what it means to say that children living in Somaliland have child rights. It conceptualises what children's rights actually entail for children living in an unrecognised State from an international law perspective. It investigates formal national law to understand how domestic laws of Somaliland and Somalia entail children's rights and how Somaliland approaches the Convention on the Rights of the Child and other relevant human rights instruments, particularly the Universal Declaration of Human Rights. It analyses how the recognised State – Somalia in this case – assumes (or not) the legal obligation under the CRC concerning the territory under the control of Somaliland by studying Somalia's legal actions, including the submission of reports to international human rights bodies and its constitutional and domestic legal framework.

There are limitations in the research as well. I did not conduct empirical research, which is an important method that could contribute to our understanding of the subject. This offers an opportunity for further research. An area that begs more research is the dynamics of *Xeer* and, in particular, its concepts and approaches to children's rights.

Selection of the case studies

Chapter 6 and Chapter 7 present two case studies: a child's right to nationality and the child's right to protection from sexual abuse. The two case studies were selected from the catalogue of children's rights in the CRC. The right to nationality is an enabling right that is crucial in accessing other rights and establishing the legal relations between the State and individuals recognised as its members. Sexual abuse is a topic mentioned in NGOs reporting on Somaliland, and as a person working in the field, I acknowledge it as a subject that can demonstrate the domestic legal system

of Somaliland. Chapter 5 provides a general overview of Somaliland's formal laws concerning children. Therefore, the study of the two cases is not exhaustive but offers a closer look at the formal laws and the interaction between different potentially applicable legal systems: formal national laws of Somaliland and Somalia, *Xeer*, Sharia and international and regional law.

1.4 Structure of the dissertation

Chapter 2 studies the status of Somaliland in the context of international legal personality, statehood and recognition. It aims to situate Somaliland in the international arena where the dichotomy of State and non-State actors dominate. Somaliland has a population, a territory and a government and its capacity to enter into international relations is contested due to the lack of recognition. Somaliland has the attributes of statehood and acts and looks like a State, but internationally, it is considered as part of Somalia. Authors employ different terms such as *de facto* State, contested State, breakaway region, self-declared republic, etc. Chapter 2 defines and adopts the term unrecognised State, and explains why it used this term.

Chapter 3 focuses on the legal obligation of Somaliland under international human rights law and in relation to children's rights. Treaty law, international customary law and rules of *jus cogens* are studied. The chapter examines Somaliland from different scenarios to investigate if there is a human rights obligation on Somaliland as an entity with effective control of a territory internationally recognised to constitute part of Somalia, a Member State of the African Union and the United Nations.

Chapter 4 examines if there is a legal obligation on Somalia under the CRC and general international human rights law in relation to the children in the territory under the control of the government of Somaliland. It examines the interrelated notions of jurisdiction (*de facto* and *de jure* jurisdiction), territorial sovereignty, and State obligation. It also investigates Somalia's actions under the implementation obligation required by the CRC to understand if Somalia has assumed an obligation over the territory. In this regard, the Constitution of Somalia and the reports of Somalia to the Committee on the Rights of the Child are reviewed.

Chapter 5 concerns the formal national law of Somaliland regarding children's rights. It examines the interactions between the *Xeer*, Sharia and the formal law and how formal laws define children's rights. Formal national laws are identified and analysed.

Chapter 6 and Chapter 7 are two case studies that focus on understanding children's right to nationality and their right to protection from sexual abuse. The domestic laws concerning these two subjects are specifically identified and legally analysed. Chapter 8 concludes by providing recommendations to stakeholders and actors at national and international levels. It is in this chapter that the main research question and sub-questions are answered.

Chapter 2 Status of Somaliland under International Law

2.1 Introduction

The chapter aims to define Somaliland from an international law perspective. What type of entity is Somaliland? Different types of international legal persons with different rights and duties exist. Explaining the types of international legal persons and how they apply to Somaliland is important for examining Somaliland's legal obligation. The concept of legal personality is essential for any legal system and is a starting point in identifying who has a legal obligation. This chapter examines international legal personality to analyse the different legal subjects in international law and their status (section 2.2). Section 2.3 defines States, unrecognised States and non-State actors. Section 2.4 explains the theories of recognition. The debate over recognition relates to whether a State's legal personality exists before recognition, and that makes it an important subject to elaborate on in this chapter. Section 2.5 focuses on Somaliland and whether it meets the requirement of statehood under the Montevideo Convention.

2.2 International legal personality[58]

Why do I want to discuss international legal personality in this chapter? Understanding international legal persons is essential in defining legal obligations. It is the starting point in elucidating who has an obligation under international law and what is the extent of that obligation. Legal personality is an important concept in legal systems. In a national law context, legal personality is often conferred by the law of persons, is part of legislation, or is determined in case law.[59] In contrast, no international legal treaty sets criteria for determining legal personality in international law.[60] Who has rights and duties under international law is a crucial question because it has consequences – it is a matter of to whom or to what entity international law applies. It is to differentiate those entities that are passive or the object of international law from subjects of international law.

International legal personality "is not an absolute concept," it is relative.[61] The ICJ definition in the *Reparation for Injuries* case states: "an international person...is...capable of possessing international rights and duties, and...has capacity to maintain its rights by bringing international claims."[62] The definition is circular.[63] Traditionally, States were considered the only legal persons,

[58] The terms international legal personality and international legal subjects are used synonymously in this dissertation.

[59] Domestic laws of different countries approach the definition of legal personality differently. What they have common, however, is having provisions or a law that determines legal persons under national law. For example, it is common that individuals and artificial legal persons (juristic persons) are subjects of national laws. However, a juristic person does not have the same rights as those of humans. Therefore, laws classify rights and duties and expressly provide to whom the national law is applicable. See Roland Portmann, *Legal Personality in International Law. Cambridge Studies in International and Comparative Law* (Cambridge: Cambridge University Press, 2010): 7.

[60] Roland Portmann, *Legal Personality in International Law. Cambridge Studies in International and Comparative Law* (Cambridge: Cambridge University Press, 2010): 5.

[61] Martin Dixon et al. *Cases & Materials on International Law* (New York: Oxford University Press, 2016): 136.

[62] Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion),1949 ICJ Reports 179; 179.

[63] James Crawford, *Brownlie's Principles of Public International Law,* (Oxford: Oxford University Press, 2012): 115.

but the development of international law in general and international criminal law and international human rights law, in particular, has transformed the notion.[64]

Others define legal personality as the ability to create international law.[65] This involves the right to conclude treaties, send diplomatic missions, the capacity to create international rights and duties, and participate in intergovernmental organisations. This narrow definition might exclude individuals, transnational corporations (TNCs), and other non-State entities. States obviously fit this definition as they have the capacity to conclude treaties, but States are not the only subject of international law. The capacity of international persons differs as they are not the same. For example, transnational corporations cannot be equated with States in terms of their capacity. The inability of companies to join international human rights treaties, for example, is not proof that companies are not international legal persons.[66] TNCs have a responsibility to protect human rights, and there is a growing debate on the obligation of transnational corporations to protect human rights.[67] The extent to which an entity enjoys rights and bears an obligation under international law may depend on its nature.

According to the ICJ: "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community."[68] For example, the legal personality of States does not equate to that of individuals, yet both are considered subjects of international law in different levels and degrees.[69]

There are various theories concerning international legal personality. Historically, State-only theory dominated the discourse. A State-only conception finds that the application of international law emanates from the consent of States.[70] In this view, international law governs relations between States.[71] Individuals and other entities fall under national law regulations. It contends that rights and obligations for individuals, for example, are derived from State consent.

Currently, it is unlikely to find an argument claiming that only States possess international legal personality. However, the point of difference rests partly with the origin and degree of the personality of non-State entities. Some legal scholars hold that international legal personality for non-State entities is derived from State acceptance.[72] The argument goes that a treaty does not

[64] Petra Perisic, "Some Remarks on the International Legal Personality of Individuals", Comparative and International Law Journal of Southern Africa 49, no. 2 (2016): 224.
[65] Martin Dixon et al. *Cases & Materials on International Law:* 136.
[66] Jernej Letnar Černič, "Corporations and Human Rights: Towards Binding International Legal Obligations?" in *Business and Human Rights*. Edited by Manoj Kumar Sinha, ed. SAGE Law. (New Delhi: Sage Publications Pvt, 2013): 17.
[67] Luigi Chiarella, "Human Rights and Transnational Companies: Responsibility without Accountability", Bocconi Legal Papers 4 (2014): 191; Jernej Letnar Černič, "Corporations and Human Rights: Towards Binding International Legal Obligations?" in *Business and Human Rights*. Edited by Manoj Kumar Sinha, ed. SAGE Law. (New Delhi: Sage Publications Pvt, 2013): 12; Fons Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen: Intersentia, 2006).
[68] International Court of Justice, Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion of April 11th 1949: 178.
[69] John P. Grant, *International Law. Law Essentials*: 35.
[70] Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual*. (Oxford: Oxford University Press, 2018): 18.
[71] Roland Portmann, *Legal Personality in International Law. Cambridge Studies in International and Comparative Law* (Cambridge: Cambridge University Press, 2010): 42.
[72] Astrid Kjeldgaard-Pedersen. *The International Legal Personality of the Individual*: 21, 22.

create rights or give individuals status as legal persons, but it imposes obligations on State Parties.[73] States are the original legal persons, but they can recognise other legal persons.[74] Therefore, international legal personality is acquired through recognition by States. In that aspect, it is derivative. This conception of recognition is based on some changes made to the State-only conception.[75] The degree of the personality of other entities should be interpreted restrictively to the extent provided by States.[76] This contention is based on the notion that States primarily make international law in a treaty or custom. States are, therefore, the sole legislators of international law, and they can accord personality by their will.[77] Proponents of this conception rely on the ICJ's Advisory Opinion in *Reparations for Injuries*, which recognised the international legal personality of the UN. The departure point of the Court was whether the States Parties had intended to grant the UN international legal personality.[78]

Another conception formulated by Kelsen contends that the international system is open. This argues that international legal personality is an *a posteriori* concept. It stresses that international law is open, and "there are no limits as to which entities can be international persons".[79] International legal personality is a consequence but not a prerequisite for holding international legal obligations.[80] In international law, personality is not a precondition for holding international obligations or authorisations but is the consequence of possessing them.[81] By contending that there are no inherent rights and obligations in regard to international legal persons, legal personality for all entities "must be established a posteriori on a case-by-case basis".[82]

A third conception is an individualistic conception, which expands international legal personality to individuals who, they argue, are the subjects whom international law ultimately protects. This individualistic conception holds the premise that an individual's legal personality is not dependent on State recognition. It postulates that international treaties and State practices are intended for human beings, so individuals are the ultimate international legal persons.[83] Under international criminal law, private individuals may be held liable for criminal offences. The function of the State

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[73] Astrid Kjeldgaard-Pedersen. *The International Legal Personality of the Individual*: 22.
[74] William Thomas Worster, "Relative International Legal Personality of Non-State Actors", Brooklyn Journal of International Law 42, no. 1 (2016): 212; Martin Dixon, *Textbook on International Law* (Oxford: Oxford University Press, 2013): 116.
[75] Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual*. (Oxford: Oxford University Press, 2018): 20.
[76] Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual*. (Oxford: Oxford University Press, 2018): 21.
[77] Roland Portmann, *Legal Personality in International Law*. Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2010): 83.
[78] ICJ's Advisory Opinion in Reparations for Injuries, 178.
[79] Roland Portmann, *Legal Personality in International Law*. Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2010): 173.
[80] Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual*. (Oxford: Oxford University Press, 2018): 26; Roland Portmann, 2010. *Legal Personality in International Law.* Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2010): 174.
[81] Roland Portmann, *Legal Personality in International Law*. Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2010): 174.
[82] Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual*. (Oxford: Oxford University Press, 2018): 26.
[83] Roland Portmann,. *Legal Personality in International Law. Cambridge Studies in International and Comparative Law* (Cambridge: Cambridge University Press, 2010): 130.

is to safeguard the interests of individuals.[84] The International Military Tribunal (IMT) at Nuremberg convicted individuals for crimes under international law. Moreover, the jurisprudence of the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda demonstrate that individuals can be held responsible for international crimes.

Other authors avoid using international legal personality and prefer to employ participants or actors to describe entities that are relevant to international law.[85] According to this school of thought, international law is a dynamic decision-making process encompassing various participants "with the object of maximising various values".[86] Therefore, there are no subjects and objects but only participants.[87]

Today, no modern conception of legal personality under international law completely rejects the potential legal personality of individuals, international organisations, transitional corporations, and non-State entities. While there is no disagreement that States are international persons, the extent and degree of international legal personality possessed by non-State entities are disputed. The different international legal persons, however, possess different legal obligations. All legal persons under international law have varying degrees of legal obligations. However, the extent of the legal obligations depends on the type of entity.

2.3 Definitions

This section defines the key concepts that are important for understanding Somaliland's status and placing it in existing classifications of international actors. Sub-section 2.3.1 starts by attempting to define what State is. It is followed by the definition of non-State actors (2.3.2) and unrecognised States (2.3.4). The definitions are working definitions adopted for the purpose of the subject of the dissertation. The objective is not to conclusively solve the existing debate on statehood under international law.

2.3.1 **Defining States**

States are key subjects of international law with rights, duties and privileges accompanying statehood. As a global body consisting of States, the UN is an institution to visit when one intends to learn about States. However, the matter is not straightforward. After the end of World War II and the formation of the UN, the number of UN Member States skyrocketed: from about 50 States in 1945 to 193 members today.[88] States have been changing throughout history, existing ones have vanished, and new States have been formed. The post-World War II period has seen a sharp increase in the number of States. The decolonisation process resulted in new States becoming independent. Also, the end of the Cold War produced the dismantling of unions (the USSR,

[84] Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual*. (Oxford: Oxford University Press, 2018): 31.
[85] Roland Portmann, *Legal Personality in International Law. Cambridge Studies in International and Comparative Law* (Cambridge: Cambridge University Press, 2010): 208.
[86] Rosalyn Higgins,' General Course', at 81 cited in Roland Portmann, *Legal Personality in International Law. Cambridge Studies in International and Comparative Law* (Cambridge: Cambridge University Press, 2010): 210; see also Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual*: 15.
[87] Conceptual Thinking about the Individual in International Law Author(s): Rosalyn Higgins Source: British Journal of International Studies, Apr., 1978, Vol. 4, No. 1 (Apr., 1978): 1-19. (Cambridge University Press): 5; Roland Portmann, *Legal Personality in International Law*: 201.
[88] https://research.un.org/en/unmembers/founders

Yugoslavia, etc.), adding more States to the international system.[89] Membership in the UN is voluntary and might not serve as conclusive evidence of statehood. The UN Member States hold the key to welcoming new members or refusing applicants.[90] The membership of the UN is open to States. The General Assembly admits new members upon the recommendation of the Security Council. It is a requirement that none of the five permanent Security Council members has voted against the membership. Hence, a veto power State can reject the membership of a State that has recognition from almost all members of the UN. In contrast, a State recognised by all UN members may voluntarily abstain from becoming a member.[91]

What are the criteria for statehood? There seems no authority is responsible for deciding whether an entity has fulfilled statehood requirements.[92] The existing States tend to be free to act on the emergence of new States.[93] No treaty governs the methods of engagement once an entity claims statehood.

The factual and legal aspects of statehood and its relationships are constantly shifting.[94] Some legal scholars contend that statehood is a question of fact, not law. The question of statehood from a legal perspective starts with the 1933 Montevideo Convention on the Rights and Duties of States. Article 1 of the Montevideo Convention states that a State shall have: (a) a permanent population, (b) a defined territory, (c) a government, and (d) the capacity to enter into relations with other States. This sub-section does not intend to replicate the already extensively discussed subject in the literature. Hence, it briefly introduces the criteria in Article 1 of the Montevideo Convention.

For a territory to be qualified as a State, a people should inhabit it permanently. Permanency does not mean the perpetual residence of the land but connotates human beings intending to settle the territory and have a claim over it.[95] The size of the population varies from small population to large countries such as India and China, with over a billion inhabitants. A population without a territory cannot establish a State. This does not mean uncontested frontiers.[96] Border disputes do not negate statehood.[97] States are territorial entities, but there is no limit on the minimum area of territory.[98] Some States are minimal, while others are located in vast areas. The geography of a State is also irrelevant in determining territory.[99] The relationship between statehood and territorial sovereignty is special because statehood relates to control over a territory.[100]

A territory with a permanent population needs to have a government to qualify as a State. Various arguments exist regarding the government's 'effectiveness,' or lack of it. Crawford stresses that

[89] Shaw, *International Law*: 198.
[90] John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo.* (Hague: The Pocket Books of the Hague Academy of International Law, 2013: 157.
[91] For example, Switzerland was not a member of the UN until 2002.
[92] It is not foreseeable for States to agree on forming a world government with sovereign powers. States are in principle equal, and each State is, to some extent, free to pursue its foreign policy without seeking approval from any other authority.
[93] James R. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2007): 45.
[94] Malcolm Shaw, *International Law*: 197.
[95] Vaughan Lowe, *International Law.* Clarendon Law Series. (Oxford: OUP Oxford, 2007): 154.
[96] John P. Grant, *International Law. Law Essentials* (Dundee: Edinburgh University Press, 2010): 41.
[97] James Crawford, *The Creation of States in International Law*: 52.
[98] Colin Warbrick, "States and Recognition in International Law" in *International Law,* edited by Malcolm D. Evans, (New York: Oxford University Press, 2003): 222.
[99] Indonesia consists of thousands of islands.
[100] James Crawford, *The Creation of States in International Law*: 48.

the point about government "is that it has two aspects: the actual exercise of authority, and the right or title to exercise that authority."[101] The government is regarded as an entity with a coherent political structure and society, with legislature, judiciary, and executive organs.[102]

The fourth criterion relates to the capacity to enter into legal relations with others States. States do not exclusively possess the capacity to enter into international relations as other international legal persons also possess it. Crawford argues that capacity "is a consequence of statehood, not a criterion for it."[103] In the event a capacity to enter into relations is absent, "the entity cannot be a state".[104] The emphasis is on the capacity of the State to exercise its executive and legislative powers as well as to conduct foreign relations through its own organs.[105] Capacity is dependent "partly on the power of the internal government of a territory, without which international obligations may not be carried into effect, and partly on the entity concerned being separate for the purpose of international relations so that no other entity both carries out and accepts responsibility for them."[106] Shaw contends that "independence is the essence of such capacity."[107] Independence seems more controversial than the rest of the Montevideo criteria. According to Shaw, independence is an "outstanding characteristic of a state."[108] A State's exercise of legislative and executive powers "must be independent of another State's legal orders."[109] Independence involves a State's right to jurisdiction over its territory and population.[110]

This dissertation defines a State as an entity that fulfils the criteria of statehood under international law. An entity's membership of the UN as an independent and sovereign State or having collective recognition is strong evidence of statehood. It is worth to emphasise that a UN membership is used in this context only to examine if an entity's status is contested or not, but it is not a pre-requisite for statehood and it is not considered as a criterion of statehood. According to Article 4(1) of the UN Charter "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." As Nicholson puts "If an entity acquires statehood solely under the recognition norm and if the entity is recognised universally, the term 'state' can be used without further qualification…"[111] This means that "a state could be created through widespread recognition."[112] The UN's membership process, which requires the approval of the UN Security Council and the General Assembly, may illustrate collective recognition.[113]

[101] James Crawford, *The Creation of States in International Law:* 44.
[102] Malcolm Shaw, *International Law*: 200.
[103] James Crawford, *The Creation of States in International Law*: 61.
[104] Malcolm Shaw, *International Law*: 202.
[105] James Crawford, *Brownlie's Principles of Public International Law*: 130.
[106] James Crawford, *The Creation of States in International Law*: 62.
[107] Malcolm Shaw, *International Law*: 202;
[108] Malcolm Shaw, *International Law*: 211;
[109] James Crawford, *Brownlie's Principles of Public International Law*: 130.
[110] Malcolm Shaw, *International Law*: 212;
[111] Rowan Nicholson, *Statehood and the State-Like in International Law* (Oxford University Press 2019): 92
[112] Jure Vidmar, "The Concept of the State and Rights of Existence", Cambridge Journal of International and Comparative Law, Vol. 4(3) (2015): 5
[113] James Crawford, *The Creation of States in International Law*: 27

2.3.2 **Defining non-State actors (NSAs)**

In the literature, non-State actors (NSAs) are defined by what they are not.[114] Defined only in the negative, the stretch of entities considered as non-State actors makes these entities "inherently a diverse group".[115] The definition given to NSAs by authors depends on their "paradigm choice"[116] and the subject of study. For instance, those studying armed groups[117] emphasise the capacity of entities to organise themselves politically in pursuit of "aims that affect vital state interests".[118] This looks from the aspect of conflicts where non-State actors are involved. Others concentrate on transnational corporations. The term includes various actors, including corporations, labour organisations, individuals, small businesses, religious groups, civil society, and armed groups (insurgents, rebels etc.).[119]

Drawing a fine line between State and non-State actors by relying on their "independence from States and State authority" is "muddied" by the fusion of the two through public-private partnerships (PPPs) where State and non-State divisions might not be that clear-cut.[120] However, the autonomy and independence of an entity from the structure of the State and government bodies might illustrate the separate existence of the non-State actor.[121] The term generally indicates organisations that do not have "a formal or legal status as a state or agent of a state, or as a constituent subunit of a state such as a province or municipality".[122]

Some authors consider unrecognised States as non-State actors.[123] While most sovereign States are UN members and can be identified,[124] we cannot classify all non-UN members as non-State actors. In this dissertation, unrecognised States are not dealt with as NSAs. A characteristic of non-State actors is that rules of public law do not govern their functioning and that they cannot create rules

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[114] Anthea Roberts and Sandesh Sivakumaran, "Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law", Yale Journal of International Law 37, no. 1 (Winter 2012): 118; Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in *Non-State Actors and Human Rights,* edited by Philip Alston (New York: Oxford University Press, 2005): 3.

[115] James Summers "Introduction" in *Non- State Actors and International Obligations: creation, evolution and enforcement,* ed. James Summers and Alex Gough (Leiden, Koninklijke Brill NV, 2018): 1: Cat 3

[116] Jean D' Aspremont, "Actors and the social practice of international law," in *Non-State Actors in International Law*, edited by Math Noortmann, August Reinisch and Cedric Ryngaert (Oxford: Hart Publishing, 2015): 11.

[117] Keith Krause & Jennifer Milliken, "Introduction: The Challenge of Non-State Armed Groups", Contemporary Security Policy, 30:2 (2009): 203.

[118] Wendy Pearlman and Kathleen Gallagher Cunningham, "Nonstate Actors, Fragmentation, and Conflict Processes", Journal of Conflict Resolution" 56(1), 2012: 3.

[119] Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in *Non-State Actors and Human Rights,* edited Philip Alston (New York: Oxford University Press, 2005): 5.

[120] Daphné Josselin and William Wallace, (eds), *Non-state Actors in World Politics* (New York: Palgrave, 2001): 2.

[121] Daphné Josselin and William Wallace, (eds), *Non-state Actors in World Politics* (New York: Palgrave, 2001): 3.

[122] Kal Raustiala, "Nonstate Actors in the Global Climate Regime" in *International Relations and Global Climate Change,* edited by Urs Luterbacher and Detlef F. Sprinz (Cambridge: Massachusetts Institute of Technology, 2001): 97.

[123] Douglas Lemke, "Do International Rules and Norms Apply to Nonstate Actors?" International Studies Review (2019): 212; Annyssa Bellal, "What Are 'Armed Non-State Actors'? A Legal and Semantic Approach" in *International Humanitarian Law and Non-State Actors*, edied by Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (The Hague: Asser Press, 2020): 36; Yael Ronen, "Human Rights Obligations of Territorial Non-State Actors", Cornell International Law Journal: Vol. 46: Issue 1 (2013): 22.

[124] Mary Ellen O'Connell, "Enhancing the Status of Non-State Actors through a Global War on Terror", Columbia Journal of Transnational Law 43, no. 2 (2005): 437.

of public law. Hence, in this dissertation, non-State actors encompass all those actors that are not States.

2.3.3 **Defining unrecognised States**

Unrecognised States,[125] *de facto* States,[126] contested States,[127] non-State territorial entities,[128] breakaway regions,[129] and self-declared republics[130] are among the different terms used to denote diverse entities. These entities share some common features and differ in other respects. Some unrecognised States are recognised by a considerable number of States – for example, Kosovo – while others do not have recognition. Providing a definition covering all of these entities is not easy.[131]

An unrecognised State is a political entity that has effective control over territory with a degree of capacity.[132] The government provides some basic governmental services such as healthcare, education, and security.[133] One of the goals of an unrecognised State is to seek international recognition as a sovereign State.[134] It has made a formal declaration of independence or has shown "aspiration for independence".[135] The majority of unrecognised States control at least two-thirds of the territory they claim.[136]

Unrecognised States do not have collective recognition and are not members of the UN.[137] Their claim of statehood is often challenged.[138] The degree of fulfilment of the Montevideo Convention by the unrecognised States differs. However, unrecognised States have a territory, a permanent population, and a government. The effective control of a government with a degree of internal sovereignty usually has been maintained over a substantial number of years.[139] The lack of *de jure*

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[125] Nina Caspersen, *Unrecognized States: The Struggle for Sovereignty in the Modern International System* (Cambridge: Polity Press, 2012): 6.
[126] Scott Pegg, *International Society and the De Facto State* (New York: Routledge, 1998): 26; Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776*, (New York: Oxford University Press, 2010): 219; Michael Schoiswohl, *Status and (Human Rights) Obligations of Non-recognised De Facto Regimes in International Law: The Case of 'Somaliland'* (Leiden: Koninklijke Brill NV, 2004): 206.
[127] Deon Geldenhuys, *Contested States in World Politics* (New York: Palgrave Macmillan, 2009): 7.
[128] Yael Ronen, "Human Rights Obligation of Territorial Non-State Actors", Cornell International Law Journal, 46 no, 1 (Winter 2013): 21-50.
[129] British Broadcasting Corporation, BBC, Somaliland profile, https://www.bbc.com/news/world-africa-14115069 last retrieved 25 April 2023.
[130] Freedom House, https://freedomhouse.org/country/somaliland, last accessed 25 April 2023.
[131] Chapter two elaborated the legal criteria of statehood under the Montevideo Convention and the role of recognition in the creation of States.
[132] Scott Pegg, *International Society and the De Facto State* (New York: Routledge, 1998): 26.
[133] Ian S. Spears, "Reflections on Somaliland & Africa's Territorial Order", Review of African Political Economy No. 95:89-98, 2003: 96; Scott Pegg, *International Society and the De Facto State* (New York: Routledge, 1998): 29.
[134] Scott Pegg, *International Society and the De Facto State* (New York: Routledge, 1998): 35.
[135] Nina Casperson*, Unrecognized States: The Struggle for Sovereignty in the Modern International System* (Cambridge: Polity Press, 2012): 11.
[136] Irene Fernandez-Molina and Matthew Porges, "Western Sahara" in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 376; Nina Casperson*, Unrecognized States: The Struggle for Sovereignty in the Modern International System* (Cambridge: Polity Press, 2012): 9
[137] Deon Geldenhuys, *Contested States in World Politics* (New York: Palgrave Macmillan, 2009): 7.
[138] Deon Geldenhuys*, Contested States in World Politics* (New York: Palgrave Macmillan, 2009): 7.
[139] Nina Casperson, *Unrecognized States: The Struggle for Sovereignty in the Modern International System* (Cambridge: Polity Pres, 2012): 7; Scott Pegg, *International Society and the De Facto State* (New York: Routledge, 1998): 26.

recognition hinders their capacity to enter into relations with other States. While the claims of an unrecognised State (with no luck in convincing the rest of the world) is that it has the capacity to enter into relations with other States, many (or all) of the existing States do not agree on that.[140]

Some of the unrecognised entities have been called unlawful and in violation of *jus cogens* rules by the UN Security Council and faced the sanction of non-recognition.[141] The unlawfulness is not due to the unilateral declaration of independence, but it is connected to "use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)."[142] Examples of these cases include Katanga (1960),[143] Southern Rhodesia (1965),[144] the Turkish Republic of Northern Cyprus (1983),[145] and the Republic of Srpska (1992).[146] The International Court of Justice states that declarations of independence that are "connected with the unlawful use of force or other egregious violations of norms of general international law, in particular, those of a peremptory character (*jus cogens*) are illegal."[147] There are others whose declarations of independence are not considered unlawful. Somaliland and Kosovo are examples of cases of unrecognised States that are not characterised as unlawful. International law neither prohibits nor permits a declaration of independence.

Nina Casperson defines an unrecognised State as an entity that has the following characteristics:[148]

- the entity has achieved *de facto* independence.
- its leadership is seeking to build further State institutions and demonstrate its own legitimacy.
- the entity has sought, but not achieved, international recognition.
- it has existed for at least two years.

Caspersen's definition captures the situation of unrecognised States. It also demonstrates the difficulties in defining unrecognised States. For example, the Sahrawi Arab Democratic Republic (SADR) does not control the vast majority of the territory it claims, but is a member of the African Union.[149] Kosovo is not a member of the UN, but it is recognised by more than half of the UN Member States.

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[140] Deon Geldenhuys, *Contested States in World Politics* (New York: Palgrave Macmillan, 2009): 7; Scott Pegg: 27

[141] John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo.* (Hague: The Pocket Books of the Hague Academy of International Law, 2013): 28; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010: 437-438, para. 81. See also, James R. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2007): 160; Alexander Orakhelashvili, Akehurst's *Modern Introduction to International Law* (New York: Routledge, 2019): 85-86: 30.

[142] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, 437-438, para. 81.

[143] Resolution 169 (1961) / [adopted by the Security Council at its 982nd meeting], of 24 November 1961.

[144] UN Security Council, Resolution 216 (1965), at its 1258th meeting], of 12 November 1965; UN Security Council, resolution 217 (1965), adopted at its 1265th meeting], of 20 November 1965.

[145] UN Security Council, Resolution 541(1983), adopted at its 2500th meeting. 18 November 1983.

[146] UN Security Council, Resolution 787 (1992), adopted at its 3137th meeting. 16 November 1992.

[147] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010: 437-438, para. 81;

[148] Nina Casperson, *Unrecognized States: The Struggle for Sovereignty in the Modern International System* (Cambridge: Polity Pres, 2012): 6.

[149] Irene Fernández-Molina and Matthew Porges, "Western Sahara" in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 376; Nina Casperson, *Unrecognized States: The Struggle for Sovereignty in the Modern International System* (Cambridge: Polity Pres, 2012): 8.

There are unrecognised States that do have State-like institutions capable of delivering services to a permanent population, securing a defined territory, and declaring independent statehood and prolonged separate existence.[150] Others do not have proper State-like institutions and are not in control of all the territories they claim.

In my view, the main characteristic of unrecognised States is their aspiration to full independence and *de jure* recognition combined with effective control over a territory and proof of maintained existence, to distinguish them from short-lived separatists, insurgents, and non-State territorial actors. The aspiration to seek independence differentiates unrecognised States from "a group which have de facto territorial control of a given area but do not seek sovereign statehood."[151] An unrecognised State has all the attributes of a State and manifests effectiveness and internal sovereignty, yet it has not attained full external independence accepted by other States and the UN.

In this dissertation, an unrecognised State is defined as an entity that fulfils the criteria of statehood in the Montevideo Convention, has declared independence, and has not gained collective recognition or UN membership. As mentioned above, UN membership is not a prerequisite for statehood, and there have been occasions where sub-national entities were members of the UN. For example, "Belarus (Byelorussia) and Ukraine were members of the UN when they were still Soviet republics."[152] Also, joining the UN is a voluntary act, and a State may abstain from joining as Switzerland did until 2002. Therefore, not being a UN member does not mean an entity is not a State. However, when the UN accepts an entity seeking international recognition for statehood as an independent State, it is evidence of collective recognition.

One may argue that the adjective "unrecognised" implies that States are of two categories: one that is fully a State and one that is half State, or existence of various levels of statehood. However, no usage of any term is without objections. Most authors add a modifier before the term "State" in relation to contested entities claiming statehood, except for the scholars who prefer to call them non-State actors.[153] The latter seems to be the most difficult one to use. For example, treating Kosovo, an entity recognised by half of the UN member States, as a non-State actor does not seem to fully reflect the status of Kosovo. One cannot also, without controversy, label it as a State due to the contested nature of Kosovo's claim of statehood. It is because of these difficulties that modifiers are put before "State" (e.g. *de facto* State, unrecognised State, contested State) which stress that these entities are contested.

To discuss the anomalies in international human rights law as applicable to children living in Somaliland, this study therefore uses the above mentioned definition of unrecognized States. In particular, the purpose of this study is to analyse children's rights in an entity that claims and acts like a State but is not recognised (and many argue is not) a State. It is due to this anomaly that

[150] Nina Casperson, *Unrecognized States: The Struggle for Sovereignty in the Modern International System* (Cambridge: Polity Pres, 2012): 6-7.
[151] Scott Pegg, *International Society and the De Facto State* (New York: Routledge, 1998): 33.
[152] Jure Vidmar, "UN Membership and the State Requirement: does 'State' Always imply 'Statehood'?" in *Max Planck Yearbook of United Nations Law,* edited by Erika de Wet et al. (Leiden: Brill/Nijhoff, 2021): 205
[153] Scott Pegg, "Twenty Years of de facto States Studies: Progress, Problems, and Prospects", Oxford Research Encyclopedia of Politics. (2017): 14-15

Somaliland does not fit the State and non-State binary that this research looks at the children's rights in such a situation.[154]

I classify unrecognised States into the following three categories:

1. Entities formed in violation of *jus cogens* rules: examples are Katanga (1960), the Turkish Republic of Northern Cyprus (1983) and the Republic of Srpska (1992).
2. Entities formed due to separation or secession from a UN Member State through a declaration of independence without violating *jus cogens* rules: examples are Somaliland and Kosovo.
3. Entities formed in relation to the decolonisation process: examples are Palestine and the Sahrawi Arab Democratic Republic.

2.4 Theories of recognition of States

What is the impact of recognition on statehood? Scholars disagree on the effect of recognition on statehood. Two leading theories that emerged from the "great debate" are declaratory and constitutive theories. These theories, opposite to one another, dominate the discourse on the recognition of States.[155] The main argument between the two theories "lies in the question whether the legal personality of a State exists prior to recognition."[156] The existence of legal personality is a fundamental question for the core subject of the dissertation, the legal obligation of Somaliland.

The main arguments of the two theories are briefly outlined in the following sub-sections.

2.4.1 **Declaratory theory**

The declaratory theory holds that an entity becomes a State when it satisfies "certain objective tests".[157] The declaratory theory draws its main argument from the Montevideo Convention, which stipulates that a State's existence is independent of the recognition of other States.[158] It postulates that for the State to exist it should fulfil the criteria of statehood. The Arbitration Commission of the Conference on Yugoslavia in Opinion 1 concurs with this position by stating: "the effects of recognition by other states are purely declaratory".[159] Moreover, the declaratory theory is also backed by national courts in various jurisdictions (e.g. The West Germany Constitutional Court, 1973 and the Supreme Court of Canada, 1998).[160]

According to the proponents of this theory, recognition is a political decision made by the executive branch of the government, and the existence and legal personality of a new State is independent of recognition.[161] Statehood is "determined by the fact of their actual existence."[162] A State is subject to international law as a legal person without the approval or assent of other States. Existing States do not have superseding powers to overrule the declaration of independence made

[154] Shpend Kursani, "Reconsidering the Contested State in Post-1945 International Relations: An Ontological Approach," International Studies Review, Volume 23, Issue 3, (2021): 753
[155] This dissertation does not discuss recognition of governments.
[156] Ti-Chiang Chen, *The International Law of Recognition* (New York: Frederick A. Praeger, Inc., 1951): 16.
[157] Ti-Chiang Chen, *The International Law of Recognition* (New York: Frederick A. Praeger, Inc., 1951): 4.
[158] Montevideo Convention on the Rights and Duties of States, 1933; Art. 3.
[159] The Arbitration Commission of the Conference on Yugoslavia, Opinion 1: paragraph 1(a).
[160] Rowan Nicholson and Thomas D. Grant, "Theories of state recognition" in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 27.
[161] James Crawford, *The Creation of States in International Law*; 22
[162] Ti-Chiang Chen, *The International Law of Recognition* (New York: Frederick A. Praeger, Inc., 1951): 4.

by an entity that fulfils the Montevideo requirements, and statehood is achieved through the fulfilment of criteria laid down by international law.[163] It contends that recognition merely acknowledges an already existing State because statehood is acquired through the operation of law. Capacity is acquired "by virtue of a particular factual situation".[164] The declaratory theory does not reject the consequence of recognition to the recognised State. It contends that recognition is a "strong evidence of the existence of the new regime".[165] The exercise of diplomatic relations by a State with other States is a consequence of statehood but not a criterion.[166] A State might refuse to engage with other States, yet its existence is not dependent on its international rapport or even the membership of intergovernmental organisations such as the UN.

2.4.2 **Constitutive theory**

The constitutive theory contends that the act of recognition creates a new State irrespective of how the entity gained independence.[167] According to the constitutive theory, a State does not exist unless the existing States recognise it. Oppenheim holds that a: "State is, and becomes, an International Person through recognition only and exclusively."[168] This theory argues that a State may exist from a constitutional law perspective or may have *de facto* existence, "but not juridically".[169] The factual existence of an entity does not mean it has an international legal personality as a State.

In Kelsen's view, recognition consists of both "a political act and a legal act".[170] Recognition involves the political act of a recognising State to engage and enter into political relations with another State[171] – often a new one. International law does not obligate a State to enter into political relations such as receiving and sending diplomats.[172] The legal act of recognition is different from the political one[173] because the consent of existing States is a criterion for a new State to become an international legal person.[174] A State's legal personality is relative, and recognition is reciprocal. The new States need to consent to obligations before they are required to enforce them.

Lauterpacht presents alternative arguments and contends that: "existing States are under the duty to grant recognition".[175] The duty to recognise put forward by Lauterpacht fails to get support from State practice and is not adhered to by many scholars.

Kelsen says it is a "principle of jurisprudence that in the province of law there are no absolute, directly evident facts, facts "in themselves," but only facts established by the competent authority

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[163] Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (London: Praeger, 199): 4.
[164] Malcolm Shaw, *International Law*: 446.
[165] Ti-Chiang Chen, *The International Law of Recognition* (New York: Frederick A. Praeger, Inc., 1951): 6.
[166] Eva Erman, "The recognitive practices of declaring and constituting statehood", International Theory 5(1), 2013: 38: Ti-Chiang Chen, *The International Law of Recognition* (New York: Frederick A. Praeger, Inc., 1951): 16.
[167] Malcolm Shaw*, International* Law: 445
[168] Robert Jennings and Arthur Watts, *Oppenheim's International Law* (Essex: Longman, 1992): 121.
[169] Ti-Chiang Chen, *The International Law of Recognition*: 130.
[170] Hans Kelsen, "Recognition in International Law, Theoretical Observations", The American Journal of International Law , Oct., 1941, Vol. 35, No. 4 (Oct., 1941): 605.
[171] ibid: 605
[172] ibid
[173] ibid: 606
[174] Malcolm Shaw, *International Law*: 446
[175] Hersch Lauterpacht, "Recognition of States in International Law", The Yale Law Journal, Vol. 53, No. 3, (1944): 385.

in a procedure prescribed by the legal order."[176] Full international legal personality of States "cannot be automatic".[177] The actions of existing States determine the statehood of the putative State.[178] International law should decide what a State is.[179] Only in recognition does an entity become a member of the international community, is bound by international obligations, and can claim rights.[180] The absence of recognition makes an entity a non-State.[181] According to constitutive theory, an unrecognised State "cannot claim any rights any right which a member of the international community has as against other members."[182] Under international law, there are no "special organs authorised to establish in a legal procedure the existence of concrete facts as determined by the law." Therefore, existing States are left to make the determination,[183] and existing States have the discretion to grant or refuse recognition.[184]

A declaration of independence does not suffice for an entity to become a State with an international legal personality that is a member in the international community.[185] Recognition proves that a community has fulfilled the conditions of statehood.[186] The unrecognised State does not exist vis-à-vis the recognising States before recognition is granted.[187] It is the recognition that brings the entity to a legal existence.[188]

2.4.3 **Theory and practice of recognition**

Shaw's view is that: "actual practise leads to a middle position between these two perceptions".[189] States have not taken a uniform stance regarding the recognition of new States. The executive branch recognises the recognising State, which instils elements of geopolitics in the process.[190] No clear formal procedure formulates how a new State should get recognition.[191] In the absence of a clear legal procedure independent of direct political interests, recognition is shrouded by political influence. Unrecognised States are contested territories.[192] A State might withhold recognition for

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[176] Hans Kelsen, *Recognition in International Law*: 606.
[177] Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947): 2; James Crawford, *Creation of States in International Law* (Oxford: Oxford University Press, 2003): 20.
[178] Thomas D. Grant, *The Recognition of States*: 2.
[179] Hans Kelsen, *Recognition in International Law*: 606.
[180] Robert Jennings and Arthur Watts, *Oppenheim's International Law* (Essex: Longman, 1992): 120.
[181] Thomas D. Grant, *The Recognition of States*: 2.
[182] Robert Jennings and Arthur Watts, *Oppenheim's International Law* (Essex: Longman, 1992): 129.
[183] Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947): 2; James Crawford, *Creation of States in International Law* (Oxford: Oxford University Press, 2003): 20.
[184] Thomas D. Grant, *The Recognition of States*: 2.
[185] Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 130.
[186] Hans Kelsen, *Recognition in International Law*: 608; Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 130.
[187] Hans Kelsen, *Recognition in International Law*: 608.
[188] Hans Kelsen, *Recognition in International Law*: 609.
[189] Malcolm Shaw, *International Law*: 446. Other authors also argue that the theories have not helped establish an enhanced understanding of the subject. See Ian Brownlie, "Recognition in Theory and Practice", British Yearbook of International Law, Volume 53, Issue 1, 1982: 197.
[190] Edward Newman & Gëzim Visoka (2021): "The Geopolitics of State Recognition in a Transitional International Order", Geopolitics: 1.
[191] Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776*, (New York: Oxford University Press, 2010): 166; John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*. (Hague: The Pocket Books of the Hague Academy of International Law, 2013): 35.
[192] Edward Newman & Gëzim Visoka (2021): "The Geopolitics of State Recognition in a Transitional International Order", Geopolitics: 4.

political reasons,[193] irrespective of the factual criteria on the ground or even the actions of other States who might accord recognition to the State in question. An objective analysis of law does not always direct the executive branches of States.

In the decolonisation formation of States, the focus was the pre-existing rights of the State gaining independence from the colonial power irrespective of its capacity.[194] Once independence was secured, the former colony became a sovereign State automatically.[195] However, the situation for other circumstances, such as those of the post-Soviet breakup and Yugoslavia,[196] as well as the declaration of independence of other entities (for example, Somaliland, South Ossetia, Nagorno-Karabakh Republic etc.), have been less uniform.

Unrecognised States struggle to fully engage with existing States. All States do not accord their diplomats immunity and privileges, and they are not permitted to join the UN. At the same time, unrecognised States exercise authority and power over a territory. Even when another State has a counterclaim[197] – as is often the case – it is the unrecognised State that controls the vast majority of the territory and provides services to its population.[198]

Non-recognition has consequences internationally and in national law contexts.[199] Recognition is a foreign policy goal for unrecognised States.[200] If granted, it helps boost the ability of the State to interact with the international community as an equal State with rights and duties similar to those of any other sovereign and independent State.[201] Lack of recognition hinders an entity from effectively exercising rights and duties.[202] For example, Somaliland faces challenges in accessing foreign aid and loans directly[203] and participating in global and regional intergovernmental organisations."[204] Recognition facilitates access to aid and participation in international trade.[205] Due to its lack of recognition, Somaliland cannot receive loans from global financial institutions such as the International Monetary Fund (IMF), and States do not provide direct aid to the government of Somaliland.[206] International humanitarian and developmental support is given in

[193] Ian Brownlie, "Recognition in Theory and Practice", British Yearbook of International Law, Volume 53, Issue 1, 1982: 198.
[194] Mikulas Fabry, *Theorizing State Recognition:* 167; Peter Radan "Recognition of States in International Law" in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 48.
[195] Mikulas Fabry, *Recognizing States*: 148.
[196] Nina Caspersen, "The Pursuit of International Recognition after Kosovo", Global Governance 21, no. 3 (2015): 395.
[197] Eva Erman, "The recognitive practices of declaring and constituting statehood", International Theory (2013) 5(1): 37.
[198] Nina Caspersen, "States without sovereignty: imitating democratic statehood" in *Unrecognised States in the International System,* edited by Nina Caspersen and Gareth Stansfield (New York: Routledge, 2011): 74.
[199] Ian Brownlie, *Recognition in Theory and Practice*: 198; Rowen Nicholson and Thomas D. Grant, "Theories of Recognition" in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 26-27.
[200] Peter Radan "Recognition of States in International Law" in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 49.
[201] Visoka et al. (eds), *Routledge Handbook of State Recognition* eds. (London: Routledge, 2020): 1-2.
[202] Malcolm Shaw, *International Law*: 448.
[203] It is not the focus of this dissertation to investigate the role of aid and loans in development or underdevelopment.
[204] Mikulas Fabry, *Recognizing States*: 222
[205] Deon Geldenhuys, *Contested States in World Politics* (New York: Palgrave Macmillan, 2009): 22; Stephen D. Krasner, "Recognition: Organised Hypocrisy Once Again", International Theory (2013) 5:1: 175.
[206] Sarah Phillips, *When There Was No Aid: War and Peace in Somaliland*. (New York: Cornell University Press, 2020): 25.

various ways, including via international non-governmental organisations (INGOs), UN agencies, or the establishment of funds co-managed by the donor countries.[207]

States make engagement with Somaliland's government not as a sovereign State, but as a *de facto* entity with physical control over a territory and population therein. Diplomats who visit Somaliland engage with it, and Western countries contribute to Somaliland's elections.[208] Ethiopia, Turkey, and Djibouti have consular offices in Hargeisa. The UK is the only UN Security Council permanent member that has an office in Hargeisa. The government of Seychelles concluded a prison transfer agreement with Somaliland in 2011.[209] Ethiopia has entered with Somaliland several trade agreements.[210] In 2016 Somaliland signed a concession agreement with a United Arab Emeritus (UAE) owned company to operate Berbera port. Moreover, the UAE and Somaliland agreed for the UAE to establish a military base in Berbera, despite rejections from Somalia.[211] These are examples of diplomatic and non-diplomatic engagements short of *de jure* recognition.

None of the theories explains the situation of unrecognised States. Unrecognised States cannot be non-existent empirically (as constitutive theory might allude). Also, their existence and statehood are challenged and constrained by denial or lack of recognition.[212] One may argue that isolation from the international system is not a limitation of statehood as a State might choose, or be forced, to be isolated. However, a sanctioned or isolationist State is not denied from joining international treaties as the case is for unrecognised States.

The paradox related to the legal consequence of recognition remains challenging. If State A sees Somaliland as a part of Somalia, then State A treats anything that happens between Somaliland and Somalia as internal affairs – even a war between the parties would mean a civil war to State A. The same is true for intergovernmental organisations such as the UN and the African Union. In terms of human rights violations, State A might still deal with Somaliland as a region within Somalia and therefore deal with Somalia on matters happening in Somaliland if, for instance, citizens of State A are persecuted in Somaliland. The difficulty is then Somalia's inability to impose its will on Somaliland as the latter considers itself an independent State that has no obligation to listen to the authorities of Somalia.

Declaration of independence is more complicated when the predecessor State does not consent.[213] In Eritrea, South Sudan, and East Timor, the path to statehood and membership in the UN was consensual because Ethiopia, Sudan and Indonesia assented to the statehood of these new States,

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[207] Sarah Phillips, *When There Was No Aid: War and Peace in Somaliland*. (New York: Cornell University Press, 2020): 71.

[208] Scott Pegg, "Somaliland," in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 421; Deon Geldenhuys, *Contested States in World Politics*: 142.

[209] Toby Fenwick, "The Seychelles-Somaliland Prisoner Transfer Agreement: A Case of Implicit Recognition", African Journal of International and Comparative Law 27, no. 3 (2019): 405.

[210] Benjamin R. Farley, "Calling a State a State: Somaliland and International Recognition", Emory International Law Review 24, no. 2 (2011): 788-789; Valentin Robiliard, "Somaliland: A Struggle for Recognition", McGill International Review 2014: 29.

[211] Scott Pegg, "Somaliland" in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 422,

[212] Deon Geldenhuys, *Contested States in World Politics*: 47; Sarah Phillips, *When There Was No Aid: War and Peace in Somaliland*. (New York: Cornell University Press, 2020): 11.

[213] Often the original States contest the new state seeking recognition. See Deon Geldenhuys*, Contested States in World Politics* (New York: Palgrave Macmillan, 2009): 24.

respectively. In these circumstances, recognition and UN membership were swift and happened within days after mutual consent was reached.[214] A unilateral declaration of independence without mutual agreement is mostly unrecognised.[215] In the case of Somaliland, Somalia has international recognition as the legitimate State, and recognition of Somaliland is universally withheld.[216] In other unrecognised States, such as Kosovo and Abkhazia, there are a number of States that granted recognition.[217] Nevertheless, recognition does not mean the same thing in all circumstances.[218] Over 100 States recognise Kosovo,[219] but it is not a member of the UN, and a substantial number of States refuse to accept Kosovo as a State.[220] Palestine does not have universal recognition,[221] but the UN General Assembly granted Palestine a "Non-Member Observer State" status.[222] This is an extra-Charter process that does not mean recognition of the State by the UN or the Member States who voted in favour of admitting Palestine to the status.[223]

The controversy surrounding recognition is reflective of the different paradigms of international legal personality explained in section 2.2. The scholars and practitioners who emphasise States' consent as the central most important pillar of international law consider recognition as a constitutive of the creation of States.[224]

It is generally agreed that unlawful use of force does not result in statehood, and an entity created in violation of international law will not be recognised.[225] In the case of Kosovo, the ICJ stated that declarations of independence are illegal if they breach *jus cogens*. The Court took Southern Rhodesia, the Turkish Republic of Northern Cyprus, and the Republika Srpska as examples since the UN Security Council expressly called these declarations illegal "at the time that those declarations of independence were made".[226] The illegality of the independence of these entities is "connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character."[227] Katanga's attempt to secede from the Congo in 1960 is another example of the UN expressly refuting the declaration of independence due to its unlawfulness.[228]

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[214] James Summers, "Pathways to Independence and Recognition" in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 129

[215] James Summers, "Pathways to Independence and Recognition" in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 129

[216] Somaliland's declaration of independence is made without the consent of Somalia, which continues to invoke the territorial integrity of the Somali Republic.

[217] Deon Geldenhuys, *Contested States in World Politics*: 25.

[218] Ian Brownlie, *Recognition in Theory and Practice*: 203.

[219] Lista e Njohjeve - MPJD | MFAD (mfa-ks.net), last accessed 9 March 2023.

[220] John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*: 64.

[221] John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*: 64.

[222] UN General Assembly, Status of Palestine in the United Nations, Resolution 67/19, UN Doc. A/RES/67/19, 29 November 2012.

[223] Jure Vidmar, "UN Membership and the State Requirement: does 'State' Always imply 'Statehood'?" in *Max Planck Yearbook of United Nations Law,* edited by Erika de Wet et al. (Leiden: Brill/Nijhoff, 2021).

[224] Constitutive theory often has a positivist outlook. See John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*: 48-49.

[225] John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*: 56.

[226] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010: 437, paragraph 81.

[227] ibid, paragraph 81

[228] John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*: 424.

2.5 What is Somaliland?

2.5.1 **Introduction**

This section explores the status of Somaliland. It examines the fulfilment of the Montevideo Convention requirements by Somaliland. The purpose is not to study the legality of Somaliland's independence under international law. The conditions laid down in the Montevideo Convention are analysed to demonstrate whether Somaliland has a defined territory, a permanent population, a government, and the capacity to enter into relations. The effect of the principle of *uti possidetis* and the declaration of independence on Somaliland's claim of statehood are discussed.

2.5.2 **Fulfilment of the Montevideo Convention by Somaliland**

2.5.2.1 ***The territory of Somaliland***

Somaliland was a British Protectorate and gained independence on 26 June 1960. About 30 countries sent congratulatory notes, but Somaliland did not apply for UN membership, and immediately joined a union with Somalia on 1 July 1960.[229] Somaliland declared the restoration of independence from Somalia in May 1991 and sought to revoke the union of Somalia and Somaliland.[230] Somaliland proclaimed that by rescinding the merger it regained its pre-union independence status.[231] The claimed territory is the same area as that of the former Somaliland Protectorate, whose boundaries were agreed on by treaties and protocols entered into by the UK, Italy, France, and Ethiopia.[232] Somaliland is in control of the majority of the land defined in the colonial borders.[233] However, there is a territorial dispute between Somaliland and the Puntland administration of Somalia over areas covering the Sool region, east of the Sanaag region, and the Buhoodle district.[234] In February 2023, a war erupted in Las Anod, the capital of Sool, where local clan militias took control from Somaliland. Despite this territorial dispute, Somaliland has a defined territory with known frontiers.[235] The requirement of a defined territory does not require a minimum area of territory, nor does the territory need to be undisputed.[236] Border disputes are common even in recognised States. Government presences exist in areas under Somaliland where services are provided and public order enforced.

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[229] See Chapter 1 for the history of Somaliland.

[230] I. M. Lewis, *A Modern History of the Somali: A Nation and State in the Horn of Africa* (Bodyell & Brewer, 2002): 282.

[231] Somaliland Constitution, art. 1(1).

[232] Article 2(1) of Somaliland Constitution defines the territory of the Republic of Somaliland as "the same area as that of the former Somaliland Protectorate and is located between Latitude 8' to 11' 30' north of the equator and Longitude 42' 45 to 49' East; and consists of the land, islands, and territorial waters, above and below the surface, the airspace and the continental shelf." See Deon Geldenhuys, *Contested States in World:* 132; Scott Pegg, "Somaliland" in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 417-418.

[233] Somaliland claims a total area of 176,200 sq km.

[234] Markus Virgil Hoehne, *Between Somaliland and Puntland: Marginalization, Militarization and Conflicting Political Visions* (Nairobi: Rift Valley Institute, 2015: 36; Deon Geldenhuys, *Contested States in World Politics*: 135.

[235] There is no evidence that the territorial dispute at the margins of the territory has reduced the territory of Somaliland.

[236] Peter Radan, "Recognition of states in international law" in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 50; James Crawford, *Brownlie's Principles of Public International Law*: 128.

2.5.2.1.1 ***The principle of uti possidetis juris***[237]

The State that claims the territory under the control of an unrecognised State primarily bases its argument on territorial integrity and sovereignty. The concept of *uti possidetis juris* is a general principle of law[238] that is linked to Africa's State formation. This principle entails States emerging from decolonisation to retain the colonial set borders.[239] When African countries gained independence from the colonial powers, intra-State grievances and irredentist movements demanded changes in how the continent was divided without the consent of Africans.[240] In response to the question of border disputes, the Organisation of African Unity – now replaced by the African Union (AU) – issued the Cairo Declaration, which stipulates that African countries "respect the frontiers existing on their achievement of independence".[241] Also, Article 4 (b) of the Constitutive Act of the AU states that the "respect of borders existing on achievement of independence" includes the principles of the Union.[242]

The tension between a declaration of independence made by a new State and a State's right to its territorial integrity is a challenge facing any new African State not seeking independence from colonial rule. Africa consists of diverse ethnicities and tribes grouped in States by the colonials without their consent.[243] The question of territory and boundaries is a heated political debate and a source of inter-State and intra-State conflicts.

Somaliland claims a colonial and defined territory of the British Protectorate of Somaliland.[244] The boundaries of the British Protectorate were established by treaties and protocols entered into by the UK, Italy and France, and Ethiopia.[245] Additionally, Somaliland stresses the five days between gaining independence from the UK on 26 June 1960 and joining a union with Somalia on 1 July 1960.[246] Hence the main argument of Somaliland is that it returns to the '*status quo ante'* and its declaration of independence does not violate the *uti possidetis juris* principle of the African

[237] See, Frontier Dispute Case (Burkina Faso v Mali) (note 9) para 20; Badinter Commission, Opinion No. 3 (11 January 1992) para 3, third principle.
[238] John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*. (Hague: The Pocket Books of the Hague Academy of International Law, 2013): 226.
[239] Steven R. Ratner, "Drawing a Better Line: UTI Possidetis and the Borders of New States" The American Journal of International Law , Oct., 1996, Vol. 90, No. 4 (Oct., 1996): 590; Anne Peters. "The Principle of Uti Possidetis Juris: How Relevant is it for Issues of Secession?" in *Self-Determination and Secession in International Law*, edited by Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov. (Oxford: Oxford University Press, 2014: 99.
[240] Charles Riziki Majinge "Uti Possidetis and State Secession In International Law: An Examination Of The Evolving Legal Practice In Africa", African Yearbook of International Law, African Foundation for International Law, 2013: 81-82.
[241] Organisation of African Union, Order Disputes Among African States, Ahg/Res. 16(I), July 1964: Paragraph 2.
[242] Constitutive Act of the African Union, Art. 4(b).
[243] Glen Anderson, "Unilateral Non-Colonial Secession and the Criteria for Statehood in International Law", Brooklyn Journal of International Law 41, no. 1 (2015): 19; John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*: 125.
[244] Alison K . Eggers, "When is a State a State? The Case for Recognition of Somaliland", 30 B . C. Int' l & Comp. L. Rev . (2007): 218; Marleen Renders. *Consider Somaliland: State-Building with Traditional Leaders and Institutions. African Social Studies Series*. (Leiden: Brill, 2012): 15.
[245] Deon Geldenhuys*, Contested States in World Politics*: 132; Scott Pegg, "Somaliland," in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 417-418.
[246] Michael Schoiswohl, *Status and (Human Rights) Obligations of Non-recognised De Facto Regimes in International Law: The Case of 'Somaliland'* (Leiden: Koninklijke Brill BV, 2004): 153; Scott Pegg, "Somaliland," in *Routledge Handbook of State Recognition,* edited by Visoka et al. (London: Routledge, 2020): 418.

Union.[247] An AU Fact-Finding Mission found that: "Somaliland's search for recognition is historically unique and self-justified in African political history".[248] The Mission cites the colonial era boundaries and states Somaliland's case is not "opening a pandora's box",[249] which means Somaliland's territorial claim does not violate the colonial borders. The report of the Mission was never presented to the heads of State and governments of the African Union.

The "respect of borders existing on achievement of independence" stated in the Constitutive Act of the AU protects the territorial integrity of States, and as the ICJ found in its *Kosovo* case: "the scope of the principle of territorial integrity is confined to the sphere of relations between States".[250] The act of withdrawing from a union that formed a single State or secession does not amount to relations between States *per se*. Therefore, even though Somaliland insists that it falls within the confines of the principle of *uti possidetis juris*, its declaration of independence cannot be interpreted to violate territorial integrity taking into account the Court's jurisprudence.[251]

2.5.2.2 ***The population in Somaliland***

According to the latest government estimates, the population of Somaliland is 5.7 million people.[252] There is a citizenship law that defines the nationals associated with the territory.[253] Although nomadic communities cross borders across the neighbouring countries, there is a population permanently linked to the territory. The vast majority of the population inhabits territories under the control of the government of Somaliland.

2.5.2.3 ***The government of Somaliland***

Somaliland has a presidential form of government with three separate branches. The people elect the president, the members of the House of Representatives and the local councils through a one-person, one-vote system.[254] The international observers mark these elections as smoothly run and credible.[255] The courts apply laws enacted or endorsed by the Somaliland parliament. The presence of an effective government capable of making and enforcing laws is a crucial feature of Somaliland. Services are provided, and branches of government exert jurisdiction in terms of conflict resolution activities carried out by the judiciary and the law-making powers of the Somaliland parliament. The government has a military, border guards, coastal guards, and a collective tax system. Somaliland has its own currency, the Somaliland Shilling.

2.5.2.4 ***Somaliland: the capacity to enter into relations with other States***

The most controversial criterion of statehood is the capacity to enter into relations with other States. The capacity to enter into legal relations with States[256] "depends upon the willingness of

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[247] Deon Geldenhuys, *Contested States in World Politics*: 135.
[248] Resumé: AU Fact-Finding Mission to Somaliland (30 April to 4 May 2005: paragraph 8.
[249] ibid,
[250] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 437, paragraph 80.
[251] The dissenting opinion of the Court argues that the Declaration of Independence has intended consequences and implications, and the Court should have looked at that angle as well.
[252] Republic of Somaliland, Country Profile 2021: 13.
[253] See Chapter 6 for the details of Somaliland Citizenship Law
[254] The Constitution establishes a multiparty system. Since 2001 when the constitution was approved, Somaliland has conducted a series of elections in 2002, 2003, 2005, 2012, 2017 and 2021. The president, members of the House of Representatives, and local councils are elected.
[255] Scott Pegg and Michael Walls, "Back on track? Somaliland after its 2017 presidential election", African Affairs, Volume 117, Issue 467, April 2018: 327.
[256] Malcolm Shaw, *International Law*: 202.

other states to allow particular interests as international voice".[257] The ability to enter into relations with other States requires the competence of the entity to make a legal representation to other States.[258] The capacity consists of internal sovereignty and independence.[259] The two topics are separately discussed below.

2.5.2.4.1 Internal sovereignty

The argument in favour of Somaliland's statehood relies heavily on the colonial history and the nature of the union**.** Somaliland enjoyed independence in the five days between 26 June and 1 July 1960 when Somaliland joined the union.[260] The creation of the Somali Republic on 1 July 1960 was a result of a voluntary unification between Somaliland, which gained independence from the UK, and Somalia, a former Italian colony under the UN Trusteeship.[261] From this merger, Somaliland withdrew unilaterally in 1991.[262] Since the declaration of independence, Somaliland has embarked on a State-building process. The re-emergence of Somaliland in 1991 happened in an era after Somalia's central government collapsed, and the country descended into a state of disarray, including the breakdown of public order.[263] There was no effective government in Somalia to consent to the decision of Somaliland. Somalia was without a government until 2001, when a Transitional National Government was formed in the neighbouring country of Djibouti.[264]

The State formation process of Somaliland has undergone various levels starting from the declaration of independence in 1991 and approval of a constitution through a national referendum in 2001, followed by a series of elections. Internal legitimacy is firmly embedded in the practice of holding elections allowing the public to grant elected officials a mandate. The democratic system has its challenges and flaws, yet it demonstrates internal sovereignty.[265]

Constitutions are key in stipulating whether or not an entity has sovereignty. Somaliland's Constitution stresses that the Republic of Somaliland is "a sovereign and independent country"[266] and that the sovereignty resides with the people. Article 10 lists a number of principles that should guide the foreign policy of Somaliland. These include for the government to observe all treaties and agreements entered into by the former State of Somalia before Somaliland proclaimed independence unless they conflict with the interests and concerns of the Republic of Somaliland. Somaliland also recognises and guarantees to endorse the United Nations Charter and international law. It upholds the peaceful resolution of political disputes and territorial integrity of other

[257] Hilary Charlesworth and Christine Chinkin, "*The boundaries of international law: A feminist analysis, with a new introduction",* cited in Martin Dixon, et al., *Cases & Materials on International Law*, 6th ed, (New York: Oxford University Press, 2016): 139.
[258] Glen Anderson, "Unilateral Non-Colonial Secession and the Criteria for Statehood in International Law", Brooklyn Journal of International Law 41, no. 1 (2015): 44.
[259] James Crawford, *The Creation of States in International Law*: 62.
[260] Bryden Matt. "The "Banana Test": is Somaliland ready for recognition?", Annales d'Ethiopie. Volume 19, année 2003: 342.
[261] James Crawford, *The Creation of States in International Law*: 412.
[262] Ministry of Information, Somaliland: Demand for International Recognition, A Policy Document of the Government of the Republic of Somaliland, Hargeisa, 2001: 29.
[263] James Crawford, *The Creation of States in International Law*: 413.
[264] I. M. Lewis, *A Modern History of the Somali: A Nation and State in the Horn of Africa* (Bodyell & Brewer, 2002): 293.
[265] According to the *Freedom in the World* reports by the Freedom House, Somaliland's record on freedoms and civil liberties are not that good. See https://freedomhouse.org/country/somaliland/freedom-world/2023 (last accessed 26 April 2023).
[266] Somaliland Constitution, art. 1(1).

countries and envisages "to replace the long-standing hostility between the countries in the Horn of Africa with better understanding and closer relations".[267] By committing to peaceful dispute resolution and respect for international law, Somaliland conveys that its international relations are grounded on international law. Although the Constitution stipulates that Somaliland shall join the United Nations, the Organisation of African Unity, the Arab League, and the Organisation of Islamic States,[268] these institutions have not so far accepted Somaliland.

The government in Somaliland manages internal affairs independently of other States. It possesses the competence of forming centralised administration, enactment, and enforcement of laws and having a judicial organ capable of adjudication.[269] Hence its organs have exclusive jurisdiction inside the territory of Somaliland. The institutions of Somaliland relatively conduct what is expected of a State in terms of having national laws and courts, and managing foreign affairs through its machinery.

The achievement of Somaliland to build institutions, invest in infrastructure, and adopt a fiscal policy empowered its internal legitimacy and implementation of policies. With its own currency, taxation laws, and central bank, Somaliland's budgetary independence reinforce the capacity to operationalise governance institutions.

2.5.2.4.2 Independence

Capacity to enter into relations with other States as a criterion of statehood is generally understood to signify independence from the authority of other States. The independence of an existing State is protected by international law. Crawford holds that capacity is not a criterion of statehood but it is a consequence.[270] A new State claiming its existence as a separate State needs to display substantial formal and real independence.[271]

Obviously, only States can have State-to-State relations. Federal member States, for example, fulfil all the criteria of statehood except the capacity to enter into relations with other States as a sovereign State.[272] An entity with all the attributes of statehood cannot, in practice, enter into relations with States if these States refuse to recognise its claim of statehood.[273] The capacity involves interactions with other States and an entity cannot in practice make such engagement if these other States refuse to interact.[274]

The independence of unrecognised States is contested. In the context of unrecognised States, there is often a government in control of the territory and another government that claims to be the sole legitimate government of the said territory but does not have physical control over the territory. In the case of Somaliland, its government has the actual exercise of authority over the territory, and Somalia has international recognition as its legitimate government without exercising any effective control over the territory.

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[267] Somaliland Constitution, art. 10(5).
[268] Somaliland constitution, art. 10(6).
[269] Like any other political entity, there are loopholes and challenges regarding the actions of the government of Somaliland in terms of human rights abuses and weaknesses in service delivery and access to justice. However, these critiques do not amount to a level to question the functionality of the system.
[270] James Crawford, *The Creation of States in International Law*: 62.
[271] James Crawford, *The Creation of States in International Law*: 63.
[272] Montevideo Convention on the Rights and Duties of States, 1933, art. 2.
[273] Vaughan Lowe, *International Law. Clarendon Law Series*. (Oxford: OUP Oxford, 2007): 157.
[274] John Grant, *International Law. Law Essentials* (Dundee: Edinburgh University Press, 2010):42.

Patron states play an influential role in some unrecognised States, as the case is for Abkhazia and South Ossetia, where Russia promotes and lobbies on their behalf, making them substantially rely on Moscow.[275] The foreign affairs of Somaliland are not reliant on a patron State. No single country recognises Somaliland as a State, and to that extent, it manages its external affairs on its own.

The government of Somaliland engages with the outside world, as shown by numerous trade and security agreements concluded between the government of Somaliland and other States such as Ethiopia and Seychelles.[276] Western countries also engage with Somaliland in developmental and humanitarian aspects, including support in elections.[277] The Somaliland passport is accepted as a travel document by some States. There is no foreign embassy in Somaliland, although there are consulates and offices that are not designated embassies.[278] None of these interactions is, however, interpretable as recognition of statehood.

There are those who view Somaliland as having fulfilled the basic characteristics of statehood when the legal criteria of statehood are considered, and it met the criteria of the Montevideo Convention.[279] Others disagree and view Somaliland as a separatist entity seeking to secede from Somalia.[280] The lack of recognition restricts its ability to act independently and establish reciprocal diplomatic relations with other States. The few States that have a presence in Somaliland either send consulate staff, not representatives or ambassadors – for instance, Ethiopia and Turkey – or only open an office with no diplomatic designation (for example, the UK).[281]

2.5.2.4.3 The legality of the declaration of independence

The inquiry into whether a declaration of independence is permitted by international law was put to the International Court of Justice by the General Assembly in an advisory opinion concerning Kosovo's unilateral declaration of independence. The Court was asked: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[282] The Opinion given by the Court is essential in understanding the legality of the declaration of independence.

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[275] Donnacha Ó Beacháin, "Abkhazia and South Ossetia" in *Routledge Handbook of State Recognition,* edited by Visoka et al: 430-431; Deon Geldenhuys, *Contested States in World Politics*: 75-76.

[276] Malcolm Shaw, *International Law*: 237.

[277] Currently, the UK is supporting the construction of the bypass road. "UK Ambassador launches construction of the Hargeisa bypass," https://www.gov.uk/government/news/uk-ambassador-launches-construction-of-the-hargeisa-bypass (last accessed 19 November 2021).

[278] Ethiopia, Djibouti and Turkey have consular offices in Hargeisa, the capital of Somaliland. Taiwan has a representative office whereas the United Arab Emirates has a trade office. The UK also has an office in Hargeisa. None of these offices are at an embassy level.

[279] John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*: 178; Bryden Matt, "The "Banana Test": is Somaliland ready for recognition?" Annales d'Ethiopie. Volume 19, année 2003: 341; Deon Geldenhuys, *Contested States in World Politics*: 137; Sarah Phillips, *When There Was No Aid: War and Peace in Somaliland*: 62; Rebecca Richards, *Understanding Statebuilding: Traditional Governance and Modern State in Somaliland*, (London: Routledge, 2014): 13; Michael Schoiswohl, *Status and (Human Rights) Obligations of Non-recognised De Facto Regimes in International Law: The Case of 'Somaliland'* (Leiden: Koninklijke Brill NV, 2004): 167-167.

[280] Henry Srebrnik, "Can clans form nations? Somaliland in the making" in *De Facto States: The quest for sovereignty*, edited by Tozun Bahcheli et al. (New York: Routledge, 2004): 220.

[281] The official in charge of the UK's office in Hargeisa is called the Head of Hargeisa Office.

[282] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010: 407, paragraph 1.

The Court stated that "the question is narrow and specific"[283] and refrained from expanding its answers to the issues of statehood and recognition. The Advisory Opinion held that the General Assembly did not ask "about the legal consequence of that declaration", Kosovo's status in relation to statehood, or "the validity or legal effects of the recognition of Kosovo".[284] Judges in a dissenting opinion disagreed and contended that the Court narrowed down the question by its own motion.[285] From their point of view, the declaration of independence has intended consequences and implications, and the Court should have looked at that angle as well.

In conclusion, the Court stated:

> The Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law. Having arrived at that conclusion, the Court now turns to the legal relevance of Security Council resolution 1244, adopted on 10 June 1999.[286]

In reference to the Court's legal opinion, it is generally regarded that international law neither prohibits nor permits a declaration of independence. The ICJ Advisory Opinion has not enlightened the dispute on recognition as the Court avoided answering the consequences of a declaration of independence.[287] Consequently, the Court has not ended the "great debate".

2.5.3 **Summary: defining Somaliland**

The above analysis of Somaliland's status in relation to the Montevideo Convention demonstrates that Somaliland satisfies all the definitions of unrecognised States, including the one employed in this dissertation. It is the primary and most straightforward example of an unrecognised State. The facts on the ground demonstrate *de facto* statehood with all the attributes of a State, yet it is not a member of the UN and has not been recognised by any UN Member State. Because it has attributes of statehood and has declared independence, it cannot be treated as a non-State actor. Its unilateral declaration of independence has not received consent from Somalia, and it is not accepted as a State by existing States.

The implication of being an unrecognised State is that its status is contested. From the perspective of Somaliland, it is an independent and sovereign State. Somalia, the United Nations and the African Union view Somaliland as part of Somalia.

2.6 Conclusion

This chapter analysed the status of unrecognised States – Somaliland in particular – in relation to international legal personality, statehood and recognition. It finds that non-State entities, transnational companies, and international organisations include various entities that possess, to varying degrees, legal personality under international law. Although there is no disagreement that States are international persons, the extent and degree of international legal personality possessed

[283] ibid p. 423, paragraph 51
[284] ibid, paragraph 51
[285] Also see, Advisory Opinion, Separate Opinion of Judge Abdulqawi A. Yusuf, para. 2.
[286] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010: 438-439, paragraph 84.
[287] Stefan Oeter, "The Role of Recognition and Non-Recognition with Regard to Secession" in *Self-Determination and Secession in International Law*, edited by Christian Walter et al. (Oxford: Oxford University Press, 2014): 46-47.

by non-State entities are disputed. Moreover, what constitutes a State is open to debate, and international law is yet to find a conclusive answer. The ambiguities and lacunae in international law leave unrecognised States in a situation of limbo.[288]

Somaliland has a population, a territory, and a government. Due to the lack of recognition, Somaliland's capacity to enter into international relations is contested. Somaliland has the power to exercise internal affairs, but its external engagement is limited because no State recognises or deals with it as a sovereign State. The debate between the declarative and constitutive theories of recognition does not help elucidate the situation, and States have not taken a uniform position to provide a practical way to solve the issue of Somaliland. The State practice of granting or withholding recognition is complex and not uniform.

This chapter defined States, unrecognised States and non-State actors to place Somaliland in a category. It concludes that Somaliland is an unrecognised State because it has all the attributes of statehood under the Montevideo Convention. What Somaliland is missing is recognition from Somalia and the other States. Non-State actors do not meet the requirements of the Montevideo Convention and do not claim statehood. Therefore, Somaliland is not a non-State actor. It is not also a universally recognised State.

[288] Nina Caspersen, *Unrecognised States*: 2-3.

Chapter 3 The Obligation of Somaliland to Protect the Rights of Children Living in Somaliland

3.1 Introduction

The status of Somaliland as an unrecognised State has been explained in Chapter 2, and its history in Chapter 1. This chapter examines the obligations of Somaliland under international human rights law in protecting the rights of children living in Somaliland. Human rights is a term used worldwide, included in most constitutions, and in press statements and resolutions from States and intergovernmental organisations. In most discourses on human rights, the State is discussed and re-discussed as the point of departure to establish the obligations of the State vis-à-vis individuals under its jurisdiction. Domestically, most States have constitutions and statutes that govern the application of rights within their jurisdictions. Internationally, numerous human rights treaties cover various human rights issues. The study of the applicability of a right in a UN Member State starts, often, by checking the treaties that the State has ratified and the subsequent actions or inactions of the State to implement them as obligatory under the treaties.

However, the description above does not perfectly fit Somaliland. Somaliland is not on the UN website, where all UN Member States are listed in relation to their human rights commitments and reservations.[289] Somaliland has neither signed nor ratified any international human rights treaties.

To understand the applicability of international child/human rights law in Somaliland, section 3.2 outlines the sources mentioned in Article 38 of the Statute of the International Court of Justice to set the concepts on which the legal analysis of this chapter is based. Is international human rights law universally applicable in all territories irrespective of their status? Section 3.3 explores the notion of the universality of international human rights law by examining treaties and customs. It also discusses the relevant regional human rights regimes. Section 3.4 briefly introduces the scope and meaning of State obligation under international human rights law with specific attention to the UN Convention on the Rights of the Child (the CRC).

After setting the conceptual clarifications of doctrines relating to human rights obligations of States, this chapter focuses on Somaliland and looks explicitly at the international human rights obligations of Somaliland in section 3.5. It examines the application of human rights treaties to Somaliland by studying the legality of accession to treaties and the concept of State succession in relation to the contexts of separation or secession of a State. Departing from Somaliland's claim of separate independence from Somalia in 1991, the section explores whether Somaliland can join the Convention on the CRC and other human rights treaties or accede to human rights treaties as a way of succession. It also examines customary law and rules of *jus cogens.* Do customary international law and rules of *jus cogens* apply or impose legal obligations on Somaliland? The section also explores the legal meaning and implications of Somaliland's unilateral commitment to respect the UN Charter, the Universal Declaration of Human Rights, treaties entered into by Somalia before May 1991, and other international human rights instruments. It looks at the territorial applicability of human rights treaties and corresponding obligations due to Somalia's ratification. Somalia, the State with the *de jure* recognition, concluded treaties, including the CRC.

[289] The UN Secretary-General is the depository of treaties and publishes human rights treaties and relevant information such as signatories, ratifications, accessions and reservations (withdrawals) of States.

Do these treaties grant rights to the children living in Somaliland? Who has the legal obligation to enforce these rights and protect beneficiaries from abuses? Section 3.6 concludes the chapter.

3.2 Sources of international law

At a national level, a constitution often states how laws are created and who has the power to execute them.[290] The international arena is not like a national system where a constitution (written or unwritten) delineates the responsibilities and powers of government institutions.[291] Every State has a law-making body responsible for enacting legally binding legislation.[292] In contrast, the international system has no central law-making machinery or law enforcement agencies. Nor a central executive body (a 'world government').[293] There is no international court with compulsory jurisdiction.[294]

Sources of international law determine the rules that constitute the international legal system and specifically how these rules are identified.[295] Authors generally differentiate between formal and material sources of law.[296] The former denotes the methods how legally binding rules with general applicability are created,[297] and it is what gives the rule its quality as law.[298] It is the formal source from which the rules derive legal validity.[299] Material sources "incorporate the essence or subject matter of the regulations."[300] It gives the substantive content of the rules.[301]

The analysis of sources of international law starts[302] with Article 38 of the Statute of the International Court of Justice. The membership to the Statute of the International Court of Justice and the United Nations is voluntary.[303] Only States can bring a contentious case to the International Court of Justice.[304] Nevertheless, Article 38 is considered as a significant normative statement outlining the sources of international law,[305] and the text of Article 38 "forms a convenient starting

[290] Malcom Shaw, *International Law*: 69.
[291] Anthony Aust, *Handbook of International Law* (New York: Cambridge University Press, 2005): 5.
[292] Hugh Thirlway, *The Sources of International Law* (New York: Oxford University Press, 2019): 2; Robert Y. Jennings "What is International Law and How Do We Tell It When We See It" in *Sources of International Law,* edited by Martti Koskenniemi (New York: Routledge, 2016): 60; Ademola Abass, *Complete International Law: Text, Cases, and Materials* (Oxford; Oxford University Press 2014).
[293] James Crawford, *Brownlie's Principles of Public International Law*; 20; Robert Jennings and Arthur Watts. *Oppenheim's International Law* (Essex: Longman, 1992): 32.
[294] Hugh Thirlway, *The Sources of International Law* 2; Shaw, *International Law*: 70.
[295] Robert Jennings and Arthur Watts. *Oppenheim's International Law* (Essex: Longman, 1992): 23.
[296] James Crawford, *Brownlie's Principles of Public International Law*: 20.
[297] ibid: 20.
[298] Hugh Thirlway, *The Sources of International Law*: 6.
[299] Robert Jennings and Arthur Watts. *Oppenheim's International Law* (Essex: Longman, 1992): 23.
[300] Malcolm Shaw, *International Law*: 71.
[301] Robert Jennings and Arthur Watts. *Oppenheim's International Law* (Essex: Longman, 1992).
[302] David Kennedy, "The Sources of International Law", American University Journal of International Law and Policy 2, no. 1 (Spring 1987): 2; Oscar Schachter, "Towards a Theory of International Obligation" in *Sources of International Law*, edited by Martti Koskenniemi (Routledge: New York, 2016): 9; Martin Dixon et al. *Cases & Materials on International Law* 6th ed, (New York: Oxford University Press, 2016): 18.
[303] When a State becomes a member of the UN, it automatically becomes a member of the ICJ.
[304] International Court of Justice Statute, art. 59.
[305] Martin Dixon et al. *Cases & Materials on International Law* 6th ed, (New York: Oxford University Press, 2016): 2; Trevor Buck et al., *International Child Law*, (New York: Routledge 2005): 44.

point for study of the concept of sources".[306] There is also a view that Article 38 "reflects State practice".[307]

Article 38 reads:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> > a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
> >
> > b. international custom, as evidence of a general practice accepted as law;
> >
> > c. the general principles of law recognised by civilised nations;
> >
> > d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono* if the parties agree thereto.

Article 38 does not enumerate the sources in a hierarchical manner.[308] Despite being listed separately in Article 38, treaties and customary law are related and do not operate in complete isolation.[309] Treaties and customs are created by States either through expressly consenting in a treaty or a State practice with *opinio juris* (custom). The Statute emphasises that the substance of sources of international law is in State practice.[310] State practice needs to be consistent, uniform, and general with "a belief that the practice is obligatory rather than habitual (the *opinio juris*)".[311] Both treaties and customs stem from States. It is the dominance of States in the creation of international law on which proponents of State-centric views of international law base their argument.

According to Article 26 of the Vienna Convention on the Law of Treaties, the principle of *pacta sunt servanda* and State consent are significant factors in giving treaties binding character.[312] In principle, treaties are not applicable to third parties either by giving benefit or imposing legal obligation without consent.[313] The Vienna Convention on the Law of Treaties 1969, which applies only to treaties between States,[314] defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single

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[306] Hugh Thirlway, *The Sources of International Law*: 3.
[307] Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 24.
[308] Markhus P. Beham, *State Interest and the Sources of International Law* (New York: Routledge, 2018): 52; Thomas D. Grant, *International Law. Law Essentials*: 12.
[309] Hilary Charlesworth and Christine Chinkin, *The boundaries of international law: A feminist analysis, with a new introduction* (2000) cited in Martin Dixon et al. *Cases & Materials on International Law* 6th ed, (New York: Oxford University Press, 2016): 19.
[310] Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 26.
[311] Martin Dixon et al. *Cases & Materials on International Law* 6th ed, (New York: Oxford University Press, 2016): 25; see also Hugh Thirlway, *The Sources of International Law* (New York: Oxford University Press, 2019): 62.
[312] Hugh Thirlway, *The Sources of International Law*: 37; Malcolm Shaw, *International Law*: 94.
[313] James Crawford, *Brownlie's Principles of Public International Law*: 21; Trevor Buck et al, *International Child Law*: 46.
[314] Vienna Convention on the Law of Treaties 1969, art. 1.

instrument or in two or more related instruments and whatever its particular designation."[315] Although the Vienna Convention applies to State Parties, it is widely recognised as a codification of existing customary law.[316]

Multilateral conventions have broad ramifications and are referred to as law-making treaties.[317] These law-making treaties contribute to the content of general international law and create legal obligations.[318] For example, except for the US, all UN Member States have ratified the United Nations Convention on the Rights of the Child (CRC, 1989), making it the most widely ratified treaty.[319] The obligations in the CRC, therefore, have general applicability – with the exception of the US.[320] Yet, a treaty with such widespread backing from almost all UN Member States cannot be challenged by a single State which has not ratified that treaty.

The meaning of the 'general principles of the law recognised by nations' is not clear. Some authors view that the general principle's scope as a source is limited.[321] They fill the gaps that may exist.[322] However, "general principles of law may derive either from municipal law analogies or from international law",[323] and are found most of national systems of law.[324] The general principles of law include the principle of good faith,[325] the principle of res *judicata,*[326] and the principle *nulla crimen sine lege,*[327] among others. International criminal law relies a good deal of general principles of law from domestic laws.[328]

Judicial decisions and the teachings of the most highly qualified publicists of the various nations are subsidiary sources of international law.[329] The judicial decisions of the ICJ apply only to the parties to a dispute.[330] However, the jurisprudence of the Court is "relied on in argument before it, but no decision can simply be applied automatically to another case."[331] Similarly, the writings of jurists are important but do not have strong normative force.

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[315] Vienna Convention on the Law of Treaties 1969, art. 2(a).
[316] Thomas D. Grant, *International Law. Law Essentials:*12; Trevor Buck et al., *International Child Law*: 46.
[317] Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 32; Hugh Thirlway, *The Sources of International Law*: 39.
[318] James Crawford, *Brownlie's Principles of Public International Law*: 30.
[319]James R. Himes, *Implementing the Convention on the Rights of the Child resource mobilization in low-income countries (The Hague:* Martinus Nijhoff Publishers, 1995): 1.
[320] According to Shaw, law-making treaties "are intended to have an effect generally, not restrictively, and they are to be contrasted with those treaties which merely regulate limited issues between a few states", Malcolm Shaw, *International Law*: 95.
[321] Malcolm Shaw, *International Law*: 99; Jean d'Aspremont, "What Was Not Meant to Be: General Principles of Law as a Source of International Law" in *Global Justice, Human Rights, and the Modernization of International Law,* edited by Riccardo Pisillo Mazzeschi and Pasquale De Sena, (Leiden: Brill/Nijhoff, 2018): 166.
[322] Trevor Buck et al., *International Child Law*, 52; Hugh Thirlway, *The Sources of International Law*: 106.
[323] Trevor Buck et al., *International Child Law*: 53
[324] Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 36.
[325] Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 38.
[326] Hugh Thirlway, *The Sources of International Law*: 117.
[327] Jaye Ellis, "General Principles and Comparative Law", The European Journal of International Law, Vol. 22 no. 4 2011: 951.
[328] Fabián Raimondo. *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*. (Leiden: Brill | Nijhoff, 2008): 73; Jaye Ellis, "General Principles and Comparative Law", The European Journal of International Law, Vol. 22 no. 4 (2011): 968-969.
[329] ICJ Statute, art 38.
[330] ICJ Statute, art. 59.
[331] Hugh Thirlway, *The Sources of International Law*: 134.

3.3 The universality of human rights

3.3.1 Introduction

Sources of human rights are a subject of debate among philosophers and theologians. Different authors have posited legal, religious and philosophical justifications for human rights.[332] The origin and historical genesis of human rights and the contribution of religions are debated.[333] The theoretical outlook of positivists, naturalists and other legal philosophies define human rights from their respective philosophical viewpoints. The purpose of this section is not to examine philosophical conceptions of justifications for human rights debated in law, philosophy and theology. Rights are supposed to be universal, applicable to everyone, everywhere and at every time. In reality, international human rights is a legal regime with sources including treaties, which is State-centric. The dissertation analyses international human rights laws by analysing the legal dimension of universality.

3.3.2 The universality of human rights

To state that human rights are universal entails legal, value and empirical dimensions. The value dimension relates to the claim that human rights norms embody or reflect values that are shared or enjoyed worldwide.[334] The concept of universality can be evaluated empirically to identify the practice of States regarding violations and protection of human rights.[335] The legal dimension concerns whether international human rights law has universal application.

The sources of international human rights laws are listed in section 3.2 of this chapter. The two main sources, treaties and customs, are made by States. The others involving non-State entities are subsidiary. Treaty making and State practice with *opinio juris* require consent, meaning that it is binding on States who have either expressly consented to obligations in a treaty or who have been behaving in certain ways for a sustained period of time with the intent of being legally bound. The main international human rights instruments, including the International Bill of Rights[336] and the United Nations Convention on the Rights of the Child, are widely ratified by States across the world's geographical divisions and cultural diversities. The CRC, for example, has ratifications of all UN Member States except the US.[337] More than two-thirds of the UN Member States have ratified the International Covenant on Civil and Political Rights (173 States)[338] and the International Covenant on Economic, Social and Cultural Rights (171 States).[339] The international human rights treaties follow the same paradigm emphasising the language of the UDHR by bestowing rights upon "every human being".[340] Unlike the UDHR, the human rights treaties are

[332] Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Cambridge: Polity, 2011): 60; Anat Biletzki, *Philosophy of Human Rights: A Systematic Introduction* (New York: Routledge, 2020): 92.
[333] Alison Dundes Renteln, *International Human Rights*: *Universalism Versus Relativism (*Louisiana: Quid Pro Books, 2013): 60.
[334] Christian Tomuschat, *Human Rights: Between Idealism and Realism* 2nd ed (New York: Oxford, 2008): 81.
[335] Christian Tomuschat, *Human Rights: Between Idealism and Realism* 2nd ed (New York: Oxford, 2008): 91.
[336] The term is used to encompass the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
[337] https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en.
[338] https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.
[339] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4.
[340] Christian Tomuschat, *Human Rights: Between Idealism and Realism* 2nd ed (New York: Oxford, 2008): 69.

legally binding and derive their binding character domestically from the ratification largely by State Parties.

Human rights treaties grant rights for all individuals, but the corresponding obligations are addressed to the State Parties. International human rights law is not liberated from the rules that govern international law. In these rules, treaties apply to State Parties, and customary international law is binding on all States except persistent objectors. Hence although the idea of human rights is, arguably, universal, the applicability and legal obligations under international human rights law emanating from sources of international law are not universal *per se* and are dependent on the nature of the entity – State or non-State, recognised or unrecognised – as well as whether the State has ratified the human rights treaty in which the rights are enshrined. Moreover, the legal source of the rights is essential, whether it is in a treaty or found in the rules of *jus cogens* or customary international law.

The United Nations Convention on the Rights of the Child is a special treaty designed to protect children, unlike the UDHR, which is for all human beings and largely entails adults' human rights. In article 1, the CRC defines a child as "*every human being* below the age of eighteen years unless under the law applicable to the child, majority is attained earlier (emphasis added)."[341] The rights in the CRC are for "each child" without discrimination.[342] Nonetheless, the obligation to respect, protect and realise children's rights in the CRC is on the State Parties and applies within their jurisdiction.[343]

International human rights laws are reflected in regional treaties at the regional level. The African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights recognise human rights, establish regional bodies, and use the language of "every individual",[344] "every person",[345] and "everyone".[346]

In adopting the Universal Declaration of Human Rights, the General Assembly proclaimed the universality of its provisions[347] by declaring that it sets "a common standard of achievement for all peoples and all nations."[348] Article 1 of the UDHR reads as follows:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[349]

The entitlements in the UDHR, replicated in treaties, are for all human beings without discrimination and distinction of any kind.[350] These inalienable rights are for all members of the human family.[351] Article 2 of the UDHR reads "…no distinction shall be made on basis of the

[341] United Nations Convention on the Rights of the Child: art. 1.
[342] ibid, art. 2.
[343] ibid, art. 2.
[344] African (Banjul) Charter on Human And Peoples' Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986: art. 2.
[345] American Convention on Human Rights: "Pact of San José, Costa Rica". Signed at San José, Costa Rica, on 22 November 1969.
[346] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, 1953: art. 1.
[347] Christian Tomuschat, *Human Rights: Between Idealism and Realism* 2nd ed (New York: Oxford, 2008): 73.
[348] The Universal Declaration of Human Rights, Preamble.
[349] The Universal Declaration of Human Rights, 1948: art. 1.
[350] ibid: art. 2.
[351] ibid: preamble.

political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty." The language of Article 2 is inclusive, encompassing territories with limited sovereignty. Yet, the UDHR is not a treaty and the argument that the UDHR in whole or some provisions constitute customary international law is debated.

The Vienna Declaration of the 1993 World Conference on Human Rights states that: "all human rights are universal, indivisible and interdependent and interrelated."[352] The Vienna Conference had widespread world attendance compared to the Universal Declaration of Human Rights drafting process.[353] The affirmation that human rights are inherent to the human person and are universal reflects a global endorsement of the universality of international human rights laws. States accept human rights instruments, and many have incorporated them into their constitutions and laws.[354] Despite the differences in cultures and ideology, States embrace the language of human rights in speeches, drafting of constitutions and endorsement of international human rights treaties, especially the CRC.[355] State Parties to human rights treaties intend to formulate legally binding obligations. At a minimum, States undertake and consent to enforce universal and inalienable human rights for all human beings within their jurisdiction.[356]

Laws – international or national – are essential in protecting human rights and are a manifestation of the existence of human rights.[357] However, human rights are not only "legal constructs" but are also moral frameworks intended "to be used against the law when the state is the criminal".[358] In this dissertation, the unit of analysis is the International Bill of Rights agreed upon by the States, particularly the Convention on the Rights of the Child and the Universal Declaration of Human Rights, which are near-universally accepted legal instruments.[359] Therefore, this chapter does not discuss the value and empirical dimensions of human rights and the debates and controversies surrounding these concepts. The international human rights law perspective is that treaties and customary international law are centred on State consent or practice, and their legal obligations are not automatically universal.

[352] The Vienna Declaration of the 1993 World Conference on Human Rights: paragraph 5.
[353] Christian Tomuschat, *Human Rights: Between Idealism and Realism* 2nd ed (New York: Oxford, 2008): 78.
[354] Louis Henkin, 1989, "The Universality of the Concept of Human Rights", The Annals of the American Academy of Political and Social Science, vol. 506, no. 1, 10-16.
[355] Cultural Relativism and Universal Human Rights Author(s): Jack Donnelly Source: Human Rights Quarterly, Vol. 6, No. 4 (Nov., 1984): 400-419. Published by The Johns Hopkins University Press: 414.
[356] The theory of universality of international human rights laws does not contradict the existence of diverse cultures and morals. Treaties undergo lengthy negotiations by State representatives who have different philosophical ideas about rights. Some States have domestic laws requiring parliaments to ratify treaties, which again indicate national acceptance of the provisions in ratified treaties.
[357] James Nickel, "Human Rights" in *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition), edited by Edward N. Zalta, URL = https://plato.stanford.edu/archives/fall2021/entries/rights-human/.
[358] Darren O'Byrne, "Re-imagining the theory of human rights", The International Journal of Human Rights, 16:7 (2012): 1083.
[359] Eric Engle, "The Convention on the Rights of the Child", QLR 29, no. 3 (2011): 793-794; Susan Kilbourne, "The Wayward Americans - Why the USA Has Not Ratified the UN Convention on the Rights of the Child", Child and Family Law Quarterly 10, no. 3 (1998): 242.

3.3.3 Human rights instruments in Africa

The human rights instruments in Africa employ the language of international human rights law and are open for States in Africa.[360] In the preamble, the African (Banjul) Charter on Human and Peoples' Rights also cited the Universal Declaration of Human Rights.

The African Charter (Banjul) on Human and Peoples' Rights is the main human rights treaty in Africa ratified by all the members of the African Union, except Morocco.[361] The Banjul Charter uses the term "every individual" and lists a catalogue of rights not that different from the International Bill of Rights. The entitlements listed in the Banjul Charter are for all human beings "without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."[362] According to the Banjul Charter, "human beings are inviolable"[363] and "shall have the right to the respect of the dignity inherent in a human being."[364] The language of the Banjul Charter does not deviate from that of international human rights instruments. However, the Banjul Charter has additions and peculiarities, including group rights and a list of duties on persons (from articles 27 to 29).

The African Charter on the Rights and Welfare of the Child, ratified by 49 African States out of 55 African Union member States, reaffirms adherence "to the principles of the rights and welfare of the child contained….in particular the United Nations Convention on the Rights of the Child."[365] It states that "a child means every human being below the age of 18 years."[366]

The other human rights instruments in Africa are:

- Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (ratified by 30 States).
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (ratified by 42 States).

The African human rights regime demonstrates that human rights are recognised in Africa to protect individuals, but the obligations resulting from these treaties incur on State parties and are limited by the notion of State jurisdiction or territory. Therefore, guarantees for children's rights in the African human rights regime mean that State Parties are obligated to respect, protect and realise children's rights as enshrined in treaty law.

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[360] Rhoda E. Howard, "Group versus individual identity in the African debate on human rights" in *Human Rights in Africa: Cross-cultural perspective*, edited by Abdullahi Ahmed An-Na'imi and Francis M. Deng (Washington: Brookings Institution, 1990): 62.

[361] The African Charter on African (Banjul) Charter on Human and Peoples' Rights Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

[362] The African Charter on African (Banjul) Charter on Human and Peoples' Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986: art. 2.

[363] The African Charter on African (Banjul) Charter on Human and Peoples' Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986: art. 4.

[364] The African Charter on African (Banjul) Charter on Human and Peoples' Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986: art. 5.

[365] African Charter on the Rights and Welfare of the Child, adopted July 1990 in Addis Ababa, Ethiopia, Entered into force on 29 November, 1999: preamble.

[366] African Charter on the Rights and Welfare of the Child, adopted July 1990 in Addis Ababa, Ethiopia, Entered into force on 29 November, 1999: art. 2.

3.3.4 The Arab Charter on Human Rights

The Arab Charter on Human Rights (2004) was adopted in 2004 and came into force in 2008.[367] The Charter uses the language of other human rights instruments. In the preamble, the Charter reaffirms "the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights."[368] Article 3(1) obligates State Parties to ensure "all individual" under their jurisdiction to enjoy rights and freedoms without distinction.[369]

Despite using the language of other human rights treaties, the Arab Charter falls short in confirming existing international human rights laws.[370] The UN High Commissioner for Human Rights stated that the Arab Charter is not consistent with international norms and standards.[371] The list of provisions in the Arab Charter seen as contrary to international norms includes the provisions relating to the death penalty for children and the treatment of women and non-citizens.[372] For example, article 7 permits the imposition of the death penalty on children under 18 years if the national law allows. Article 37 of the CRC prohibits capital punishment for offences committed by a child below 18 years' old. Other issues in the Arab Charter that raise serious concerns include women's rights and the rights of non-Muslim minorities.[373]

3.4 International human rights obligations of States

3.4.1 State obligations: overview

Human rights treaties impose legal obligations on State Parties to protect, respect and fulfil human rights enshrined in treaties. The typology is important and entails positive and negative obligations. The State is required to refrain from infringing human rights and to take positive measures and actions to prevent violations of these rights and ensure the exercise of rights.[374]

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[367] Somalia is a member of the Arab League, but not a member of the Charter, see https://www.britannica.com/topic/Arab-League, last accessed 12 June 2022.

[368] Arab Charter on Human Rights adopted on 2004, came into force in 2008: preamble.

[369] Arab Charter on Human Rights adopted on 2004, came into force in 2008: art. 3(1).

[370] Mervat Rishmawi, "The Revised Arab Charter on Human Rights: A Step Forward", Human Rights Law Review 5, no. 2 (2005): 365; Dalia Vitkauskaite-Meurice, "The Arab Charter on Human Rights: The Naissance of New Regional Human Rights System or a Challenge to the Universality of Human Rights?", *Jurisprudencija: Mokslo darbu žurnalas* 119 (1), 2010:172-173.

[371] Mervat Rishmawi, "The Revised Arab Charter on Human Rights: A Step Forward", Human Rights Law Review 5, no. 2 (2005): 365; Dalia Vitkauskaite-Meurice, "The Arab Charter on Human Rights: The Naissance of New Regional Human Rights System or a Challenge to the Universality of Human Rights?" *Jurisprudencija: Mokslo darbu žurnalas* 119 (1), 2010:172-173.

[372] UN press release. Statement by UN High Commissioner for Human Rights on the entry into force of the Arab Charter on Human Rights. https://news.un.org/en/story/2008/01/247292-arab-rights-charter-deviates-international-standards-says-un-official last accessed 21 February 2022.

[373] The Covenant on the Rights of the Child in Islam – not yet in force - use a similar approach to that of the Arab Charter by guaranteeing rights for all children and guarantees equality for all children (art. 5). Yet, the outlook and protection in the Covenant are not similar to the UN CRC. As it is not the focus of this chapter to compare human rights instruments, this issue is not further explained. However, it is a matter that needs examination to analyse the similarities and differences.

[374] Dinah Shelton, *Remedies in International Human Rights Law* 3rd ed. (New York: Oxford University Press, 2015): 13.

Human rights obligations in a treaty are somewhat different from other international law obligations because they are related to the obligation of a State in connection to a person to a vertical relationship,[375] and as such human rights contain *erga omnes* obligations.[376] General international law often concerns reciprocal obligations between States in a horizontal relationship. Human rights treaties are also between States, but the intended right holders and beneficiaries are the individuals in these States.[377]

The sources of legal obligations of States emanate from the sources of international law (see section 3.2). In the human rights spectrum, treaties, international customary law and *jus cogens* generate legal obligations. Treaties impose a legal obligation on contracting parties to perform these obligations in good faith.[378] The principle of *pacta sunt servanda* requires States to carry out treaty obligations in good faith.

The Convention on the Rights of the Child (CRC) is a treaty voluntarily entered into by States. Article 4 of the CRC says:

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

According to the Committee on the Rights of the Child, when a State ratifies the Convention on the Rights of the Child, it takes on obligations under international law to implement it.[379] The implementation involves that "States parties take action to ensure the realisation of all rights in the Convention for all children in their jurisdiction."[380] The obligation is for all branches of government – executive, judiciary and legislative – and at all levels.

The obligation of the State is to protect the children under its jurisdiction from violations, including those from acts of a third party.[381] States are also required to take positive measures to ensure the realisation of children's rights as stipulated in the CRC.

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[375] Frederic Megret, "Nature of obligations" in *International Human Rights Law,* edited by Daniela Moeckli et al., (New York: Oxford University Press, 2014): 96; William A. Schabas, *The Customary International Law of Human Rights* (Oxford: Oxford University Press, 2021): 40.

[376] Human Rights Committee, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004 (2187th meeting): paragraph 2; Olivier De Schutter, *International Human Rights Law* (New York: Cambridge University Press, 2010): 48.

[377] Frederic Megret, "Nature of obligations" in *International Human Rights Law,* edited by Daniela Moeckli et al., (New York: Oxford University Press, 2014): 99; Olivier De Schutter, *International Human Rights Law* (New York: Cambridge University Press, 2010): 48.

[378] Vienna Convention on the Law of Treaties: 26; Mark E. Villiger. Commentary on the 1969 Vienna Convention on the Law of Treaties. Leiden: Brill | Nijhoff, 2009): 367; Steven Wheatley, *The Idea of International Human Rights Law* (New York: Oxford University Press, 2019): 98.

[379] General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child: paragraph 1.

[380] General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child: paragraph 1.

[381] CRC: art. 2(2).

Legal obligations are also part of other core human rights treaties.[382] Article 2 of the International Covenant on Civil and Political Rights sets the obligation of State Parties to respect the Covenant rights and ensure these rights to the people under their jurisdiction without discrimination. The Human Rights Committee, the treaty body established by the International Covenant on Civil and Political Rights, finds that the legal obligations in article 2 "are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party."[383] The legal obligation is both negative and positive, and States shall not violate human rights but also shall take measures to fulfil their legal obligations.[384]

The peremptory norms of general law (*jus cogens*), customary international law, the general principles of law and judicial decisions constitute the legal obligations of States in relation to the respect, protection and fulfilment of human rights. The legal obligations from these sources – for example, *jus cogens* – are generic in the sense that they are not confined to State Parties, but all States are under legal obligations.

3.4.2 Reservations

Reservations made by State Parties is a statement that "purports to exclude or modify the legal effect of a treaty in its application to the State."[385] A reservation relates to State obligations because it limits or restricts the application of human rights treaties. According to Article 19 of the Vienna Convention on the Law of Treaties, "a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation."[386] A reservation that is "incompatible with the object and purpose of the treaty" is not permitted.[387] Human rights treaties may have broad participation, but States often make reservations.[388]

The question is, who has the authority to decide about the validity of reservations? Article 51 of the UN Convention on the Rights of the Child governs reservations and states as follows:

> 1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
>
> 2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

[382] See article 2 of the International Covenant on Economic, Social and Cultural Rights and General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant), 1990, by the Committee on Economic, Social and Cultural Rights, As well as the General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.
[383] Human Rights Committee: paragraph 4.
[384] Human Rights Committee: paragraphs 6-7.
[385] General Comment Adopted by The Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, General Comment No. 24 (52) 1/, Ccpr/C/21/Rev.1/Add.6 11 November 1994: 3.
[386] Vienna Convention on the Law of Treaties, 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331: Art. 19(a).
[387] Vienna Convention on the Law of Treaties, 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331: Art19(c).
[388] Kelebogile Zvobgo, et al., "Reserving Rights: Explaining Human Rights Treaty Reservations", International Studies Quarterly (2020) 64: 787.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.

The CRC is silent about the legal effect and mode of determining reservations[389] and does not state who has the power to test the "object and purpose" to evaluate reservations. The Committee on the Rights of the Child has remarked "that some States have made reservations which plainly breach article 51(2) by suggesting, for example, that respect for the Convention is limited by the State's existing Constitution or legislation, including in some cases religious law."[390] The General Comment of the Committee does not specify the articles in the CRC whose reservation is against "the object and purpose" of the CRC.

The Human Rights Committee took a less cautious stance on the subject. It stated that reservations that are against the *jus cogens* rules violate "the object and purpose of the Covenant".[391] The Committee made a list of rights that are *jus cogens* rules.[392] The inference from the Human Rights Committees' jurisprudence is that the Committee on the Rights of the Child can play a similar role and elaborate the provisions in the CRC that should not be subjected to reservations.[393]

Reservations are made by States across geographical divisions of the world. Seventy-five States made reservations to the CRC (some withdrew their reservations later). For example, the States that made reservations to the Convention on the Rights of the Child include Western countries such as Austria, Australia, the Netherlands, Canada, France and others, as well as non-Western States including Somalia, Jordan, Mali, India, Bangladesh and many more.[394] Some reservations are non-specific and might apply to all the articles of the CRC. For example, nine Muslim majority States made reservations on all provisions of the CRC that are "incompatible with the law of Islamic Sharia" and national laws.[395] Others are specific to articles. Article 14(1) (freedom of thought, conscience and religion) is subjected to reservations by countries, including Bangladesh, Iraq, Jordan, Maldives, Morocco, Oman, Somalia, Syria, UAE, Algeria and Brunei. Jordan and Somalia made reservations to article 20 (alternative care for a child), while Bangladesh, UAE,

[389] William A. Schabas, "Reservations to the Convention on the Rights of the Child", Human Rights Quarterly, May, 1996, Vol. 18, No. 2: 481.
[390] General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6): paragraph 15.
[391] General Comment Adopted by The Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, General Comment No. 24 (52) 1, CCPR/C/21/Rev.1/Add.6 11 November 1994: paragraph 8.
[392] "Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be." General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, General Comment No. 24 (52) 1, CCPR/C/21/Rev.1/Add.6 11 November 1994.
[393] William A. Schabas, "Reservations to the Convention on the Rights of the Child", Human Rights Quarterly, May, 1996, Vol. 18, No. 2: 487.
[394] https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4, last accessed 9 February 2022.
[395] These States are Afghanistan, Iran, Kuwait, Malaysia, Qatar, Saudi Arabia, Somalia, Syria, and Mauritia.

Brunei and Somalia made reservations to article 21 (adoption). Canada states that it "reserves the right not to apply the provisions of article 21 to the extent that they may be inconsistent with customary forms of care among aboriginal peoples in Canada." In article 37(c), the Government of Canada reserves "the right not to detain children separately from adults where this is not appropriate or feasible." Denmark made reservations on Article 40 (2) (b) (v). France made reservations on Article 30 and interprets Articles 6 and 40(2)(b)(v).

A reservation is a tool used to modify or dilute strong obligation(s) in a treaty,[396] and its use is primarily motivated by an attempt "to relax obligations that might otherwise make a given treaty too costly to ratify."[397] Some authors view that "democratic governments are more likely" to use reservations than authoritarian governments.[398] Some governments adopt reservations to avoid legal actions in their domestic courts[399] or to introduce new legislation to incorporate the treaty or to make the national law accommodating.[400]

Reservations may restrict the application of human rights provisions in treaties and are problematic tools.[401] Although reservations encourage broad participation in human rights treaties, they weaken the implications and enforcement of the treaty.[402] In a nutshell, reservation is a problem in the implementation of human rights treaties. State Parties to a treaty might take on different legal obligations depending on the reservations they make. This indicates that even members of the same treaty might not have similar legal obligations emanating from the treaty.

There are no State-made reservations to the articles concerning sexual abuse (art. 19, 34 and 30). Only Singapore made a declaration pertaining to Article 19. Five States reserved or made declarations to Article 7 of the CRC. Article 7 guarantees the right of the child to "be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents."[403] The open-ended reservations made by several States proclaiming that all provisions of the CRC that are "incompatible with the law of Islamic Sharia" are reserved might apply to the provisions relevant to the two case studies of this dissertation, namely children's right to nationality and protection from sexual abuse.

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[396] Daniel W. Hill, Jr., "Avoiding Obligation: Reservations to Human Rights Treaties", Journal of Conflict Resolution 2016, Vol. 60(6): 1130; Heather Elko McKibben and Shaina D. Western, "'Reserved Ratification': An Analysis of States' Entry of Reservations Upon Ratification of Human Rights Treaties", B.J.Pol.S. 50, Cambridge University Press, 2018: 688; Kelebogile Zvobgo et al., "Reserving Rights: Explaining Human Rights Treaty Reservations", International Studies Quarterly (2020) 64: 788.

[397] Kelebogile Zvobgo et al., "Reserving Rights: Explaining Human Rights Treaty Reservations", International Studies Quarterly (2020) 64: 785.

[398] Daniel W. Hill, Jr., "Avoiding Obligation: Reservations to Human Rights Treaties", Journal of Conflict Resolution 2016, Vol. 60(6): 1132.

[399] Heather Elko McKibben and Shaina D. Western, "'Reserved Ratification': An Analysis of States' Entry of Reservations Upon Ratification of Human Rights Treaties", B.J.Pol.S. 50, Cambridge University Press, 2018: 689.

[400] Elisabeth Lijnzaad, *Reservations to UN-human rights treaties: ratify and ruin?* (Dordrecht-Boston-London : Springer, 1995): 77-78.

[401] Elisabeth Lijnzaad, *Reservations to UN-human rights treaties: ratify and ruin?* (Dordrecht-Boston-London : Springer, 1995): 104.

[402] William A. Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform", Canadian Yearbook of International Law 32 (1994): 41.

[403] UN Convention on the Rights of the Child: art. 7.

3.5 International human rights obligations of Somaliland

3.5.1 Introduction

The section answers this question: Does international human rights law have a binding legal effect on Somaliland? To answer this question, the section relies on the formal sources of international law. Moreover, Somaliland is looked at from various viewpoints and perspectives since the status of Somaliland is contested (see Chapter 2).

Somaliland and the other unrecognised States do not fit the dichotomy of State and non-State actors. On the one hand, Somaliland is not recognised as a sovereign State by any State. On the other hand, Somaliland has, contestably, fulfilled the criteria of statehood under the Montevideo Convention. It has a defined territory, a population and a government with a degree of capacity. Due to Somaliland's effective control over the territory over a sustained period of time (since 1991), one cannot convincingly call it a non-State actor. Suppose we assume that Somaliland is a State or State-like entity. In that case, several questions arise regarding the application of human rights law due to the fact that: (a) Somaliland, at this time cannot ratify a human rights treaty, and (b) regional and international human rights bodies deal with Somaliland as part of Somalia and, therefore, do not subject Somaliland to the existing human rights monitoring mechanisms.

The adherents of the declaratory theory of statehood view that the rights and obligations of a State are not derivative of State recognition. If requirements of statehood are fulfilled, a lack of recognition does not negate a State from bearing legal obligations and enjoying rights and privileges under international law.[404] In contrast, the constitutive theory of statehood holds that an entity is not a State without recognition.

The criterion of effective control over a territory is essential in international law. In the *Namibia* case, South Africa was held to account as a responsible State in the territory of Namibia even though the control was not recognised as legitimate by the International Court of Justice and the international community. Some unrecognised States, such as Somaliland, are different from both cases of foreign occupation – like the case of South Africa - and from entities with *de facto* control over an area, that do not have an aspiration for independence. An important characteristic to keep in mind is that Somaliland has demonstrated effectiveness and internal sovereignty, but it has not achieved external independence accepted by other States. This background necessitates covering all sides, hoping to shed light on children's rights in Somaliland from all viewpoints.

Here are two competing perspectives:

1. Somaliland as an independent State: this assumes that Somaliland is an independent State and the lack of recognition has no legal effect on its statehood. This argument is primarily based on the declaratory theory of recognition and Somaliland's position.

2. Somaliland is a *de jure* part of Somalia: from the international community's view, Somaliland is addressed as a *de jure* part of Somalia, and that is also the official position of the government of Somalia. Proceeding from this perspective, it is important to examine whether Somaliland, as a *de jure* part of a recognised UN Member State (Somalia), but under the control of authorities who do not accept Somalian authority, has legal obligations

[404] Ti-Chiang Chen, *The International Law of Recognition* (New York: Frederick A. Praeger, Inc., 1951): 4; James Crawford, *The Creation of States in International Law*: 22.

under international human rights law. Somalia's legal obligation under the UN Convention on the Rights of the Child, a human rights treaty entered into by Somalia, is discussed in Chapter 4.

Without making an argument supporting one over the other, the section examines the two scenarios by specifically looking at how the following apply to either scenario:

1. Human rights instruments, particularly the UN Convention on the Rights of the Child and the Universal Declaration of Human Rights
2. International customary law
3. Rules of *jus cogens*.

3.5.2 Application of human rights treaties to Somaliland

The subsection discusses whether Somaliland can join multilateral human rights treaties as well as the applicability of human rights treaties to Somaliland, which has not ratified any human rights treaty (sub-section 3.5.2.1). Moreover, sub-section 3.5.2.2 addresses State succession of human rights treaties in relation to Somaliland.

3.5.2.1 Accession to treaties

Unrecognised States struggle in joining multilateral treaties, including human rights treaties. The status of these entities differ, as some might not fulfil the objective criteria of statehood under general international law, and others might meet all criteria but still remain unrecognised. Also as Jure Vidmar wrote, a situation can happen "that the 'State' status under the law of a statehood and the status of 'State party' to an international treaty do not overlap."[405] According to Article 83 of the Vienna Convention, a State can accede to the treaty if it belongs to the categories in Article 81. Article 81 of the Vienna Convention on the Law of Treaties reads:

> The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialised agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention.

Although the Vienna Convention is a treaty binding on State Parties, most of its articles are argued to constitute as a codification of customary law.[406] 'The Vienna Formula' is a relevant concept used for the depository practice of the UN Secretary-General. This Formula does not accord statehood, but it deals with situations in which an entity can be considered as a State for the purpose of a treaty.[407] Treaties are contractual instruments applicable to parties.[408] The accession to a treaty does not demonstrate conclusive evidence for statehood, and not being a party to treaties does not prove that an entity is not a State. As a procedural function, "an entity without statehood can

[405] Jure Vidmar, "UN Membership and the State Requirement: does 'State' Always imply 'Statehood'?" in *Max Planck Yearbook of United Nations Law,* edited by Erika de Wet et al. (Leiden: Brill/Nijhoff, 2021): 240.
[406] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* 8th edition (New York: Routledge, 2019: 251; John P. Grant, *International Law. Law Essentials*: 12; Trevor Buck et al., *International Child Law*: 46.
[407] Jure Vidmar, "UN Membership and the State Requirement: does 'State' Always imply 'Statehood'?" in *Max Planck Yearbook of United Nations Law,* edited by Erika de Wet et al. (Leiden: Brill/Nijhoff, 2021): 215.
[408] Robert Jennings and Arthur Watts, *Oppenheim's International Law:* 32.

sometimes participate in a treaty-regime that was in principle meant to be open only for States."[409] Moreover, there might be a situation where an entity that meets the criteria of statehood cannot participate in a treaty. Due to the complex admission procedure of the UN, requiring the acceptance of all the veto powers in the UN Security Council,[410] an entity that fulfils the criteria of statehood might not be able to pass the politically-charged admission process, and an invitation from the General Assembly involves securing acceptance from many States.

The procedure of inviting a State to accede to a treaty follows the decision-making process of the UN General Assembly. States can, either individually or jointly, sponsor a resolution inviting a State to join human rights treaties. The General Assembly adopts resolutions by a vote of a simple majority.[411]

The UN General Assembly granted Palestine the status of a non-member observer State.[412] This extra-Charter process permitted Palestine to ratify human rights treaties.[413] The same opportunity was not possible for Taiwan, where the Secretary-General rejected Taiwan's ratification and accession of human rights treaties.[414] The process of granting or rejecting the status of a non-member observer State is political, with no written procedure or treaty to clarify how it works. The admission of an entity as a non-member observer State does not mean it is recognised as a State. Several UN Member States who voted in favour of the General Assembly "vote on the admission of Palestine to the status of non-member State…explicitly stated that this was not recognition."[415]

The CRC is open for signing by all States.[416] The CRC does not elucidate the meaning of a State, and does not contain a "Vienna Formula". Like other treaties, the CRC designates the Secretary-General as the depository of the Convention.[417] According to the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, when a treaty uses "all States," the Secretary-General "would be in a position of considerable difficulty unless the Assembly gave him explicit directives on the areas coming within the "any State" or "all States" formula. He would not wish to determine, on his own initiative, the highly political and controversial question of whether or not the areas whose status was unclear were States. Such a determination, he believed, would fall outside his competence. He therefore stated that when the "any State" or "all States"

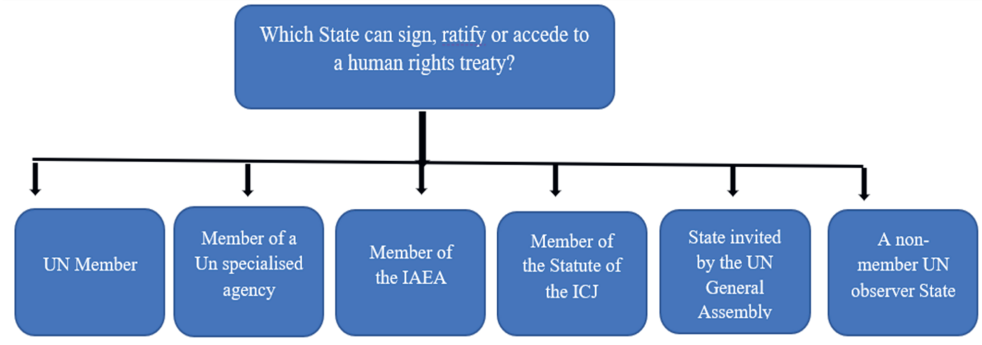
[409] Jure Vidmar, "UN Membership and the State Requirement: does 'State' Always imply 'Statehood'?" in *Max Planck Yearbook of United Nations Law,* edited by Erika de Wet et al. (Leiden: Brill/Nijhoff, 2021): 207.
[410] Article 4 of the UN Charter reads: "1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations. 2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."
[411] Rules of Procedure of the General Assembly (Embodying Amendments and Additions Adopted by the General Assembly up to September 2007)
[412] UN General Assembly, Status of Palestine in the United Nations, Resolution 67/19, UN Doc. A/RES/67/19, 29 November 2012.
[413] Jure Vidmar, "UN Membership and the State Requirement: does 'State' Always imply 'Statehood'?" in *Max Planck Yearbook of United Nations Law,* edited by Erika de Wet et al. (Leiden: Brill/Nijhoff, 2021): 212.
[414] Wen-Chen Chang, "The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison", North Carolina Journal of International Law and Commercial Regulation 36, no. 3 (2011): 598.
[415] Jure Vidmar, "UN Membership and the State Requirement: does 'State' Always imply 'Statehood'?" in *Max Planck Yearbook of United Nations Law,* edited by Erika de Wet et al. (Leiden: Brill/Nijhoff, 2021): 212.
[416] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990: art. 46.
[417] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990: art. 53.

formula was adopted, he would be able to implement it only if the General Assembly provided him with the complete list of the States coming within the formula, other than those falling within the "Vienna formula."[418] Thus when the "Vienna Formula" is not applicable to a treaty, there should be "unequivocal indications from the Assembly that it considers a particular entity to be a State even though it does not fall within the 'Vienna formula.'"[419]

Although many treaties adopted 'the Vienna Formula,' "..some treaties are silent on this matter and do not textually contain such definitional phrasing. Even in such circumstances, the 'Vienna formula' has been applied in practice. The actions of the UN Secretary-General as Depository of Multilateral Treaties are also instructive in this regard."[420] Therefore, the 'Vienna Formula' is an important practical tool for the participation in treaties.

The International Covenant on Economic, Social (ICESC) and Cultural Rights and the International Covenant on Civil and Political Rights (ICCPR) contain 'the Vienna Formula'. Article 26(1) of the ICESC and Article 48(1) of the ICCPR read as follows:

> The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialised agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.



[421]

Somaliland is not a member of the UN or of any of the specialised agencies or of the International Atomic Energy Agency or a party to the Statute of the International Court of Justice, and it is not invited by the General Assembly of the United Nations to become a party to a treaty, and it is not designated by the UN as a non-member observer State. This means it does not meet 'the Vienna Formula.' Somaliland has not made an attempt similar to that of Taiwan trying to join a 'ratified' human rights treaty with the Secretary-General. In spite of that, it does not mean Somaliland

[418] Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, Prepared by the Treaty Section of the Office of Legal Affairs, ST/LEG/7/Rev.l (1999): paragraph 81, page 23
[419] Ibid
[420] Jure Vidmar, "UN Membership and the State Requirement: does 'State' Always imply 'Statehood'?" in *Max Planck Yearbook of United Nations Law,* edited by Erika de Wet et al. (Leiden: Brill/Nijhoff, 2021): 217.
[421] Vienna Convention on the Law of Treaties: art. 81.

cannot, in principle, pursue the options in 'the Vienna Formula' to ratify human rights treaties. It signifies that Somaliland is not a member of a human rights treaty at present.

An entity's fulfilment of the'Vienna Formula' expands its functional capacity to join treaties, particularly those that contain 'the Vienna Formula.' It permits wider participation in treaties "without any prejudice toward the entity's legal territorial legal status."[422]

3.5.2.2 State succession and human rights treaties

Succession to human rights treaties in which Somalia was a State Party before Somaliland's declaration of independence is a key subject that is pivotal in understanding whether these treaties are applicable to Somaliland through State succession.

Does the situation of an unrecognised State reflect a sovereign State permanently replacing another to raise the question of succession? Or is the unrecognised State a territory occupied temporarily by a belligerent group? The legal effect of lack of recognition is a disputed subject that remains relevant in every aspect of the legal discussion concerning an unrecognised State. For the time being, this section treats unrecognised States as States to clarify the rules of succession pertaining to States created as a result of secession or separation. When the sovereignty of one State replaces that of another, a number of legal problems arise. Is the successor State bound by all or any of the treaties of the predecessor?

The creation of a new State through breaking up or separating from a State in the context of unrecognised States raises the question of State succession to treaties. In fact, unrecognised States claim to succeed a territory from the country they were part of. Do unrecognised States, also, succeed to multilateral 'law-making' human rights treaties? The State practice of succession lacks uniformity.[423] Some authors reject State succession,[424] while those who maintain support for succession differ on whether it is automatic or not.[425] There is a consensus that States that become independent through decolonisation enjoy a clean slate.[426] The case of a State formation outside of decolonisation is not uniform, and the subject of State succession is controversial.[427] Some scholars maintain that State succession does not affect newly created States who start a new life from treaty obligations incurred by the predecessor State.[428]

The Vienna Convention on Succession of States in respect of Treaties defines the succession of States as "the replacement of one State by another in the responsibility for the international

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[422] Jure Vidmar, "UN Membership and the State Requirement: does 'State' Always imply 'Statehood'?" in *Max Planck Yearbook of United Nations Law,* edited by Erika de Wet et al. (Leiden: Brill/Nijhoff, 2021): 216.
[423] Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 236.
[424] Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 209.
[425] Menno T. Kamminga, "Impact on State Succession in Respect of Treaties" in *The Impact of Human Rights Law on General International Law*, edited by Menno T. Kamminga and Martin Scheinin, (Oxford: Oxford University Press, 2009): 101.
[426] Menno T. Kamminga, "State Succession in Respect of Human Rights Treaties", European Journal of International Law 7, no. 4 (1996): 471.
[427] James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012): 224; Andreas Zimmermann, "Secession and the law of State succession" in *Secession: International Law Perspective*, edited by Marcelo G. Kohen (Cambridge: Cambridge University Press, 2006): 210; Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 209.
[428] Malcolm Shaw, *International Law:* 947; Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 209; James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012): 438

relations of territory."[429] The Vienna Convention makes a 'distinction' between a succession of independent States through decolonisation and the emergence of a new State in a non-colonial context.[430] In the context of a separation of a State, Article 34(1(a) of the Vienna Convention stipulates that "any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed." Crawford says such distinction is not supported by State practice.[431] It is important to note that the Vienna Convention on Succession of States in respect of Treaties has been acceded to by only 23 Member States.[432]

There is no general rule governing all aspects of State succession and each case warrants separate examination.[433] Treaties pertaining to territorial boundaries or territory-grounded treaties are not affected by State succession, meaning the succession in this context is automatic.[434] The focus here is on human rights treaties concerning State formation through separation or secession.

Human rights treaties are commonly seen as special and are given separate consideration.[435] If the classical State succession rules are adhered to in the context of human rights treaties of a newly formed State, "there is a danger that this might result in a situation where people formerly protected by such treaties are deprived of such protection as a consequence or by-product of state succession."[436] The manner in which the breakup of the former USSR and the Socialist Republic of Yugoslavia approached the succession of human rights treaties also lacked uniformity.[437] Most of the former Yugoslavia members made notifications concerning succession to human rights treaties.[438]

The position of human rights monitoring bodies regarding the succession of human rights treaties is that of automatic succession.[439] In General Comment No. 26, the Human Rights Committee views that the rights in the International Covenant on Civil and Political Rights:

> belong to the people living in the territory of the State party……that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any

[429] Vienna Convention on Succession of States in respect of Treaties, done at Vienna on 23 August 1978. Entered into force on 6 November 1996. United Nations, Treaty Series, Vol. 1946, 3: art. 2(1(b).
[430] The Vienna Convention on Succession of States in respect of Treaties: art. 16 and 34.
[431] James Crawford*, Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012): 438
[432] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIII-2&chapter=23&clang=_en, last retrieved 9 March 2022
[433] Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 210
[434] James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012): 439; Malcolm Shaw*, International Law*: 967-968.
[435] Malcolm Shaw, *International Law*: 984.
[436] Malcolm Shaw, *International Law*: 982.
[437] Andreas Zimmermann, "Secession and the law of State succession" in *Secession: International Law Perspective*, edited by Marcelo G. Kohen (Cambridge: Cambridge University Press, 2006): 215.
[438] ibid: 219.
[439] Menno T. Kamminga, "Impact on State Succession in Respect of Treaties" in *The Impact of Human Rights Law on General International Law*, edited by Menno T. Kamminga and Martin Scheinin (Oxford: Oxford University Press, 2009): 107.

subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.[440]

Adopted without a vote, the UN Commission on Human Rights resolution 1995/18 on the Succession of States in respect of international human rights treaties underscores successor States to "continue to be bound by obligations under international human rights treaties."[441] The Commission views that human rights treaties have a special nature, and "requests the human rights treaty bodies to consider further the continuing applicability of the respective international human rights treaties to successor States, with the aim of assisting them in meeting their obligations."[442]

Human rights that are grounded on customary international law may apply to the new State.[443] A succession of customary international law is automatic to the new States, whether formed by a decolonisation process or other forms of State creation.

Somalia was a State Party to the following human rights treaties when Somaliland declared the restoration of independence:

- International Covenant on Civil and Political Rights (ratified/signed 24 January 1990)
- International Covenant on Economic, Social and Cultural Rights (ratified/signed 24 January 1990)
- International Convention on the Elimination of All Forms of Racial Discrimination (ratified/signed 26 January 1967)
- Convention concerning Forced or Compulsory Labour (ratified/signed 18 November 1960)
- Equal Remuneration Convention (ratified/signed 8 December 1961)
- Abolition of Forced Labour Convention (ratified/signed 8 December 1961)
- Convention relating to the Status of Refugees (ratified/signed 10 October 1978)
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (ratified/signed 12 June 1962)
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (ratified/signed 12 June 1962)
- Convention Against Torture and Other Cruel or Degrading Treatment (ratified/signed 1990).

The following International Labour Organisation Conventions are also ratified by Somalia:[444]

- ❖ Discrimination (Employment and Occupation) Convention.
- ❖ Medical Examination of Young Persons (Sea) Convention
- ❖ Workmen's Compensation (Accidents) Convention
- ❖ Equality of Treatment (Accident Compensation) Convention
- ❖ Seamen's Articles of Agreement Convention

[440] General Comment No. 26: Continuity of Obligations Adopted at the Sixty-first Session of the Human Rights Committee, on 8 December 1997 CCPR/C/21/Rev.1/Add.8/Rev.1, General Comment 26. (General Comments) (Contained in Document A/53/40, annex VII): paragraph 4.
[441] UN Commission on Human Rights, Succession of States in respect of international human rights treaties, 24 February 1995, E/CN.4/RES/1995/18: paragraph 1.
[442] UN Commission on Human Rights, Succession of States in respect of international human rights treaties, 24 February 1995, E/CN.4/RES/1995/18: pparagraph 3.
[443] Malcolm Shaw, *International Law*: 984.
[444] 15(a) of the annex to Human Rights Council resolution 5/1, Somalia, A/HRC/WG.6/11/SOM/1, 11 April 2011: paragraph 42, page 8.

- ❖ Repatriation of Seamen Convention
- ❖ Forced Labour Convention
- ❖ Underground Work (Women) Convention
- ❖ Recruiting of Indigenous Workers Convention
- ❖ Contracts of Employment (Indigenous Workers) Convention
- ❖ Penal Sanctions (Indigenous Workers) Convention
- ❖ Labour Clauses (Public Contracts) Convention
- ❖ Protection of Wages Convention
- ❖ Abolition of Forced Labour Convention.

Somalia ratified the UN Convention on the Rights of the Child (CRC) in 2015. If Somaliland's independent status commenced from May 1991, the CRC is not a treaty subject to rules of State succession.

Article 10(1) of the Somaliland Constitution, titled "foreign relations" reads:

> 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.[445]

The article allows for the survival of unspecified treaties concluded by Somalia before 1991, alluding to an automatic succession of treaties. The meaning of Somaliland's "interest and concerns" are not defined in the Constitution or elsewhere. It is obvious that human rights treaties cannot be contrary to the interest and concerns of Somaliland taking into account that Article 21 in the Bill of Rights section of the Constitution emphasises the application of international human rights treaties by Somaliland by stating that: "the articles which relate to fundamental rights and freedoms shall be interpreted in a manner consistent with the international conventions on human rights and also with the international laws referred to in this Constitution."

The Constitution has a domestic legal meaning in relation to treaties. When it comes to the international aspect, there is no record of Somaliland attempting to notify the UN Secretary-General of a decision to a succession of human rights treaties entered into by Somalia. The Vienna Convention stipulates that notification of succession concerning multilateral treaties shall be written and signed by the head of Government or Minister of Foreign Affairs or a representative with full powers.[446] The notification shall be sent to the depository – the UN General-Secretary is often the depository of human rights treaties. The date of succession is when the depository receives the notification.[447] The notification "however phrased or named" shall express the consent of the successor State to be considered as bound by the treaty.[448] It is also general practice for States to deposit their positions regarding treaties with the UN Secretary-General.

3.5.3 Customary international law and *jus cogens* norms

Treaty law is insufficient in the protection of human rights in an unrecognised State that is not a member of a human rights treaty.[449] Treaties are consent-based instruments that require States to

[445] Somaliland Constitution: art. 101(1).
[446] Vienna Convention on Succession of States in respect of Treaties, done at Vienna on 23 August 1978. Entered into force on 6 November 1996. United Nations, Treaty Series, vol. 1946, p. 3: Art. 38(1, 2).
[447] ibid: art. 38(3, 1-b).
[448] ibid: art. 2(g).
[449] Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles", [1988] AUYrBkIntLaw 5; (1988-1989) 12 Australian Year Book of International Law: 82.

voluntarily join them and is binding primarily on members. Although many States are parties to treaties, "a significant number of States have not adhered to many of the treaties."[450] In the context of unrecognised States, the need to look beyond human rights treaties is increasingly important. This section studies two essential components of human rights protection, namely customary international law and *jus cogens* norms. The focus of this dissertation is not to ascertain customary international human rights law or *jus cogens*. The section looks at jurisprudence, soft law and the writings of authors to examine the existence of customary international human rights law and its application to Somaliland.

3.5.3.1 Customary international law

Customary international law is a source of human rights obligations that are binding on all States.[451] Schachter states that: "whether human rights obligations have become customary international law cannot readily be answered on the basis of the usual process of customary law formation."[452] The list of rights that are customary international law is not well defined.[453] The examples of customary international law, given in different contexts, include the prohibitions of torture, genocide, racial discrimination, and slavery.[454] There is an overlap between rules of *jus cogens* and customary international law.

In 2012, the International Court of Justice (*Belgium v. Senegal*) found that "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).[455] The act of torture is an international crime independent of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[456] The Court cited the Universal Declaration of Human Rights and stipulated that the prohibition of torture "is grounded in a widespread international practice and on the *opinio juris* of States."[457] The decision of the Court demonstrates that customary international law has independent existence even when such rights are subsequently codified in a treaty or the right itself evolved to customary international law after the treaty's adoption.

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[450] Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Mijhoff, 1991): 335.
[451] Theodor Meron, "Human Rights Instruments and Customary Law" in *Human Rights and Humanitarian Norms as Customary Law*. (Oxford: Oxford University Press, 1991): 80; Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" [1988] AUYrBkIntLaw 5; (1988-1989) 12 Australian Year Book of International Law: 83.
[452] Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Mijhoff, 1991): 336.
[453] Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 3rd ed. (Cambridge: University Press, 2019): 85: Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff, 1991): 336; James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012): 642.
[454] Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge: Cambridge University Press, 2015): 3; Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 3rd ed. (Cambridge: Cambridge University Press, 2019): 88; Malcolm Shaw, *International Law*: 275.
[455] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, 422: paragraph 99.
[456] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, 422: paragraph 97.
[457] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, 422: paragraph 99.

The Human Rights Committee's General Comment 24 states that provisions in the ICCPR that represent customary international law and *jus cogens* are not subject to reservations and made a list[458] of such provisions.[459]

The original objective of the Universal Declaration of Human Rights (UDHR) was not to be a legally binding instrument. After seven decades since its inception, there is an argument that the UDHR or some of its provisions now constitute customary international law.[460] The main human rights treaties, including the CRC, contain references to the UDHR. The International Court of Justice cited the Universal Declaration of Human Rights in contexts where the Court was discussing customary international law or *jus cogens* norms.[461]

The 'near-universal ratification' of treaties such as the CRC reinforce the argument that they are a codification of rules of international customary law.[462] However, there is no solid evidence demonstrating that the CRC is customary international law. The CRC is a relatively new treaty. Due to the universal ratification, it has not attracted attention to investigate or consider the customary nature of the CRC.

The customary international law provisions in the UDHR, ICCPR or other treaties expressly recognised as such by the ICJ or other bodies are predominantly adults' rights. Certainly, children also benefit from the prohibition of capital punishment of children, prohibition of torture, and genocide, to give few relevant examples, but the expansive language of the CRC is missing from these other human rights treaties and customary international law. In summary, customary international law largely protects adults' rights.

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[458] The Committee listed the following rights:
Slavery,
Torture,
Cruel, inhuman or degrading treatment or punishment,
Arbitrarily depriving persons of their lives,
Arbitrarily arresting and detaining persons,
Denying freedom of thought, conscience and religion,
Presuming a person guilty unless he/she proves his innocence,
Execute pregnant women or children,
Permit the advocacy of national, racial or religious hatred,
Denying persons of marriageable age the right to marry,
Denying minorities the right to enjoy their own culture, profess their own religion, or use their own language, and
Denying the right to a fair trial.

[459] Human Rights Committee, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant Adopted at the Fifty-second Session of the Human Rights Committee, on 4 November 1994: paragraph 8.

[460] John P. Humphrey, "The International Bill of Rights: Scope and Implementation", 17 Wm. & Mary L. Rev. 527 (1976): 529; Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 3rd ed. (Cambridge: Cambridge University Press, 2019): 59; Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff, 1991): 337; Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* 8th edition (New York: Routledge, 2019): 353.

[461] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, p. 422, para. 99: Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422: 97-99.

[462] William A. Schabas, *The Customary International Law of Human Rights*, (Oxford: Oxford University Press, 2021): 8.

3.5.3.2 Jus cogens norms

Jus cogens norms are norms that are relied on in various arguments, but their ascertainment poses a challenge.[463] According to Article 53 of the Vienna Convention on the Law of Treaties, "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." The Vienna Convention reads,

> For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The Convention does not make a list of such norms, nor does it assign any international body to make a determination of which norms are *jus cogens*. The International Law Commission adopts a definition similar to that of the Vienna Convention.[464]

In the annex, the Draft Conclusions of the International Law Commission provide 'a non-exhaustive list of norms' and considers the following as *jus cogens* norms:

a) The prohibition of aggression
b) The prohibition of genocide
c) The prohibition of crimes against humanity
d) The basic rules of international humanitarian law
e) The prohibition of racial discrimination and apartheid
f) The prohibition of slavery
g) The prohibition of torture
h) The right of self-determination.[465]

Despite the difficulties concerning identification, the existence of *jus cogens* norms and their binding character is based on strong evidence. The International Court of Justice found in 2006 that genocide is a peremptory norm of general law.[466] Other bodies, including the European Court of Human Rights (ECtHR), reinforced the norms of *jus cogens* and stated, for instance, that prohibition of torture is a *jus cogens* norm.

[463] Michael Wood, "The Unilateral Invocation of Jus Cogens Norms", in *Peremptory Norms of General International Law (Jus Cogens),* edited by Dire Tladi: 372,
[464] According to Draft conclusion 2 [3(1)] "a peremptory norm of general international law (jus cogens) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."
[465] International Law Commission, Peremptory norms of general international law (jus cogens) Seventy-first Session Geneva, 29 April–7 June and 8 July–9 August 2019: annex.
[466] Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, 6.

Peremptory norms are binding on every State even if the State did not ratify a human rights treaty.[467] *Jus cogens* norms have universal application.[468] These are norms that are not restricted by the capacity or the status of the State. They are non-derogable and binding on all places at all times. The list in the International Law Commission's Draft Conclusions protects children and adults alike, but are not especially children's rights, and covers a limited aspect of human rights. The definition of *jus cogens* is narrow.[469] Although it protects human beings, including children, from the most heinous crimes, many violations of children's rights are not included in the *jus cogens*.

3.5.3.3 The customary law status of children's right to nationality and protection from sexual abuse

There is no evidence proving that the two rights that are focused on as case studies in this dissertation constitute customary international law. The establishment of a custom requires identifying a general, repeated and consistent State practice with a subjective element of being legally binding acts (*opinion juris*). The State practice concerning granting nationality and protection of children from sexual abuse is far from being consistent.

The 1961 Convention on the Reduction of Statelessness (55 State Parties)[470] and the 1954 Convention relating to the Status of Stateless Persons (80 State Parties) do not have universal ratification.[471] Various human rights treaties recognise the right to nationality, but domestic laws usually regulate nationality, and attribution of nationality is the domain of States.[472] States' approaches to dealing with and addressing issues of statelessness and the right to nationality are not uniform. States employ various modes, procedures and substantive laws that govern nationality and statelessness. Some States adopt *jus sanguinis,* and others prefer *jus soli,* whereas some combine both modes. Nevertheless, the right to nationality as a human right might be in customary international law even though the exact content of the right – what does it entail exactly, including which obligations, etc. – is a subject of discussion. States are not in dispute that there is a right to a nationality.

In relation to Article 24 of the International Covenant on Civil and Political Rights, the Human Rights Committee, in its General Comment No. 17, commented that: "while the purpose of [Article 24] is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every

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[467] Rhona K. M. Smith, *Texts and Materials on International Human Rights*, 3rd ed., (New York: Routledge, 2013): 15; Christine Chinkin "Sources," in *International Human Rights Law,* edited by Daniel Moeckli, et al., (Oxford: Oxford University Press, 2018): 73.

[468] International Law Commission, Peremptory norms of general international law (jus cogens) Seventy-first Session Geneva, 29 April–7 June and 8 July–9 August 2019: Draft conclusion 3 [3(2)]; Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff, 1991): 342.

[469] Robert Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (Oxford: Hart Publishing Ltd, 2015: 7.

[470] https://www.unhcr.org/protection/statelessness/3bbb24d54/states-parties-1961-convention-reduction-statelessness.html, last accessed 23 March 2022.

[471] https://www.unhcr.org/protection/statelessness/3bbb0abc7/states-parties-1954-convention-relating-status-stateless-persons.html, last accessed 23 March 2022

[472] See Mónika Ganczer, "*The Right to a Nationality as a Human Right?"* in *Hungarian Yearbook of International Law and European Law 2014*. (Eleven International Publishing, The Hague): 15; Raylene Keightley, "The Child's Right to a Nationality and the Acquisition of Citizenship in South African Law". South African Journal on Human Rights 14, no. 3 (1998): 411.

child born in their territory."[473] However, the Committee continued on by stating that States: "are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born."[474]

Article 19 of the CRC is an international legal provision undertaken to protect children "from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse." State practice on the protection of children from sexual abuse lacks uniformity, and the initiatives of States to prevent and respond to violence against children are in general insufficient.[475] The Committee on the Rights of the Child finds that "legal frameworks in a majority of states still fail to prohibit all forms of violence against children, and where laws are in place, their enforcement is often inadequate."[476]

3.5.4 Unilateral commitment to international human rights laws

The self-imposed obligation of Somaliland to international human rights law is an essential subject. This section looks at the language of the Somaliland Constitution pertaining to international human rights instruments. Are human rights treaties self-imposed by Somaliland legally binding on it? The answer to this question has two dimensions: the national level and the international level. This section analyses the international law aspect of the subject with a particular focus on the UN Charter, the Universal Declaration of Human Rights, and the UN Convention on the Rights of the Child (CRC).

Article 10(2) of the Constitution reads: "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."[477] Article 21(2) of the Constitution sets forth:

> The articles which relate to fundamental rights and freedoms shall be interpreted in a manner consistent with the international conventions on human rights and also with the international laws referred to in this Constitution.

Article 21(2) and Article 10(2) cover two categories of human rights instruments:

a. "International conventions on human rights" is a generic statement that might encompass all existing human rights treaties
b. "International law referred to in this constitution" which are the UN Charter, the Universal Declaration of Human Rights, and treaties in which Somalia was a State Party before May 1991, the date Somaliland declared independence.

The self-obligation of Somaliland to human rights treaties relates to State succession of treaties Somalia was a member of all other human rights treaties that are not subject to the rules of State succession and the Universal Declaration of Human Rights.

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[473] CCPR General Comment No. 17: Article 24 (Rights of the child), adopted at the Thirty-fifth session of the Human Rights Committee, on 7 April 1989: paragraph 8.
[474] ibid.
[475] Committee on the Rights of the Child, General Comment No. 13 (2011) Article 19: The right of the child to freedom from all forms of violence: paragraph 11.
[476] ibid.
[477] Somaliland Constitution, art. 10(2). The English translation is done by Ibrahim Hashi, Somalilandlaw.com, last accessed 25 February 2022.

a. The UN Charter

Article 10(2) of the Somaliland Constitution states that Somaliland: "recognises and shall act in conformity with the United Nations….." The UN Charter is a treaty grounded on the consent of States. However, it is a universally accepted document, and Somalia was also a member of the UN Charter before 1991(and is still a member). The UN Charter contains a limited reference to human rights. In the preamble, the Charter reaffirms: "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[478] In Article 1, the Charter includes the purpose of the UN "…in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[479] The Charter also requires the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[480]

The Constitution of Somaliland imposes a legal obligation – at a minimum nationally – on Somaliland to adhere to the principles of human rights enshrined in the UN Charter.

b. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights was adopted not as a legally binding instrument. After decades since its inception, there is an argument that the Universal Declaration of Human Rights or some provisions therein constitute customary international law. The Constitution of Somaliland makes a direct reference to the Universal Declaration of Human Rights.

Although there is a debate about which provisions in the UDHR account for customary international law, its importance and implications in Somaliland are reflected by the Constitution. The Universal Declaration of Human Rights was drafted to fill the gap in the UN Charter. The Constitution's inclusion of the statement that Somaliland "shall respect the Universal Declaration of Human Rights" demonstrates a willingness on the side of Somaliland to implement the UDHR.

The UDHR provides that all human beings are "free and equal in dignity and rights"[481] and guarantees equal enjoyment of the rights in the Declaration without distinction. Article 30 states:

> Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Article 2 states that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.." and that "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty." The term "limitation of sovereignty" means that the capacity and status of the territory are irrelevant for the application of the UDHR. Whether or not the territory is recognised as an independent State, the individuals in the territory are entitled to all the rights and freedoms under the UDHR. The UDHR is not State-centric in the traditional sense of statehood. The challenge is the legal binding effect

[478] UN Charter: preamble.
[479] UN Charter: art. 1(3).
[480] UN Charter: art.55(c).
[481] Universal Declaration of Human Rights, 1948: art. 1.

of the Declaration. The argument purporting that the UDHR in its entirety or some of its provisions are now customary international law has not highlighted which articles are customary international law.

The UDHR contains article 15, which guarantees everyone the right to a nationality and prohibits arbitrarily depriving a person of his/her nationality or denying the right to change one's nationality.[482] No specific stipulation in the UDHR protects children from sexual violence.

c. The status of the CRC in the Constitution

The Constitution of Somaliland does not mention the UN Convention on the Rights of Child (CRC), and it is not part of the treaties entered into by Somalia before 1991. Somalia ratified the CRC in 2015. The Juvenile Justice of Somaliland, Act No. 36/2007, cites the Convention on the Rights of the Child in the preamble and in articles 2 and 5. Article 2 provides that the Somaliland Constitution, Sharia, the Convention on the Rights of the Child and international human rights treaties are the basis of the Juvenile Justice Act. Article 5(1) states that the objective of the Act is to "protect the rights of children in accordance with the Convention on the Rights of the Child, international human rights treaties and in a manner consistent with Somaliland's cultural and Islamic values."[483]

There is no public record showing Somaliland attempting to transmit a notification of deposit of accession to the CRC to the UN Secretary-General. According to a report by Save the Children, Somaliland endorsed the CRC in 2001.[484] The report does not include a copy of a government document. The Ministry of Justice, the Ministry of Employment, Social and Family Affairs and the Office of the Attorney General have not denied the existence of the endorsement but also said they have no copies of the said endorsement.[485] The endorsement might have a legal implication under domestic law, but under international treaty law, such action does not constitute accession to a treaty.

3.5.5 Human rights obligations of sub-national administration

From the UN's and UN Member States' perspective, the territory of Somaliland is part of Somalia. This categorisation deals with Somaliland's territory as a sub-national entity. Somalia is a member of the UN Convention on the Rights of the Child, among other human rights treaties.[486]

Human rights treaties, the peremptory norms of general law (*jus cogens*), customary international law, the general principles of law and the judicial decisions constitute legal obligations of States in relation to the respect, protection and fulfilment of human rights and such obligation is not restricted to the national government. Subnational State authorities are also under an obligation as part of the State. Article 4 of the CRC obligates the State Parties to "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention." The Committee on the Rights of the Child states that the legal obligation

[482] Universal Declaration of Human Rights, 1948: art. 15.
[483] The Juvenile Justice Act No. 36/2007: article 5(1).
[484] Save the Children stated in its report, Save the Children, Child Rights Analysis in Somaliland, 2003: 24.
[485] During this research, these two ministries and the Office of the Solicitor General were asked if they have a copy of a document pertaining to acceptance of the CRC. No such document is available from these institutions.
[486] https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=161&Lang=EN last accessed 21 February 2022.

in the CRC is for all branches – executive, judiciary and legislative – and all levels.[487] Human rights treaties are, in general, applicable to the entire territory of the State Party.[488] In the meaning of Article 4 of the CRC, the territory of Somaliland is located within the jurisdiction of Somalia and, as a result, the CRC is applicable to the territory of Somaliland. There is a difference between the territorial applicability of a treaty and the attribution of wrongful conduct and legal obligation on a State. The first involves that the CRC applies to all the territories internationally recognised to constitute Somalia. The enforcement of rights and taking on the legal obligations enshrined in the CRC concern whether or not the territory is under the control of the recognised State. Once a State loses control over a territory, wrongful conducts are not attributable to the State.

The fact on the ground is that the government of Somaliland, which has effective control over the territory, does not accept the assertion that it is a sub-national unit. It does not participate in the periodic reports of Somalia submitted to the human rights monitoring bodies and does not report to or accept the authority of the government of Somalia. However, under international human rights law, Somalia is obligated to include its reports on the situation in the territory of Somaliland. Somalia's reports under the CRC and its periodic reports on occasions contain sections about Somaliland.[489]

3.6 Conclusion

Human rights in domestic laws and under international law are different in sources, meaning and application. Despite the existence of the idea of human rights in national laws of most States, the sources of international human rights law are State-centric and primarily impose legal obligations on recognised States. Unrecognised States lack international *de jure* recognition, and their status under international law is ostensibly anomalous and contested. Due to the complex nature of unrecognised States, international human rights law is less developed in providing rules tailored to respond to the challenges posed by the uniqueness of unrecognised States. Although some unrecognised States – for example, the State of Palestine – might find a way to navigate the complex procedure enshrined in Articles 81 and 83 of the Vienna Convention on the Law of Treaties to become a party to a treaty, generally unrecognised States struggle in joining human rights treaties.

International customary law and rules of *jus cogens* are less restrictive than treaty law. The *jus cogens* rules protect humanity from the most heinous crimes and are viewed as universally applicable. Ascertainment of customary international human rights law is a difficult and complex exercise that is yet to be fully resolved. There is no agreed list of human rights in customary law. *Jus cogens* rules and customary law are argued as having universal application and offer protection.[490] These are norms that are not limited by the State's capacity or status.

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[487] General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child: paragraph 1.

[488] Malcolm Shaw, *International Law*: 926: James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012): 378.

[489] See Chapter 4 for more details about Somalia's approach to Somaliland and its reporting practices regarding Somaliland.

[490] International Law Commission, Peremptory norms of general international law (jus cogens) Seventy-first Session Geneva, 29 April–7 June and 8 July–9 August 2019: Draft conclusion 3 [3(2)]; Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff, 1991): 342.

Despite possessing characteristics of statehood, the UN and the African Union consider Somaliland as part of Somalia. This chapter examined the applicability of international human rights law in Somaliland by examining the sources of international law as stipulated in article 38 of the Statute of the International Court of Justice.[491]

Regarding the question of succession to treaties, two issues have been discussed in this chapter. First is the possibility of Somaliland acceding to the CRC. It has been concluded that the 'Vienna Formula' applies, and Somaliland can join the CRC if one of the following criteria is satisfied: (a) Somaliland is admitted to the UN as a Member State, (b) Somaliland is accepted as a member in any of the UN specialised agencies, (c) Somaliland becomes a party of the International Atomic Energy Agency, (d) Somaliland joins the Statute of the International Court of Justice, and/or (e) Somaliland is invited by the General Assembly of the United Nations to become a party to the CRC. Currently, none of these criteria has been met by Somaliland.

Second, if we consider Somaliland a secessionist entity, can Somaliland succeed in international human rights treaties ratified by Somalia? The State practice of the succession of treaties by a newly established State through separation or secession lacks uniformity. However, this chapter elaborated that fundamental human rights protected by international human rights treaties belong to individuals living in the territory.[492] The Vienna Convention on Succession of States in respect of Treaties and international human rights bodies accept that treaties in force at the date of the succession of States in respect of the entire territory of the predecessor State continue in force in respect of the successor State, and once the people are accorded the protection under a treaty, that protection continues to belong to them even if the State changes.[493]

The challenge is, however, how to proceed in applying the rules of State succession to an unrecognised State. The lack of recognition impedes the practicality of depositing accession with the Secretary-General and engaging with international human rights bodies as a State that can be a respondent or plaintiff. Moreover, there is no record of Somaliland attempting to notify the UN Secretary-General of a decision to succeed to human rights treaties or accede to others.

Although State succession might not directly apply as long as the question of recognition is pending, the CRC and other human rights treaties ratified by Somalia are applicable to the territory of Somaliland from an international legal perspective. The treaties described above, however, impose a legal obligation on Somalia. As a consequence, rights enshrined in treaties lack corresponding obligations and enforceability against Somaliland under international law.

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[491] Article 38(1) of the ICJ Statute reads:
"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[492] Case Bijelic v Montenegro and Serbia, Application No. 19890/05, 11 June 2009, paragraph 69.

[493] Vienna Convention on Succession of States in respect of Treaties, done at Vienna on 23 August 1978. Entered into force on 6 November 1996. United Nations, Treaty Series, Vol. 1946, p. 3: art. 34(1(a); General Comment No. 26: Continuity of Obligations Adopted at the Sixty-first Session of the Human Rights Committee, on 8 December 1997 CCPR/C/21/Rev.1/Add.8/Rev.1, General Comment 26. (General Comments) (Contained in Document A/53/40, annex VII): paragraph 4; Menno T. Kamminga, "Impact on State Succession in Respect of Treaties" in *The Impact of Human Rights Law on General International Law*, edited by Menno T. Kamminga and Martin Scheinin (Oxford: Oxford University Press, 2009): 107.

The question of the meaning of territorial application might arise in the absence of corollary legal obligation. Once ratified, human rights treaties continue to be applicable in the relevant territory even if the status or control of the territory changes. In spite of that, an unrecognised State, not a party to a treaty, cannot assume a legal obligation resulting from the treaty.

However, nothing precludes Somaliland from voluntarily incorporating the CRC and other treaties in its domestic law, and in doing so, Somaliland would self-impose legal obligations justiciable only in its courts. Somaliland's unilateral commitment to respect the UN Charter, the Universal Declaration of Human Rights, treaties entered into by Somalia before May 1991 and other international human rights instruments carries legal obligations in accordance with its domestic law, but it is not a proper mechanism permitting Somaliland to accede to human rights treaties in the special *modus operandi* of State succession of treaties.

4 The Obligation of Somalia to Protect the Rights of Children Living in Somaliland

4.1 Introduction

Until 2015, Somalia and the US were the only two UN Member States who had not ratified the UN Convention on the Rights of the Child (CRC). The ratification of Somalia in 2015 means Somalia is now under a legally binding obligation to respect, protect and fulfil the rights of the CRC for the children who are within its jurisdiction. The obligation of State Parties to the CRC arises from Article 2 and Article 4 of the CRC. According to Article 2, Somalia is required to respect and ensure the rights in the CRC for the children within its jurisdiction without discrimination. Internationally, Somalia has *de jure* recognition as a UN Member State with sovereignty over all of its territory. Although Somalia does not have effective physical control over Somaliland, the territory of Somaliland is viewed internationally as part of Somalia.

This chapter examines Somalia's legal obligation concerning the rights of children in Somaliland. Is there a legal obligation on Somalia under the CRC and general international human rights law in relation to the children in the territory under the control of the government of Somaliland? Does the lack of effective control over the territory mean Somalia has no jurisdiction over this territory? This chapter examines the interrelated notions of jurisdiction (*de facto* and *de jure* jurisdiction), territorial sovereignty, and State obligation. It also investigates Somalia's actions under the implementation obligation required by the CRC to understand if Somalia has assumed an obligation over the territory. In this regard, the Constitution of Somalia and the reports of Somalia to the Committee on the Rights of the Child are reviewed. Moreover, the chapter reviews if the Committee ever mentions Somaliland and, if so, what is the Committee's approach to who has the legal obligation under the territory that the government of Somaliland controls.

This chapter is part of this dissertation's examination of the legal obligation of all relevant authorities (Somalia and Somaliland) to understand children's rights better in Somaliland. It examines the issue of who has the legal obligation under the CRC and in general international human rights law to respect, protect and fulfil children's rights in the CRC.

This chapter starts by looking at the overall obligation of Somalia under the CRC (section 4.2) followed by the reservations made by Somalia in connection to the discharge of treaty obligations (section 4.3). Section 4.4 elaborates on the concept of "within the jurisdiction" of the State Party and how human rights treaties in general and the CRC, in particular, define and determine the jurisdiction of a State Party – Somalia in this case – to assess the application of a treaty and fulfilment of an obligation. Section 4.5 examines Somalia's national legal order to understand the domestic law definition of Somalia's jurisdiction and whether the territory under the control of the government of Somaliland is excluded or included in the jurisdiction of Somalia, and how treaties are domesticated. Section 4.6 concludes the chapter.

4.2 Somalia's legal obligations under the CRC

According to Article 2 of the CRC, a State party is required to respect and ensure the rights in the CRC for the children within its jurisdiction without discrimination.[494] Furthermore, Article 2(2) obliges State Parties to take all appropriate measures to ensure that children are protected against

[494] CRC: art. 2(1).

all forms of discrimination or punishment.[495] Under Article 4, State Parties are obligated to take "all appropriate legislative, administrative, and other measures" to implement the rights in the CRC. In relation to economic, social and cultural rights, the State is required to "undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation."[496]

The legal obligations of State Parties to the CRC entail the tripartite obligations to protect, respect and fulfil children's rights enshrined in the Convention. The tripartite obligation brings about positive and negative obligations.[497] The *erga omnes* obligations in human rights treaties[498] involve the obligation of a State Party in connection to a person to a vertical relationship.[499] Therefore, the beneficiaries and right holders are the individuals under the jurisdiction of the State Parties to the CRC.[500]

The Committee on the Rights of the Child, a treaty body established by the CRC, states that the implementation of the CRC requires that: "States parties take action to ensure the realisation of all rights in the Convention for all children in their jurisdiction."[501] The obligation is for all branches – executive, judiciary and legislative – and all levels. The obligation of the State is to accord protection to children living in the State's jurisdiction from violations from a third party.[502]

The obligation to respect entails that the State refrain from interfering with the rights and freedoms of the person.[503] In this regard, respect requires the State to observe "the freedom of individuals," and also to facilitate the enjoyment of these rights. Protection requires States to protect rights from interferences emanating from non-State actors and other entities under their jurisdiction.[504] The obligation to protect aims to ensure human rights are not abused by non-State entities or other States,[505] and is to prevent occurrences of abuses and to provide a remedy to those whose rights

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[495] CRC: art. 2(2).
[496] CRC: art. 4.
[497] Dinah Shelton, *Remedies in International Human Rights Law* 3rd ed. (New York: Oxford University Press, 2015): 13
[498] Human Rights Committee, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004 (2187th meeting): paragraph 2; Olivier De Schutter, *International Human Rights Law* (New York: Cambridge University Press, 2010): 48.
[499] Frederic Megret, "Nature of obligations" in *International Human Rights Law.* edited by Daniela Moeckli et al., (New York: Oxford University Press, 2014): 96; William A. Schabas, *The Customary International Law of Human Rights* (Oxford: Oxford University Press, 2021): 40.
[500] Frederic Megret, "Nature of obligations" in *International Human Rights Law,* edited by Daniela Moeckli et al., (New York: Oxford University Press, 2014): 99; Olivier De Schutter, *International Human Rights Law* (New York: Cambridge University Press, 2010): 48.
[501] General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child: paragraph 1.
[502] CRC: art. 2(2).
[503] Ida Elisabeth Koch, "Dichotomies, Trichotomies or Waves of Duties?", Human Rights Law Review, Vol. 5, Issue 1, 2005: 82; Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke and Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Oxon: Routledge, 2014): 89.
[504] Rory O'Connell et al., *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Oxon: Routledge, 2014): 92s.
[505] Ida Elisabeth Koch, "Dichotomies, Trichotomies or Waves of Duties*?",* Human Rights Law Review*,* Volume 5, Issue 1, 2005:82; Olivier De Schutter, *International Human Rights Law: Cases, Materials and Commentary* (Cambridge: Cambridge University Press, 2010): 248.

are abused by a non-State entity.[506] The third category is the obligation to fulfil, which requires the State "to adopt appropriate legislative, administrative and other measures towards the full realisation of human rights."[507]

The notion of the obligation to protect becomes particularly crucial in relation to the protection of children's rights in situations where the threats to the enjoyment of rights emanate from an entity that does not accept the authority of the State party and the State is not able to exert influence in preventing abuses of child rights or providing remedy. In the case of Somaliland, the government of Somalia is not in physical control of the territory.

4.2.1 Somalia's reservations about the CRC

States use reservations to modify strong obligations in a treaty,[508] which might constitute an attempt to relax obligations under a treaty. This approach is adopted by some States to avoid the implementation of the treaty in the domestic legal order.[509] Somalia does not use reservations as a tool to indicate a limited scope of obligation in relation to the territory of Somaliland. Somalia made only the following reservation to the CRC:

> The Federal Republic of Somalia does not consider itself bound by Articles 14, 20, 21 of the above stated Convention and any other provisions of the Convention contrary to the General Principles of Islamic Sharia.

Article 14 relates to the child's freedom of thought, conscience and religion. Article 20 addresses "a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State." It requires States to ensure alternative care for such a child including "foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children." Article 21 covers adoption of children and outlines basic guarantees for adoption including "that the best interests of the child shall be the paramount consideration."

According to Article 51(2) of the UN Convention on the Rights of the Child: "a reservation incompatible with the object and purpose of the present Convention shall not be permitted." The Committee on the Rights of the Child in its General Comment No. 5 emphasised that it "is deeply concerned that some States have made reservations which plainly breach article 51(2) by suggesting, for example, that respect for the Convention is limited by the State's existing

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[506] Olivier De Schutter, *International Human Rights Law: Cases, Materials and Commentary* (Cambridge: Cambridge University Press, 2010): 365.

[507] Olivier De Schutter, *International Human Rights Law: Cases, Materials and Commentary* (Cambridge: Cambridge University Press, 2010): 461.

[508] Daniel W. Hill, Jr., "Avoiding Obligation: Reservations to Human Rights Treaties", Journal of Conflict Resolution 2016, Vol. 60(6): 1130; Heather Elko McKibben and Shaina D. Western, "'Reserved Ratification': An Analysis of States' Entry of Reservations Upon Ratification of Human Rights Treaties", B.J.Pol.S. 50, 2018: 688; Kelebogile Zvobgo et al., "Reserving Rights: Explaining Human Rights Treaty Reservations", International Studies Quarterly (2020) 64: 788,

[509] Kelebogile Zvobgo et al., "Reserving Rights: Explaining Human Rights Treaty Reservations", International Studies Quarterly (2020) 64: 785; Daniel W. Hill, Jr., "Avoiding Obligation: Reservations to Human Rights Treaties", Journal of Conflict Resolution 2016, Vol. 60(6): :1132; Heather Elko McKibben and Shaina D. Western, "'Reserved Ratification': An Analysis of States' Entry of Reservations Upon Ratification of Human Rights Treaties", B.J.Pol.S. 50, 2018: 689; Elisabeth Lijnzaad, *Reservations to UN-human rights treaties: ratify and ruin?* (Dordrecht-Boston-London : Springer, 1995): 77-78.

Constitution or legislation, including in some cases religious law."[510] The Committee cites Article 27 of the Vienna Convention on the Law of Treaties which provides: "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

Somalia's reservation includes the generic statement that "the Federal Republic of Somalia does not consider itself bound by….any other provisions of the Convention contrary to the General Principles of Islamic Sharia." This reservation might conflict with "the object and purpose" of the Convention as it could be used to preclude Somalia from implementing all the articles or any article it picks as "contrary to the General Principles of Islamic Sharia". The purport of these principles is not explained in the reservation. Nevertheless, Somalia's initial report covers all articles of the CRC, including provisions on concerns about reservations. It is not clear whether or not this amounts to the withdrawal of reservations.

4.2.2 "Within the jurisdiction" of Somalia

The CRC imposes the legal obligation on State Parties to the extent of their jurisdiction. Hence the concept of jurisdiction is essential to determine Somalia's legal obligation concerning children in the territory under the control of Somaliland. To what extent, if any, is Somalia under a legal obligation to respect, protect and fulfil the rights of children in Somaliland?

Jurisdiction primarily extends within the territory of the State,[511] except in the context of extraterritorial jurisdiction.[512] A State has the authority to legislate, enforce, adjudicate or otherwise conduct constitutional powers within its territory.[513] The legal definition demonstrates the different aspects of jurisdiction in terms of prescriptive, enforcement and adjudicative jurisdiction.[514] The power of the State cannot be enforced in the territory of another State.[515] The prescriptive jurisdiction concerns "the geographical reach of a State's laws"[516] because

[510] General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6): paragraph 15.
[511] Stephen Allen et al., "Introduction: Defining State Jurisdiction and Jurisdiction in International Law" in *The Oxford Handbook of Jurisdiction in International Law*, edited by Stephen Allen et al., (Oxford: Oxford University Press, 2019): 7; Kaius Tuori, "The Beginnings of State Jurisdiction in International Law until 1648" in *The Oxford Handbook of Jurisdiction in International Law*, edited by Stephen Allen et al., (Oxford: Oxford University Press, 2019): 26; James Crawford, *Brownlie's Principles of Public International Law:* 456; European Court of Human Rights, Guide on Article 1 of the European Convention on Human Rights, Obligation to respect human rights – Concepts of "jurisdiction" and imputability Updated on 30 April 2022: paragraph 13, page 7.
[512] Fons Coomans, "The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights", Human Rights Law Review 11:1, 2011: 5; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties Law, Principles, and Policy* (Oxford: Oxford University Press, 2011): 8; Conway W. Henderson, *Understanding International Law* (West Sussex: Wiley-Blackwell, 2010): 141.
[513] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law,* 8th ed: (New York: Routledge 2019) 123; Stéphane Beaulac, "The Lotus Case in Context: Sovereignty, Westphalia, Vattel, and Positivism" in *The Oxford Handbook of Jurisdiction in International Law*, edited by Stephen Allen et al., (Oxford: Oxford University Press, 2019): 41; James Crawford, *Brownlie's Principles of Public International Law*: 456.
[514] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010): 43; Stéphane Beaulac, "The Lotus Case in Context: Sovereignty, Westphalia, Vattel, and Positivism" in *The Oxford Handbook of Jurisdiction in International Law*, edited by Stephen Allen et al., (Oxford: Oxford University Press, 2019): 41.
[515] Stéphane Beaulac, "The Lotus Case in Context: Sovereignty, Westphalia, Vattel, and Positivism" in *The Oxford Handbook of Jurisdiction in International Law*, edited by Stephen Allen et al., (Oxford: Oxford University Press, 2019): 51.
[516] Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (Oxford: Oxford University Press, 2015): 9.

enforcement "is restricted by territorial factors".[517] Enforcement jurisdiction relates to the State's coercive power to enforce laws such as arresting a person or carrying out searches or other forms of enforcement mechanisms.[518] Although a State might have full power to prescribe legislation as it sees fits, its enforcement powers are limited by its territorial reach.[519]

Territorial jurisdiction is connected to sovereignty.[520] Sovereignty results in a State having exclusive jurisdiction over a territory and the people living in the territory.[521] "International jurisdiction is an aspect of an ingredient or a consequence of sovereignty . . . [J]urisdiction involves both the right to exercise it within the limits of the State's sovereignty and the duty to recognise the same right of other States."[522] Sovereignty makes jurisdiction a necessary competence of the State.[523] Territorial control does not exclusively decide the legality of sovereign action.[524] Acquisition of a title is the fundamental bedrock for territorial sovereignty.[525] Title "relates to both the factual and legal conditions under which territory is deemed to belong to one particular authority or another."[526]

There might be a situation where a State exercises control over a territory without a title and, as a consequence, carries the responsibility for activities undertaken in the territory, but without gaining the title in relation to that territory.[527] The converse can happen as well. Due to invasion, internal conflict or other incidents, a State might lose factual control over a part of its territory.[528] Although the factual loss of territorial control does not mean loss of title to the territory, it affects the determination of a State responsibility "for acts carried out in the pertinent territory".[529]

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[517] Malcolm Shaw, *International Law*: 646.
[518] Vaughan Lowe, 'Jurisdiction' in *International Law*, edited by Malcolm Evans (Oxford: Oxford University Press, 2003): 330-331; Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010): 44.
[519] Vaughan Lowe, 'Jurisdiction' in *International Law*, edited by Malcolm Evans (Oxford: Oxford University Press, 2003): 351.
[520] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010): 43; Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (Oxford: Oxford University Press, 2015): 5; Stephen Allen et al., "Introduction: Defining State Jurisdiction and Jurisdiction in International Law," in *The Oxford Handbook of Jurisdiction in International Law*, edited by Stephen Allen et al., (Oxford: Oxford University Press, 2019): 5; Malcolm Shaw, *International Law*: 645; James Crawford, *Brownlie's Principles of Public International Law*: 456.
[521] James Crawford, *Brownlie's Principles of Public International Law*: 447; Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*: 123.
[522] Frederick A. Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years', Hague Recueil 186 (1984): 9, 20. Cited in Stéphane Beaulac, "The Lotus Case in Context: Sovereignty, Westphalia, Vattel, and Positivism" in *The Oxford Handbook of Jurisdiction in International Law*, edited by Stephen Allen et al., (Oxford: Oxford University Press, 2019): 42.
[523] Stéphane Beaulac, "The Lotus Case in Context: Sovereignty, Westphalia, Vattel, and Positivism," in *The Oxford Handbook of Jurisdiction in International Law*, edited by Stephen Allen et al., (Oxford: Oxford University Press, 2019): 45.
[524] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*: 122.
[525] Malcolm Shaw, *International Law*: 487; Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*: 122.
[526] Malcolm Shaw, *International Law*: 490.
[527] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*: 123.
[528] Fons Coomans, "The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights", Human Rights Law Review 11:1, 2011: 13; Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*: 125.
[529] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*: 125.

Two approaches exist under public international law in relation to jurisdiction.[530] One argues that States "exercise jurisdiction as they see fit, unless there is a prohibitive rule to the contrary."[531] The other "prohibits States from exercising jurisdiction as they see fit, unless there is a permissive rule to the contrary."[532] The Permanent Court of International Justice, in its famous *Lotus* case, held:

> Now the first and foremost restriction imposed by international law upon a state is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[533]

However, jurisdiction is not entirely and exclusively territorial.[534] Extraterritorial jurisdiction might be exercised when a State has effective control over a territory or has the physical power or control over individuals.[535]

The legal concept of jurisdiction is normative and "primarily concerns the competence to control and alter the legal relations of those subject to that competence through the creation and application of legal norms."[536] In the field of human rights, jurisdiction is not only the legality of the State's action, but it is also about "whether an obligation to observe human rights applies towards certain individuals, and hence defines the scope of application *ratione personae*: towards which rights-holders does a State Party hold obligations?"[537] Human rights treaties primarily impose a legal obligation on a Contracting Party or State Party,[538] depending on the language of a treaty, to accord freedoms and rights to individuals "within its jurisdiction".[539] Failure to guarantee these rights under a treaty or customary international law results in State responsibility for violating the treaty.[540] Hence jurisdiction in human rights is concerned with the definition of the individuals whom a State is required to respect, protect and fulfil their human rights.[541]

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[530] Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (Oxford: Oxford University Press, 2015): 29.
[531] ibid: 29.
[532] ibid: 29.
[533] Permanent Court of International Justice, The Case of S.S. "Lotus" No. 10, 1927: 18-19.
[534] Malcolm Shaw, *International Law*: 646.
[535] European Court of Human Rights, Case of Al-Skeini and Others v. the United Kingdom (Application No. 55721/07), 7 July 2011: paragraph 130-142, pages 56-60; European Court of Human Rights, Loizidou v Turkey, App no 15318/89 (ECtHR, 18 December 1996), paragraph 49, pages 15-16.
[536] Stephen Allen et al., "Introduction: Defining State Jurisdiction and Jurisdiction in International Law" in *The Oxford Handbook of Jurisdiction in International Law*, edited by Stephen Allen et al., (Oxford: Oxford University Press, 2019): 4.
[537] Wouter Vandenhole, "The 'J' Word Driver or Spoiler of Change in Human Rights Law?" in *The Oxford Handbook of Jurisdiction in International Law*, edited by Stephen Allen et al., (Oxford: Oxford University Press, 2019): 415; Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* 8th ed. (Oxon: Routledge, 2019): 213.
[538] The UN Convention on the Rights of the Child, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights use State Party.
[539] Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (Oxford: Oxford University Press, 2015): 96.
[540] Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (Oxford: Oxford University Press, 2015): 96.
[541] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*: 123; Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (Oxford: Oxford University Press, 2015): 22.

Jurisdiction is connected to but not similar to State responsibility.[542] "The rules of treaty law determine when a treaty obligation is in force for a State and what it means, i.e., how it is to be interpreted. The rules of State responsibility determine what the legal consequences of its breach in terms of such matters as reparation are."[543] Principles of State responsibility are also applicable in the event of a breach of legal obligation in a human rights treaty.[544] This is the case because international law makes no distinction between responsibility arising from contracts or tortious responsibility, and, therefore, any form of breach by a State of any obligation results in State responsibility.[545]

In the context of Somaliland's territorial jurisdiction, there is an overlap. Both the governments of Somaliland and Somalia claim territorial jurisdiction. The former has effective control over the territory. The UN, the African Union (AU) and all UN and the AU Member States recognise Somaliland as a territory that is part of Somalia. Somalia lost effective control over the territory to the authority of the Somaliland government in 1991 after rebel groups ousted the government of Somalia from power and the central government collapsed.

The notion of effective control over a territory in relation to State obligation is reflected in the jurisprudence of the African Commission on Human and Peoples' Rights (the African Commission).[546] The African Commission's jurisprudence contains instances when a State invaded another State and allegedly committed human rights violations.[547] In such circumstances, "the Commission recognised extraterritorial obligations stemming from military presence and occupation."[548] In the *Al-Asad* case, the Commission acknowledged the State's obligation when it has effective control over a territory.[549] The Commission held that "the Charter applies primarily within the territorial jurisdiction of States Parties. This is because the sovereignty of states with which they undertake international obligations is territorial, and the jurisdiction they exercise in the discharge of those obligations is equally primarily territorial."[550]

In the context of unrecognised States, the African Commission on Human and People's Rights rejected a case concerning a father of nine children with a history of serious mental illness who was facing execution in Somaliland. The Commission found "that even though the Complaint is

[542] James Crawford and Simon Olleson, "The Nature and Forms of International Responsibility" in *International Law*, edited by Malcolm Evans (Oxford: Oxford University Press, 2003): 446; Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (Oxford: Oxford University Press, 2015): 97.
[543] James Crawford and Simon Olleson, "The Nature and Forms of International Responsibility" in *International Law*, edited by Malcolm Evans (Oxford: Oxford University Press, 2003): 451.
[544] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties Law, Principles, and Policy* (Oxford: Oxford University Press, 2011): 51.
[545] ICJ, Rainbow Warrior (France/New Zealand), (1990) 20 RIAA 217, para 75.
[546] Anne Oloo and Wouter Vandenhole "Enforcement of extraterritorial human rights obligations in the African human rights system" in *The Routledge Handbook on Extraterritorial Human Rights Obligations,* edited by Mark Gibney et al, (Oxon: Routledge, 2022): 143.
[547] 227/99 Democratic Republic of Congo / Burundi, Rwanda, Uganda; Communication 383/10 – Mohammed Abdullah Saleh Al-Asad V. The Republic of Djibouti; see also International Court of Justice, Case Concerning Armed Activities on The Territory of the Congo (Democratic Republic Of The Congo v. Uganda) Judgment of 19 December 2005: 178.
[548] Anne Oloo and Wouter Vandenhole "Enforcement of extraterritorial human rights obligations in the African human rights system" in *The Routledge Handbook on Extraterritorial Human Rights Obligations,* edited by Mark Gibney et al, (Oxon: Routledge, 2022): 150.
[549] Communication 383/10 – Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti:134, pages 25-26.
[550] Communication 383/10 – Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti:134, pages 25-26.

addressed against Somalia, it alludes to Somaliland which is *de facto*, not a region within Somalia, as it has a completely separate existence and therefore, in reality, Somalia has no effective control over Somaliland nor the courts of Somaliland in which the Victim is being tried. The Commission therefore does not have jurisdiction to entertain the Communication because Somaliland is not recognised by the African Union."[551]

The case law of the European Court of Human Rights might shed light on the interpretation of State obligation in instances where the State has lost effective control over part of its territory to an entity that is not recognised as a State.[552] The Court has dealt with several cases on this subject, including some concerning occupation by a third State and situations involving unrecognised States (e.g. the case of Kosovo and Transdniestria).[553]

In its jurisprudence, the European Court reinforces the notion that jurisdiction is primarily territorial.[554] This means jurisdiction is exercised within the territory of the State, except in the situation of extraterritorial jurisdiction.[555] The exercise of jurisdiction is a necessary condition for a State to take responsibility for acts or omissions.[556] When a State is prevented from exercising its authority in part of its territory, the jurisdiction of the State becomes reduced or limited.[557] The limitation might arise out of "a separatist State within the territory of the State".[558] The loss of control over a territory due to a separatist regime does not cause the State to cease its jurisdiction over the territory, nor does it eliminate the State's positive obligation. Positive obligation relates to a State "to take all the appropriate measures which it is still within its power to take."[559] Although the Court held that the Moldovian Government is the only legitimate government under international law in relation to the territory under the control of the Moldavian Republic of Transdniestria" (the MRT), it decided that the Moldovian government continues to have *de jure*

[551] The African Commission on Human and Peoples' Rights, Abdullahi Ali Ismail v. The Federal Republic of Somalia, Communication 663/17, the 22nd Extra-Ordinary Session, 29 July to 7 August 2017: paragraph 14, page 3.
[552] The jurisprudence of the European Court of Human Rights does not apply to Somaliland. However, the tenets on the jurisdiction of the European Court are similarly but with lesser volume available in the case law of the African Commission, the International Court of Justice, the Human Rights Committee and the Committee on the Rights of the Child. The European Court happens to have jurisdiction over situations in several unrecognised States and as such has issued many decisions on the subject. That is why it is used here to explain the concept of jurisdiction in relation to unrecognised States.
[553] European Court of Human Rights, Guide on Article 1 of the European Convention on Human Rights, Obligation to respect human rights – Concepts of "jurisdiction" and imputability Updated on 30 April 2022: 88, page 29.
[554] Case of *Behrami And Behrami v. France And Saramati v. France, Germany And Norway (Dec.) [Gc]* - 71412/01 Decision 2.5.2007: 69, page 22-23; Case of Ilaşcu And Others v. Moldova And Russia (Application No. 48787/99, Strasbourg 8 July 2004: 312, 73; Case of *Azemi v. Serbia (Dec.)* - 11209/09, 5.11.2013: 38, page 9; see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Reports 2004: paragraph 109.
[555] Fons Coomans, "The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights," Human Rights Law Review 11:1, 2011: 5; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties Law, Principles, and Policy* (Oxford: Oxford University Press, 2011): 8; Conway W. Henderson, *Understanding International Law* (West Sussex: Wiley-Blackwell, 2010): 141
[556] Case Of Ilaşcu And Others V. Moldova And Russia (Application No. 48787/99, Strasbourg 8 July 2004: 311, Page 73
[557] Case of *Azemi v. Serbia (Dec.)* - 11209/09, 5.11.2013: 42, page 9; Case Of Ilaşcu And Others v. Moldova and Russia (Application No. 48787/99, Strasbourg 8 July 2004: 312, 73; Case Of Ilaşcu And Others v. Moldova and Russia (Application No. 48787/99, Strasbourg 8 July 2004: 333, 77.
[558] Case Of Ilaşcu And Others v. Moldova and Russia (Application No. 48787/99, Strasbourg 8 July 2004: 312, 73.
[559] ibid: 73.

jurisdiction and positive obligation.[560] The positive obligation of the Moldovian government is "to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention."[561]

In the case of Ilaşcu and Others v. Moldova and Russia, the European Court of Human Rights held that the applicants who were in the territory under the Moldavian Republic of Transdniestria" (the MRT), "are within the jurisdiction of the Republic of Moldova for the purposes of Article 1 of the Convention, but that its responsibility for the acts complained of, committed in the territory of the "MRT", over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention."[562] The Court found that Moldova was in breach of its positive obligations.[563]

In a case submitted by Mr Ali Azemi, a national of Kosovo residing in Kosovo, against the Serbian Government, the European Court of Human Rights ruled on the issue of jurisdiction in the situation where the State has no *de facto* control over a territory. Serbia argued that the applicant was not within the *de facto* jurisdiction of Serbia.[564] The Court held "that Serbia cannot be held responsible under Article 1 of the Convention for the non-enforcement of the Municipal Court's decision."[565] The Court emphasised that Serbia could not be held responsible because there was no evidence that "Serbia exercised any control over UNMIK [United Nations Mission in Kosovo], Kosovo's judiciary or other institutions that had been established by virtue of UNMIK regulations. Nor can it be said that the Serbian authorities supported militarily, economically, financially or politically Kosovo's institutions."[566] Moreover, the Court did not find any positive obligations similar to Moldova's positive obligations in the case of *Ilaşcu and Others*.[567]

The Republic of Cyprus lost the territory of Northern Cyprus. Although it does not lose its title and *de jure* jurisdiction over Northern Cyprus, the loss of control affects its obligation relating to the territory of Northern Cyprus. In the case of *Loizidou v. Turkey* involving Turkey's invasion of the Republic of Cyprus's territory, the European Court concluded that Turkey has jurisdiction in the territory of Northern Cyprus within the meaning of Article 1 of the Convention[568] because "the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory."[569]

[560] ibid: 331, 77.
[561] ibid: 331, 77.
[562] ibid: 77-78.
[563] ibid: 351, 82.
[564] *Azemi V. Serbia (Dec.)* - 11209/09, 5.11.2013: 33, page 8.
[565] *Azemi V. Serbia (Dec.)* - 11209/09, 5.11.2013: 33; 11 page 49.
[566] *Azemi V. Serbia (Dec.)* - 11209/09, 5.11.2013: 33; 45 page 10.
[567] *Azemi V. Serbia (Dec.)* - 11209/09, 5.11.2013: 3347, page 11.
[568] European Court Of Human Rights, Loizidou v. Turkey (Preliminary Objections), (Application No. 15318/89), 23 March 1995; 64 page 19.
[569] European Court Of Human Rights, Loizidou v. Turkey (Preliminary Objections), (Application No. 15318/89), 23 March 1995; 62 page 18.

The case law of the African Commission and the European Court demonstrates that loss of control over a territory does not remove the State from its *de jure* jurisdiction to take positive obligation.[570] The *de facto* situation reduces the scope of a State's jurisdiction in relation to that territory.[571] The *de facto* situations vary in the different territories. For example, it is different when the case falls under the control of another State as the case in Northern Cyprus and Transdniestria, where Turkey and Russia, respectively, have some form of control or presence. In the case of Kosovo and Somaliland, there is no third State that occupies these territories to assume responsibility. Yet, in both situations (occupation and separatists/separation), the legal obligation of the State becomes reduced but exists *de jure*.

The State with the *de jure* jurisdiction must undertake a positive obligation to ensure that the rights of the persons in the territory out of its control are respected. The European Court of Human Rights outlined six positive obligations of the State with *de jure* jurisdiction. These obligations are (verbatim):[572]

a. Three general obligations:

i. to affirm and reaffirm its sovereignty over the territory in issue
ii. to refrain from providing any kind of support to the regime unrecognised by the international community
iii. to actively attempt to re-establish control over the disputed territory.

b. Three special obligations relating to individual applicants are:

i. to attempt to resolve the applicants' situation by political and diplomatic means
ii. to attempt to resolve the applicants' situation by appropriate practical and technical means
iii. to take the appropriate judicial action to protect the applicants' rights.

The jurisprudence of treaty bodies is similar to the position of the European Court. The Human Rights Committee (HRC) recognises the difficulties expressed by Georgia "in implementing the Covenant in the Abkhazia and Tskhinvali Region/South Ossetia, and acknowledging positive steps taken to ensure protection of the rights under the Covenant of persons living in territories presently not under its control, including encouraging United Nations special procedures mechanisms invited to Georgia to visit such territories and engage in dialogue with de facto authorities, the Committee is concerned that the populations concerned do not fully enjoy the Covenant provisions (arts. 1 and 2)."[573] The HRC made several similar observations regarding Transdniestria and Kosovo where it noted that State Parties, Moldova and Serbia, are not able to exercise effective control over these territories. However, it emphasised that the State Parties have a continuing

[570] European Court of Human Rights, Guide on Article 1 of the European Convention on Human Rights, Obligation to respect human rights – Concepts of "jurisdiction" and imputability. Updated on 30 April 2022: paragraph 105, page 35.
[571] ibid
[572] European Court of Human Rights, Guide on Article 1 of the European Convention on Human Rights, Obligation to respect human rights – Concepts of "jurisdiction" and imputability. Updated on 30 April 2022: paragraph 106, page 35.
[573] Human Rights Committee, UN doc CCPR/C/GEO/CO/3, 2007: paragraph 6, page 2.

obligation under the ICCPR to ensure that the human rights of the population in these territories are respected.[574]

The Committee on the Rights of the Child adopted an approach similar to that of the Human Rights Committee. The Committee noted that the territories of Abkhazia and the Tskhinvali region/South Ossetia, Transnistria and Kosovo remain outside of the effective control of the State Parties, Georgia, Moldova and Serbia, respectively, and as such pose a serious obstacle to the implementation of the UN Convention on the Rights of the Child in these territories.[575] In the case of Cyprus, for example, "the Committee notes that the State party, as a consequence of events that occurred in 1974 and that resulted in the occupation of part of the territory of Cyprus, is not in a position to exercise control over all of its territory and consequently cannot ensure the application of the Convention in areas not under its control. However, it remains a matter of concern to the Committee that no information on children living in the occupied territories could be provided."[576]

In its concluding observations on the initial report of Somalia, 22 June 2022, the Committee on the Rights of the Child does not mention any limitations Somalia is facing from a loss of control over the territory to Somaliland. Somaliland is dealt with in the report as part of Somalia and as a place with no particular challenges to reduce Somalia's legal obligation under the CRC. The only obstacle stated in the report are the "severe effects of the ongoing armed conflict, political instability, presence of armed groups and consequences of climate change creating natural disasters in the State party, which have led to severe violations of children's rights and constitute a serious obstacle to the implementation of the rights enshrined in the Convention."[577] However the Committee reminded Somalia "of the continuity of international human rights obligations and that the rights under the Convention apply to all children at all times. The Committee also reminded the State Party that it bears the primary responsibility to protect its population and should therefore take immediate measures to prevent further violence against children, including killings and injuries."[578]

In its report, Somalia also treats Somaliland as part of its territory[579] and does not acknowledge any obstacle or hindrance impeding fulfilment of the legal obligation under the CRC. In the replies of Somalia to the list of issues in relation to its initial report, Somalia included Somaliland as part of the federal member states of Somalia.[580] The report defines Somalia's geographical situation: "Somalia borders Djibouti to the northwest, Kenya to the southwest, the Gulf of Aden to the north, the Guardafui Channel and Indian Ocean to the east, and Ethiopia to the west. It lies between

[574] See Human Rights Committee, CCPR/C/MDA/CO/2 4 November 2009; paragraph 5, page 2; and Human Rights Committee, CCPR/C/SRB/CO/3 2017; paragraph 3, page 1.
[575] Committee on the Rights of the Child, CRC/C/OPAC/GEO/CO/1, 2019: paragraph 6, page 2; CRC/C/GEO/CO/4, 2017: paragraph 4, page 1; CRC/C/OPSC/GEO/CO/1, 2019; paragraph 7, page 2; CRC/C/MDA/CO/4-5, 2017: paragraph 4, page 1; CRC/C/SRB/CO/2-3, 2017: paragraph 4, page 1.
[576] Committee on the Rights Of The Child, Concluding observations: Cyprus, CRC/C/15/Add.205 2 July 2003: paragraph 5, page 2. The Committee reiterates this statement in the subsequent concluding remarks. See CRC/C/CYP/CO/3-4, paragraph 6, page 2.
[577] Committee on the Rights of the Child, CRC/C/SOM/CO/1, 22 June 2022: paragraph 4 pages 1-2.
[578] Committee on the Rights of the Child, CRC/C/SOM/CO/1, 22 June 2022: paragraph 4 pages 1-2.
[579] See paragraphs 221, 222 and 273 of the initial report submitted by Somalia under article 44 of the Convention, due in 2017, received: 16 September 2019, CRC/C/SOM/1.
[580] Replies of Somalia to the list of issues in relation to its initial report, date received: 14 October 2020, CRC/C/SOM/RQ/1: paragraph 40, page 7, and paragraph 96 page 14.

latitudes 2°S and 12°N, and longitudes 41° and 52°E." This includes Somaliland within the borders of Somalia.[581]

The approach of Somalia to other human rights bodies is similar. The Human Rights Committee in its list of issues prior to the submission of Somalia's initial report asked the government to "report to what extent the State party is in a position to guarantee the rights protected by the Covenant in those areas not subject to its effective control, such as Somaliland and Puntland, as well as areas controlled by Al-Shabaab."[582]

In the initial report, Somalia denies that Puntland is not under the effective control of the Federal Government of Somalia.[583] In regard to Somaliland, the following reply was made:

> In the interest of national unity and democratic deliberation, the Federal Government of Somalia is currently engaged in a dialogue with Somaliland. Somaliland also has constitutional safeguards on human rights and a Human Rights Commission.[584]

In a number of instances, the report outlines actions taken in Somaliland concerning human rights. For example, the report mentions that Somaliland has passed the sexual offences bill[585] and that there is an ongoing process to amend the Press Law.[586] The Human Rights Committee itself asks Somalia to report about "Somaliland's media law, and inform how they comply with the Covenant,"[587] and about individuals that "were arbitrarily arrested and/or subjected to prolonged detention charges related to the exercise of freedom of expression, in particular in Somaliland."[588]

In the first cycle of the Universal Periodic Report, Somalia stated that it was not possible for the Universal Periodic Report Task Force to hold "consultations and include in the drafting of the report other stakeholders, including the regional administrations of Somaliland and Puntland, because of time and logistic constraints and, in the case of Somaliland reluctance to participate in this exercise."[589] The report also commented:

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[581] Initial report submitted by Somalia under article 44 of the Convention, due in 2017, Somalia, Committee on the Rights of the Child, the United Nations, CRC/C/SOM/1, 16 October 2019: paragraph 2, page 4.
[582] Human Rights Committee, List of issues prior to submission of the initial report of Somalia, CCPR/C/SOM/QPR/1, 5 May 2020: paragraph 2, page 1.
[583] Human Rights Committee, Initial report submitted by Somalia under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2021, CCPR/C/SOM/1, received: 18 October 2020: paragraph 25, page 8.
[584] Human Rights Committee, Initial report submitted by Somalia under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2021, CCPR/C/SOM/1, received: 18 October 2020: paragraph 26, page 8.
[585] Human Rights Committee, Initial report submitted by Somalia under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2021, CCPR/C/SOM/1, received: 18 October 2020: paragraph 95, page 19.
[586] Human Rights Committee, Initial report submitted by Somalia under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2021, CCPR/C/SOM/1, received: 18 October 2020: paragraph 229, page 37.
[587] Human Rights Committee, List of issues prior to submission of the initial report of Somalia, CCPR/C/SOM/QPR/1, 5 May 2020: paragraph 25, page 5.
[588] Human Rights Committee, List of issues prior to submission of the initial report of Somalia, CCPR/C/SOM/QPR/1, 5 May 2020: paragraph 26, page 5.
[589] National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, Somalia, A/HRC/WG.6/11/SOM/1, 11 April 2011: paragraph 4, page 3.

> Central state authority disintegrated resulting in the emergence of clan-based administrations controlling limited territories and often in dispute over such territories. In 1991 the northwest part of Somalia has established Somaliland state and in 1998 the northeast an autonomous federal regional administration of Puntland was created. While Somaliland has declared an intention to secede, the rest of Somalia including some regions in Somaliland and Puntland do not consent to the separation but support the unity, integrity and sovereignty of Somalia.[590]

The report in paragraph 17 acknowledges that "a degree of stability continues in Somaliland as well as in Puntland, which has permitted certain progress in human rights enjoyment."[591] In the 2011 UPR, Somalia seems to acknowledge limitations and the fact that "Somaliland has declared an intention to secede." However, it does not inform the Human Rights Council that the territory of Somaliland remains outside of the effective control of Somalia. The Human Rights Council's Working Group on the Universal Periodic Review did not state a loss of control. Moreover, in the other subsequent reports in 2016 and 2021, Somalia did not mention any limitations relating to a *de facto* loss of control in the territory of Somaliland that might reduce its capacity to fulfil human rights obligations.

Somaliland is mentioned seven times in the 2011 report and once in Somalia's 2015 and 2021 UPR national reports.[592] In all three reports, Somalia briefly named Somaliland's progress in specific areas in the context as part of 'the regional administrations of Somalia.'

Somaliland is mentioned in the concluding remarks in several paragraphs explaining that "the constitutions of the member States of Puntland and Somaliland" define a child as a person below the age of 15 years,[593] that the birth registration is extremely low in Somalia "despite the initiatives undertaken in some districts of Puntland and Somaliland",[594] and that sexual offences laws are passed in "Puntland and Somaliland",[595] and "Somaliland and Puntland established child courts in 2018."[596] In all the references about Somaliland, it is addressed as part of Somalia and is included in the report of the Committee on the Rights of the Child as an explanation of progress made by Somalia in certain areas concerning children's rights.[597]

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[590] National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, Somalia, A/HRC/WG.6/11/SOM/1, 11 April 2011: paragraph 15, page 4.
[591] National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, Somalia, A/HRC/WG.6/11/SOM/1, 11 April 2011: paragraph 17, page 5.
[592] National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Somalia, A/HRC/WG.6/24/SOM/1, 28 October 2015: paragraph 91, page 20**;** National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, Somalia, A/HRC/WG.6/11/SOM/1, 11 April 2011: paragraphs 4, 15 and 17; National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Somalia, A/HRC/WG.6/38/SOM/1, 26 February 2021: paragraph 18, page 7.
[593] Committee on the Rights of the Child, CRC/C/SOM/CO/1, 22 June 2022: paragraph 22, page 4.
[594] Committee on the Rights of the Child, CRC/C/SOM/CO/1, 22 June 2022: paragraph 32, page 6.
[595] Committee on the Rights of the Child, CRC/C/SOM/CO/1, 22 June 2022: paragraph 40, page 8.
[596] Committee on the Rights of the Child, CRC/C/SOM/CO/1, 22 June 2022: paragraph 66(a), page 14.
[597] Puntland is a semiautonomous region that is a member of the Federal Government of Somalia. Formed in 1998, Puntland did not declare independence but is located within the federal system of Somalia. It, however, enjoys considerable autonomy for its internal affairs.

4.3 Implementation of the CRC for the children living "within the jurisdiction" of Somalia

4.3.1 The status of the CRC in Somalia's domestic law

Human rights treaties often include articles requiring States to adopt certain measures to discharge their obligations under the treaty.[598] Article 4 of the CRC States: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention."

A debate between monists and dualists dominates the discussion about the relationships between national law and international law.[599] Dualists hold that national law and international law are separate systems.[600] International law can become applicable in a State once it is adopted as part of the national law[601] through an "act of transformation".[602] Domestic law governs the relationships between the State's citizens, whereas international law is seen as between States.[603] International law has no power to change or create rules in the national arena. If there is a conflict between the two, the national courts and tribunals apply the national law, and the domestic legal order decides which rules have supremacy.[604]

In the monist approach, national law and international law belong to one legal system.[605] The two systems are coherent and consistent, and individuals are the ultimate subjects of international law.[606] Because monists view international law and domestic law as the same legal order, and that international law is superior, international law is regarded as incorporated into national law.[607] Thus international law is directly applicable in the national legal system.[608] Hans Kelsen includes the jurists who hold monist theory, and he uses his theory of basic norm (*Grundnorm*) to explain that national and international law are part of a single system of norms.

Article 26 of the Vienna Convention on the Law of Treaties states that "every treaty in force is binding upon the parties to it and must be performed by them in good faith." The manner ni which international law may apply within State is governed by the national law of the State, and States adopt various ways.[609] However, States are held responsible for failure to fulfil an international obligation.[610] Hence whether a State employs direct application or transformation of a treaty into

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[598] Mario Mendez, *The Legal Effects of EU Agreements* (Oxford: Oxford University Press, 2013): 3.
[599] John H. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis", The American Journal of International Law, Apr., 1992, Vol. 86, No. 2 (Apr., 1992): 311.
[600] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* 8th ed. (Oxon: Routledge, 2019): 57; Malcolm Shaw, *International Law*: 131; Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 53; James Crawford, *Brownlie's Principles of Public International Law*: 48.
[601] Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 53.
[602] John H. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis", The American Journal of International Law , Apr., 1992, Vol. 86, No. 2 (Apr., 1992): 315.
[603]James Crawford, *Brownlie's Principles of Public International Law*: 48.
[604] ibid: 48.
[605] Malcolm Shaw*, International Law*: 131; Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 54; Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*: 57.
[606] James Crawford, *Brownlie's Principles of Public International Law*: 48.
[607] Robert Jennings and Arthur Watts, *Oppenheim's International Law:* 54, 132.
[608] James Crawford, *Brownlie's Principles of Public International Law*: 48.
[609] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* 8th ed. (Oxon: Routledge, 2019): 60; Robert Jennings and Arthur Watts, *Oppenheim's International* Law: 82.
[610] ibid: 82.

national law by enacting legislation is irrelevant in terms of determining if the State has fulfilled the obligation.[611] There are circumstances in a treaty that may impose an obligation on State Parties "to enact a particular rule as part of their own municipal law."[612] Therefore, a State's failure to transform a human rights treaty into a statute of parliament to implement is regarded as a fact that indicates a State's status in discharging the obligation imposed by the treaty.[613]

A State that breaches international law "cannot justify itself by referring to its domestic legal situation."[614] Article 27 of the Vienna Convention on the Law of Treaties provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This is supported by the jurisprudence in the Permanent Court of International Justice, the International Court of Justice, and arbitral tribunals.[615]

Generally, constitutions or laws state how treaties are dealt with in the domestic system.[616] In Somalia, the power to ratify a treaty vests with the parliament.[617] The provisional Constitution of Somalia (2012) and other laws are silent on whether, after its ratification, a treaty becomes automatically part of Somalia's laws or whether there are other steps to be taken to transform it into legislation. There is no evidence of judicially-mandated stipulations dictating how a treaty becomes applicable in Somalia's domestic system.

As a State Party to the CRC, in fulfilling its treaty obligation, Somalia has to, *inter alia*, incorporate the CRC into domestic laws. In the absence of a constitutional provision or a statute setting out the domestication of treaties, the following sections examine the articles in the Constitution concerning children.

4.3.2 The Constitution of Somalia and children's rights

After its independence in 1960, the Somali Republic established a Constitution in 1961. The 1961 Constitution was rescinded in 1969 when the military overthrew the civilian administration in a coup. In 2012, a Provisional Constitution was approved by delegates, and it remains the transitional constitution applicable in Somalia.[618] Regional administrations (federal member States) have their separate constitutions.[619]

The Provisional Constitution of Somalia includes a chapter (art. 13 to 41) containing human rights articles. Article 29, titled children, defines a child as a person under 18 years of age.[620] Article 29 stipulates the following rights for children:

1. Every child has the right to a good and righteous name and a nationality from birth.
2. Every child has the right to be protected from mistreatment, neglect, abuse, or degradation.

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[611] ibid: 83.
[612] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*: 58.
[613] Robert Jennings and Arthur Watts, *Oppenheim's International Law*: 83.
[614] Malcolm Shaw, *International Law*: 133.
[615] For more details, see James Crawford, *Brownlie's Principles of Public International Law*: 51.
[616] Stefan Kadelbach, "International Law and the Incorporation of Treaties into Domestic Law", German Yearbook of International Law 42 (1999): 2.
[617] Provisional Constitution of Somalia, 2012: art. 90(q).
[618] The Constitution will undergo a review process that would lead to holding a referendum. That is why it is a provisional constitution.
[619] The 2012 Provisional Constitution divides the administration of the country into federal regions which consist of at least two regions. Before the collapse of the central government in 1991, the system was a unitary one.
[620] Provisional Constitution of Somalia, art. 29(8).

3. No child may perform work or provide services that are not suitable for the child's age or create a risk to the child's health or development in any way.
4. Every child may be detained only as a last resort, for a limited time, in appropriate conditions, and must be detained separately from adults with the exception of the child's immediate family. The child's immediate family must be informed of the child's detention as soon as practicable.
5. Every child shall have the right to legal aid paid for by the State if the child might otherwise suffer injustice.
6. Every child has the right to be protected from armed conflict, and not to be used in armed conflict.
7. In every matter concerning a child, the child's best interests are of paramount importance.

The Constitution prohibits female circumcision, which it recognises "as a cruel and degrading customary practise, and is tantamount to torture."[621] The State is under a legal duty to provide child care.[622] Article 28(3) states that "every child has the right to care from their parents, including education and instruction. In instances where this care is not available from the family, it must be provided by others. This right applies to street children and children of unknown parents, the rights of whom the State has a particular duty to fulfil and protect." Marriage becomes legal only if both "the man and the woman" provide free consent, and only if either party has attained the age of majority.[623] According to Article 30, education is a basic right for all Somali citizens who have the right to free education up to secondary school.[624]

The constitutional provisions apply to Somali citizens and in the territory of Somalia. Article 8 of the Constitution stipulates that "the people of the Federal Republic of Somalia are one, indivisible and comprise all the citizens." Somalia's territory is defined in Article 7 of the Constitution which states that the sovereignty of Somalia extends over all the territory of the Federal Republic of Somalia. Article 7(2) provides that "the territory of the Federal Republic of Somalia is inviolable and indivisible." The boundaries of Somalia are those already described in the 1960 Constitution approved during the union of Somaliland and Somalia.[625] Therefore, the 2012 Provisional Constitution recognises the territory under the control of Somaliland as part of the Federal Republic of Somalia.[626] From the perspective of Somalia's Constitution, the territory under the control of the government of Somaliland is situated within the jurisdiction of Somalia.

4.3.3 Child rights related laws in Somalia.

The Constitution predates Somalia's ratification of the CRC. Since the ratification, Somalia has not created laws that incorporate the CRC into national legislation. In its initial report to the Committee on the Rights of the Child, Somalia promised to take measures "to bring national legislation and practice in line with the Convention include the enactment, amendment and

[621] Art. 15(4).
[622] Art. 28(2)
[623] Art. 28(5)
[624] Art. 30(1)(2)
[625] Art. 7(4)
[626] Article 7(5) sets the boundaries as following: "The boundaries of the Federal Republic of Somalia are: (a) To the north: The Gulf of Aden` (b) To the north west: Djibouti` (c) To the west: Ethiopia` (d) To the south west: Kenya` (e) To the east: the Indian Ocean."

development of laws and policies that will directly address child protection."[627] The laws listed by Somalia to be adopted are the Child Rights Bill, the Somali Sexual Offences Bill, the Juvenile Justice Bill, the FGM Bill and Disability Bill. Only the Disability Bill has been enacted.

The following laws predate the CRC ratification and contain provisions related to children's rights.

- The Penal Code (1962) governs the legal age of criminal responsibility
- The Juvenile Courts and Reformatories Law No. 13 of 8th March 1970
- The Somali Labour Code (1972) puts the minimum age of employment at 15 years' old
- The Basic Education Law (Law No. 6 of 12th February 1987) covers education
- The Somali Citizenship Law (1962) governs nationality (see Chapter six of this dissertation)
- The Civil Code (1973) defines the age of majority.

4.4 Conclusion

The biggest issue to deal with when analysing the legal obligation of a State Party to the CRC in the context of a territory under the control of an unrecognised State is the matter of jurisdiction, and if the State Party is bound by treaty obligations when it loses the effective control over a territory. This issue is unanswered by treaty law, and there is no identifiable customary law to rely on. Therefore, in order to understand the problem, it is imperative to address the fundamental issue of the scope of State jurisdiction in the field of human rights in relation to the human rights obligation emanating from a treaty.

In this chapter, it is made clear that a State retains the *de jure* jurisdiction over its territory even if it loses it to foreign occupation or a separatist government. The *de facto* loss of control reduces the legal scope of the State's jurisdiction, but it does not eliminate the existence of the obligation. The case law in various human rights bodies demonstrates that the [recognised] State shall retain a positive obligation to ensure the protection of the rights of the person living in the territory over which it no longer has *de facto* control.

The State of Somalia is subject to the obligations under the CRC in relation to the acts or omissions that occur in the territory of Somaliland and by the authorities of Somaliland to the extent of fulfilling a positive obligation resulting from its *de jure* jurisdiction. Somalia's positive obligation is general in terms of its overall obligation covering the entire population of the territory, and special when it is about individual complainants.

Neither in the Constitution nor in any report communicated to an international or a regional body has Somalia proclaimed limitation or reduction of legal obligation as a result of *de facto* loss of effective control over the territory under the control of Somaliland. In its reporting to the human rights treaty bodies, Somalia's position concerning this territory is murky. In one report (2011 UPR), Somalia accounted for what might seem to be an acknowledgement of its inability to assert influence in Somaliland. Yet in this same report and other subsequent Universal Period Reports (UPR), and its reports to the Human Rights Committee and the Committee on the Rights of the Child, Somalia has continued to report about the territory of Somaliland without announcing a reduction of jurisdiction or limitation in fulfilling its obligation in relation to the territory. This

[627] Initial report submitted by Somalia under article 44 of the Convention, due in 2017, Somalia, CRC/C/SOM/1, 16 October 2019: paragraph 34, page 8.

approach is dissimilar to the actions of other States such as Georgia, Moldovia, and Serbia, who inform treaty bodies of the limitations resulting from the loss of control.

It is another question, that this dissertation is not focusing on, whether Somalia has fulfilled its positive obligation. The investigation of this question requires more than looking at the law and makes it necessary to carry out empirical research.

This chapter also seeks to understand the domestic legal order of Somalia in incorporating or transforming the CRC into the national legal system and how it relates to the children living in Somaliland. The Constitution of Somalia contains expansive clauses protecting children's rights relative to the Somaliland Constitution, which does not include children's rights in its Bill of Rights section (see Chapter 5). Although Somalia continues to exercise prescriptive jurisdiction, it is unable to enforce laws enacted by the Federal Government of Somalia on the territory of Somaliland. In that respect, Somalia's authority to legislate, enforce, adjudicate or otherwise exercise constitutional powers in Somaliland is severely restricted by its lack of effective control.

By the three general obligations set out by the jurisprudence of the European Court of Human Rights as a reference – arguably the most advanced human rights court that has also dealt with the largest cases related to contexts similar to Somaliland – one might be inclined to inquire if Somalia has taken any positive actions to ensure the rights of the persons in the territory of Somaliland are respected. Somalia is under a legal obligation under the CRC to respect, protect and fulfil children's rights in Somaliland as far as the *de jure* jurisdiction allows by assuming a positive obligation. The loss of effective control does not remove Somalia from its obligation under the Convention, but it might reduce the scope of the obligation. Somalia's lack of acknowledgement of the loss of control may be translated to imply that the notion of limited obligation is inapplicable in this context. In any case, under international human rights law, Somalia's jurisdiction over the territory of Somaliland over which it lost control does not cease. The limited jurisdiction of Somalia under the CRC extends to the tripartite obligation to respect, protect and fulfil. Therefore, the responsibility is not only to protect children from violations coming from a third party, but it also relates to taking positive actions to ensure that children's rights are fulfilled.

Chapter 5 Children's Rights in the Formal National Laws of Somaliland

5.1 Introduction

This chapter focuses on the formal national laws of Somaliland concerning children's rights. The aim is to look in-depth at children's rights in the Constitution, and other formal laws enacted by the Parliament. This chapter begins by examining the provisions of the Constitution. It starts with an introduction (section 5.1) and the Constitution (section 5.2), followed by a brief introduction of *Xeer* and Sharia law to explore their role in children's rights (section 5.3). Section 5.4 explores formal laws passed and signed into law. Section 5.5 concludes with the findings of this chapter.

This chapter does not focus on the international obligation of Somaliland to respect children's rights and the status of international human rights laws in Somaliland. Also, it does not concern the laws of Somalia. Other chapters of this dissertation concentrate on these issues (see Chapters 3 and 4).

Which formal laws are applicable in Somaliland?[628] This question does not have a straightforward answer. Courts apply, and administrative agencies enforce, laws passed by Somalia before Somaliland announced its separation from Somalia in 1991. Moreover, the Parliament of Somaliland has passed dozens of laws since its formation in 1993.[629] As a result, the following formal laws are applicable in Somaliland:

1. The 2001 Constitution of Somaliland.
2. Laws passed by the Parliament of Somaliland and signed by the President under the law-making process stipulated in the Constitution. Somaliland has bicameral legislation consisting of the House of Representatives and the House of *Guurti*. The law-making power rests with the Parliament. When the two houses of the Parliament pass a law, it goes to the President to sign it into law or revert it to the Parliament. A law becomes legally binding 30 days after the President has signed the law.
3. Somalia's laws are applicable before Somaliland declared independence in 1991 unless they are expressly repealed or repudiated by subsequent legislation.[630]

In this chapter, I discuss all three forms of legislation above. As a matter of order, we will start with the Constitution. Children's right to nationality and child sexual abuse are discussed separately in Chapters 6 and 7 and are not covered in this chapter.

[628] The classification or labelling of 'formal national law' is not itself straightforward and could be subject to objections. Yet, for the purpose of limiting the scope of this research, it became necessary to use the concept of formal national law and define it. This chapter, chapter six and chapter seven also discuss the interactions of Xeer, Sharia and formal law in various levels, and how the three influence each other and sometimes overlap.

[629] http://www.somalilandparliament.net/Test/acts-xeerar/, last accessed 8 October 2020.

[630] Article 130(5) of the Constitution states that: "All the laws which were current and which did not conflict with the Islamic Sharia, individual rights and fundamental freedoms shall remain in force in the country of the Republic of Somaliland until the promulgation of laws which are in accord with the Constitution of the Republic of Somaliland. At the same time, laws which conform to the constitution shall be prepared, and each such law shall be presented within minimum time scales set by the House."

5.2 Somaliland's Constitution

5.2.1 Introduction

The question—what is a constitution? —is not easily answered. Constitutions vary considerably from country to country. Some constitutions are an assemblage of several laws passed individually over time and constitute the basic law.[631] Others have a single document that contains the whole constitutional framework of the country.[632] The United Kingdom constitution is said to be unwritten, but it "includes a variety of constitutive statutes, such as the Magna Carta and the Parliament Acts",[633] as well as unwritten conventions and court judgments. Constitutions define State institutions, their powers, limitations, duties and contain human rights, and are concerned with "the relationship between the individual and the State".[634] They are, in many jurisdictions, the supreme law of the land. Often constitutions are written "after gaining independence" or "after revolution" or "after a war".[635]

Somaliland's current Constitution is linked to its historical development. During the military regime in Somalia, there was no constitution.[636] Somalia's military government collapsed in 1991, and a declaration was made that the Northern Regions (Somaliland) would establish a State separate from Somalia.[637] The declaration was followed by a series of peace conferences to settle internal conflicts and clan wars in Somaliland. Post-war State-building has challenges.[638] Since 1991, Somaliland has taken measures to establish a State structure to "fulfil international criteria for statehood".[639] The process to strengthen the new Somaliland State included drafting and approving a Constitution. The development of Somaliland's Constitution has taken three phases. First, at the 1993 Borama Conference, a National Charter was formulated to serve as Somaliland's "temporary constitution".[640] Second, the 1997 Hargeisa Conference adopted a provisional Constitution to replace the National Charter.[641] The last phase occurred in 2001 when the

[631]Isaac Amit, "From the Bill of Rights to Basic Laws: Constitutional Rights in Israel," Cardozo Journal of International and Comparative Law 25, no. 3 (Summer 2017): 484.
[632] Peter W. Hogg, P*, Constitutional Law of Canada* (Toronto: Thomson Canada Limited 2006): 2.
[633] Ernest A. Young, "The Constitution Outside the Constitution", Yale Law Journal 117, no. 3 (December 2007): 408.
[634] A W Bradley and K D Ewing, *Constitutional and Administrative Law*, (Pearson 2007) 3, 7; Ernest A. Young, "The Constitution Outside the Constitution", Yale Law Journal 117, no. 3 (December 2007): 412; From A Dissertation Upon Parties (1733), reprinted in Bolingbroke, Political Writings (ed. Armitage).
[635] Peter W. Hogg, P, *Constitutional Law of Canada* (Toronto: Thomson Canada Limited 2006): 2.
[636] The military regime had absolute power without a constitution democratically approved.
[637] Judy el Bushra and Judith Gardner (eds), *Somalia - the Untold Story: The War Through the Eyes of Somali Women* (Pluto Press, 2004), https://doi.org/10.2307/j.ctt184qq8n: 5; Michael Walls, *A Somalia Nation-State: History, Culture and Somaliland's Political Transition* (Pisa: Ponte Invisible 2014): 166; Marleen Renders and Ulf Terlinden, "Negotiating Statehood in a Hybrid Political Order: The Case of Somaliland", Institute of Social Studies, 41(4): 723–746 (2010): 730.
[638] Rebecca Richards, "Fragility within stability: the state, the clan and political resilience in Somaliland", Third World Quarterly, 41:6, (2020): 1071; Mark Bradbury, *Becoming Somaliland* (London: James Currey, 2008). 77; Lars Buur and Helene M. Kyed, *State Recognition and Democratisation in Sub-Saharan Africa: A New Dawn for Traditional Authorities?* (US: Palgrave, 2007): 185; Ken Menkhaus, "Governance without Government in Somalia", International Security, Vol. 31, No. 3 (Winter 2006/07): 91.
[639] Mark Bradbury, *Becoming Somaliland, UK ed. Edition* (London: James Currey, 2008). 77; Ken Menkhaus, "Governance without Government in Somalia", International Security, Vol. 31, No. 3 (Winter 2006/07): 91.
[640] I. M. Lewis, *A Modern History of the Somali* (Ohio: Ohio University Press 2002): 283; Rebecca Richards, "Fragility within stability: the state, the clan and political resilience in Somaliland", Third World Quarterly, 41:6, (2020): 1072.
[641] Mark Bradbury, *Becoming Somaliland,* (London: James Currey, 2008): 131.

Constitution of Somaliland was approved in a referendum held in 2001.[642] The Constitution consists of five chapters (130 articles) and the preamble, and each chapter is divided into parts.[643]

5.2.2 Human rights in the 2001 Constitution

The Constitution of Somaliland contains the doctrine of separation of powers – the law-making, the executive and the judiciary – and details the degree of separation and the duties of each institution.[644] The law-making power rests with the legislature, the executive has the authority to implement legislation, and courts have the role of interpreting the law and adjudicating disputes. The independence of the judiciary is guaranteed.[645] No organ of the State has absolute power.[646] The Constitution stipulates that it is the supreme law of Somaliland, and any law that is inconsistent with the Constitution has no force or effect.[647] The term of the President is for five years and can only be re-elected for one other term of office.[648]

In the preamble, the basic principles of the Constitution are enumerated as follows:

a. Islamic Sharia
b. Decision-making through consultations
c. Separation of powers
d. Decentralisation
e. Guarantees of private property rights and the protection of the free market
f. Sanctity of human life through the entrenchment of fundamental rights and individual freedoms
g. Peaceful and proper co-existence with States in the region and worldwide.[649]

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[642] Michael Walls, *A Somalia Nation-State: History, Culture and Somaliland's Political Transition* (Pisa: Ponte Invisible 2014): 209-210; Mark Bradbury, *Becoming Somaliland*, (London: James Currey, 2008):133; Marleen Renders, *Consider Somaliland : State-Building with Traditional Leaders and Institutions*, (Boston: Brill, 2012): 200; Marleen Renders and Ulf Terlinden, "Negotiating Statehood in a Hybrid Political Order: The Case of Somaliland", Institute of Social Studies, 41(4): 723–746 (2010): 734**;** for further information on the referendum see, Initiative& Referendum Institute, Final Report of the Initiative& Referendum Institute's Election Monitoring Team, Somaliland National Referendum, 31 May 2001.

[643] Chapter one: Part One: General Provisions, Part Two: General Principles, Part Three: The Rights of the Individual, Fundamental Freedom and Duties of the Citizens. Chapter two: Part One: The Legislative Branch, Part Two: The House of Elders. Chapter three: The Executive. Chapter four: Part One: The Judiciary, Chapter five: part one, part two, part three and part four.

[644] Somaliland Constitution, art. 37, 38, 90, 98.

[645] The legislative organ consists of the House of Representative and the House of Elders (*Guurti*). Under the Constitution, the judiciary consists of the courts and the office of the attorney general. Courts are further sub-divided into military courts and civilian courts (the Supreme Court and lower courts at regions and districts. See more in the Somaliland Constitution, art. 37, 38, 90, 98.

[646] Somaliland Constitution, art. 37.

[647] ibid, art. 128.

[648] ibid, art. 88

[649] Somaliland Constitution, preamble.

The Constitution devotes part three of chapter one specifically to the guarantee of fundamental rights and freedoms, and the following human rights are stipulated in the Constitution:[650]

- Participation in political, economic, social and electoral rights (art. 22)
- Freedom of movement and association (art. 23)
- Right to life, the security of the person, and dignity (art. 24)
- Prohibition of crimes against human rights such as torture, extra-judicial killings, mutilation (art.24)
- Right to liberty (art. 25)
- The innocence of the accused persons until proven guilty by a competent court (art. 26)
- Right to legal representation (art. 27)
- Pre-trial rights (art. 27)
- Right to sue and defence (art. 28)
- Right to privacy (art. 29)
- Freedom of communication (art. 30)
- The right to own private property (art. 31)
- Freedom of public demonstration, expression of opinion, press and other media (art. 32)
- Freedom of belief (art. 33)
- Political asylum (art. 35)
- Rights of women (art. 36)

The human rights in the Constitution generally include rights that are primarily civil and political. It presents mostly rights that are adult's rights. It does not contain any right to education, healthcare, employment, or other social, economic, and cultural rights. Socio-economic rights are not mentioned in the Constitution, except in relation to the right to participate in economic, social and cultural affairs, which is a political right.[651]

The Constitution affirms all citizens' equal rights without discrimination based on "colour, clan, birth, language, gender, property, status or opinion".[652] The Constitution also prohibits "precedence and discrimination on the grounds of ethnicity, clan affiliation, birth and residence and programmes aimed at eradicating long-lasting bad practices shall be a national obligation."[653]

Due to the lack of *de jure* recognition, Somaliland has not signed or ratified international human rights treaties. However, the Constitution expressly recognises international human rights laws. It acknowledges the Universal Declaration of Human Rights and the UN Charter. It also states that Somaliland shall conform to international law, and observe all treaties entered into by Somalia before 1991.[654] The primary international human rights treaties ratified by Somalia before 1991 are:

- International Covenant on Civil and Political Rights (ratified/signed 24 January 1990)

[650] The Constitution is divided into five chapters, each sub-divided into parts. Chapter one contains general provisions (part one), general principles (part two) and the Rights of the Individual, Fundamental Freedoms and the Duties of the Citizen (part three, art. 21-36).
[651] Somaliland Constitution, art. 22, 31, 36.
[652] ibid, art. 8.
[653] ibid, art. 8.
[654] ibid, art. 10.

- International Covenant on Economic, Social and Cultural Rights (ratified/signed 24 January 1990)
- International Convention on the Elimination of All Forms of Racial Discrimination (ratified/signed 26 January 1967)
- Convention concerning Forced or Compulsory Labour (ratified/signed 18 November 1960)
- Equal Remuneration Convention (ratified/signed 8 December 1961)
- Abolition of Forced Labour Convention (ratified/signed 8 December 1961)
- Convention relating to the Status of Refugees (ratified/signed 10 October 1978)
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (ratified/signed 12 June 1962)
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (ratified/signed 12 June 1962)
- Convention Against Torture and Other Cruel or Degrading Treatment (ratified/signed 1990).

Not all of these treaties are about children's rights, and Somalia ratified the Convention on the Rights of the Child (CRC) only in 2015, after Somaliland declared its independence.[655] Consequently, the CRC is precluded from the list of international human rights treaties recognised by the Somaliland Constitution.

5.2.3 Children's Rights in the Constitution

In the Constitution, a reference to children is contained in Article 19 under "the Care of the Vulnerable of the Society". The article states: "the state shall be responsible for the health, care, development and education of the mother, the child, the disabled who have no one to care for them, and the mentally handicapped persons who are not able and have no one to care for them." Article 19 is in part two of the Constitution under the "general principles" that articulate economic, environmental, economic, political aspirations and is not justiciable. Justiciable human rights provisions are incorporated in part three of the Constitution, and no reference is made of children in part three. The word child is mentioned in the Constitution only twice. First, it refers to Article 19 (Care of the Vulnerable in Society).[656] The second is Article 20(2), which stipulates adopting a law governing "the conditions of work of children".[657] The outlook of the Constitution is reminiscent of guaranteeing human rights and freedoms without distinction. However, it lacks provisions focusing on children's rights and social, economic and cultural rights.

5.3 *Xeer* and Sharia

5.3.1 Introduction

This section aims to give an overview of the role of *Xeer* and Sharia law in Somaliland, and their interaction with formal national laws. This is important to understand the legal situation for children, and the reason this chapter as a whole focuses on formal national laws. The first sub-section (5.3.2) explains *Xeer*, and the second sub-section (5.3.3) explores Sharia law. This section shows the hybrid systems applicable in Somaliland and how they contain norms that might impact Somaliland's children.

[655] https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en, last accessed 19 September 2020.
[656] Somaliland Constitution, art. 19.
[657] ibid, art. 20

5.3.2 *Xeer* in Somaliland

Xeer is related to the social organisation of Somali clans.[658] Clans are subdivided into smaller kinship units tied together by a founding ancestor[659] from whom, traditionally, its members trace their descent and take their collective name."[660] The closest kinship is the *jilib*.[661] The adult male members of *jilib* pay and receive blood compensation[662] and have a single *Caaqil* (chief).[663] When the number of *jilib* expands, they split, and each new group selects its own *Caaqil*.[664] Genealogy links the member to the clan, and each person is expected to memorise his/her genealogy up to the founding ancestor.[665] The clan tree has various branches divided into smaller sub-clan segmentations of kinships. The lineage system establishes a vertical hierarchy of clan structure.[666] So while the *Caaqil*[667] is the head of the kinship, sultans are the heads of sub-clans and clans.[668]

Kinships and clans are bound together by *Xeer*, which is a law binding in or between clans.[669] *Xeer* is unwritten and transmitted orally. Due to the segmentation of different kinships, sub-clans and clans, there is no unified *Xeer*. Although *Xeer* varies, there are shared principles recorded orally in proverbs. Clans and sub-clans "are a means of policing the clans and enforcing the traditional legal system through collective action, creating a self-help' justice system that 'provides a sanction against violence and reinforces collective responsibility."[670]

If a dispute arises, the parties involved in the dispute might resort to negotiation, mediation or arbitration.[671] In negotiation, any elder(s) or *Caaqil* can attempt to negotiate a settlement. If negotiation cannot solve the issue, parties might refer to mediation or arbitrators (*gudi*, *guurti* or

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[658] I. M. Lewis, *A Modern History of the Somali* (Ohio: Ohio University Press 2002): 10. The clan is an important social organisation, but not the only one. There is a tendency among some authors to overemphasise the importance and role of clans in Somali society. This dissertation has no intention of doing that. There are social, economic, political, religious and geographical factors that are also important and relevant for Somaliland society.

[659] The founding ancestors in which Somalis trace their descent are males.

[660] I. M. Lewis, *A Modern History of the Somali* (Ohio: Ohio University Press 2002): 6.

[661] Jama Mohamed, "Kinship and Contract in Somali," A Journal of the International African Institute, Vol. 77, No. 2 (2007): 226. The closest kinship is also called *Jifo* or *Tol*, in the Somali language. Some authors, particularly I. M. Lewis call it diya-paying group. It is also called *mag-wadaag* (roughly meaning those share compensation). See (Lewis, 1998: 173).

[662] Blood-compensation (*mag* in the Somali language) is derived from Islamic law. It relates to the payment of camels to the victim or heirs of a victim in a homicide case or bodily harm as compensation.

[663] Clan members are expected to memorise the full lineage of their clan. Therefore, parents teach children their genealogy. It is called *Ab-tirsiinyo*. *Ab* means father and *tirsiinyo* is counting.

[664] The Ministry of Interior registers and gives identification cards to *Caaqil*.

[665] Lineage is also used to identify people. For example, when a person wants to marry or pay for a house, his/her sub-clan is asked.

[666] Afyare Abdi Elmi, *Understanding the Somalia Conflagration: Identity, Political Islam and Peacebuilding* (New York: Pambazuka Press, 2010): 29.

[667] What predominantly determines the role of *Caaqil* is the payment of blood compensation (*mag*).

[668] Different clans use different names for the role of sultans. They are also called *garaad, boqor* and *ugaas*.

[669] Lidwien Kapteijns, "Gender Relations and the Transformation of the Northern Somali Pastoral", The International Journal of African Historical Studies, Vol. 28, No. 2 (1995): 245. *Xeer* is pronounced as her. It means law. Before the colonial powers imposed the Westphalia State system, the *Xeer* was the law of the land. Therefore, *Xeer* is also used to mean law in the formal law sense. In this section, *Xeer* means customary law.

[670] Rebecca Richards*, Understanding Statebuilding: Traditional Governance and the Modern State in Somaliland*, 1st Edition (Farnham, Surrey, England: Routledge, 2014): 1074.

[671] Michael Walls, *A Somalia Nation-State: History, Culture and Somaliland's Political Transition* (Pisa: Ponte Invisible 2014): 44.

xeer-beegti).[672] The latter involves an ad hoc committee assigned to hear and decide a case following *Xeer*. The ad hoc committee members may be from the kinships involved in the dispute or outside of it. In either event, the members are chosen for their knowledge of *Xeer* and demonstrated impartiality.[673] Like a jury in some formal judicial systems, the parties select the committee members, and any member whom both parties do not accept is disqualified from sitting on the committee. Children and women are not allowed to serve on committees.[674] Moreover, a woman cannot attend a proceeding, and if she is a party to the dispute, a male relative must represent her.[675] Boys are not barred from attending *Xeer* proceedings, but they are not allowed to speak. In some kinships, boys are permitted to testify as witnesses.[676]

The final decision rendered by a committee, or reached through mediation or a negotiation settlement, becomes a precedent for future similar cases involving the same kinships. *Xeer* is thus predominately made through the decision of cases. Therefore, it is not static, but develops and changes, and varies considerably between different kinships and clans. If there is no previous similar case or the parties involved in the new case belong to clans that have never had a dispute of this sort, then the committee has the power to decide, and its decision becomes the new *Xeer*.

In *Xeer*, there is no punishment in the sense of imprisonment or the death penalty. Civil wrongs are divided into *qudh* (homicide) and *qoon* (a wound).[677] In both instances, the party that inflicted the wound or caused the death has to pay compensation in camels or their monetary equivalent. For homicide, compensation usually is 100 camels if the victim is a man and 50 camels for a woman. In all various forms of wounds,[678] compensation is paid in camels or the equivalent money as assessed by those learned in Sharia (*wadaado*). However, the actual amount to be paid depends on the *Xeer* between the kinships. There might be a fixed amount of compensation payable within a kinship or between two kinships based on precedent. The kinship of the perpetrator collectively pays the compensation. In a homicide case, only one-third of the compensation goes to the family of the victim.[679] The adult male members of the kinship collectively share the rest. The *Caaqil*s are responsible for its distribution. All male members of a kinship (*jilib*) have to pay equal amounts of compensation.[680]

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[672] *Gudi, guurti* or *xeer-beegti* are generally used interchangeably.

[673] Lidwien Kapteijns, "Gender Relations and the Transformation of the Northern Somali Pastoral,", The International Journal of African Historical Studies, Vol. 28, No. 2 (1995): 246.

[674] Minority clans are treated as outcasts. These clans include the Yibir, Madhibaan, Tumaal and Muus Dheriye. They are restricting from marrying other clans.

[675] Lidwien Kapteijns, "Gender Relations and the Transformation of the Northern Somali Pastoral", The International Journal of African Historical Studies, Vol. 28, No. 2 (1995): 246.

[676] This is based on the oral tradition of clans. The author found no literature on this, but from personal experience as a member of Somali society knows that clans have different standards on this.

[677] Haji N.A. Noor Muhammad, "Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic", Journal of African Law 11, no. 2 (Summer 1967): 101.

[678] A wound is any bodily harm inflicted on a person. The amount of payable compensation is dependent on the severity of the wound. For instance, if a person's bone has been injured, the compensation is then camels, but if the bone has been uncovered, but not broken, the compensation is five camels. For more information, see Haji N.A. Noor Muhammad, "Civil Wrongs under Customary Law in the Northern Regions of the Somali Republic", Journal of African Law 11, no. 2 (Summer 1967): 101.

[679] Payment of one-third is the most common model, but kinships might have different precedence on the number of camels payable to the victim's family and those shared by the rest of the kinship.

[680] Clans might have different modes of paying compensation. The *Caaqil* is responsible for claiming and paying compensation within his kinship.

Xeer deals with sexual violence as well. The perpetrator of sexual violence pays compensation in camels or the equivalent in money. The number of camels payable to the family of a rape victim depends on the status of the victim and the *Xeer* of the kingship(s) involved.[681] Like homicide cases, the male adult members of the survivor's kinship collectively share the compensation. Under the *Xeer*, a woman who was raped might be forced to marry the rapist.[682] *Xeer* considers rape as a kinship issue, but not a crime against an individual.[683]

Kinships, *Xeer* and the *Caaqil* play a role in the formal nationality law framework. An *Caaqil* has first to identify a kinship member to receive the national identity card (ID) and vote in elections.[684] The Ministry of the Interior's national identity office records the kinship and *Caaqil* of every citizen who gets a national ID or voter registration card.[685]

No research appears to have compared the number of cases resolved through *Xeer* with those resolved through formal courts. Some 44% of the Somaliland population live in nomadic and rural communities.[686] For such communities, *Xeer* provides a means of governance, adjudication, and security. In these communities, government institutions' presence is limited to formal justice institutions located only in towns. Nevertheless, *Xeer* is not confined to nomadic and rural communities, as it also plays a role in towns and cities where it offers an alternative dispute resolution mechanism.

Under the Somaliland Code of Civil Procedure, a court might recognise and enforce arbitral awards made in the *Xeer*.[687] A court can refer a civil case to a *Xeer* arbitration committee. There is no clause in formal criminal law permitting resolution of criminal cases through the *Xeer*. Nevertheless, there are criminal cases in which clan elders become involved and negotiate a settlement in the *Xeer*.[688] For example, the Penal Code imposes the death penalty in murder cases. However, the victim's family can choose to receive either compensation or demand execution. Although it is not written anywhere in the formal Penal Code, courts release convicted murderers when compensation is paid.

Xeer played a role in rebuilding Somaliland after the collapse of the central government of Somalia in 1991.[689] When the Somali National Movement (S.N.M.) took over Somaliland in 1991, inter-clan violence erupted. To restore peace, clan elders using *Xeer* organised peace conferences at local and national levels.[690] It is worth mentioning that clan elders wrote Somaliland's declaration

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[681] In some kinships, if the victim is unmarried, the compensation is higher.
[682] Alejandro Bendaña & Tanja Chopra, "Women's Rights, State-Centric Rule of Law, and Legal Pluralism in Somaliland", Hague Journal on the Rule of Law, (2013) 5: 44–73.
[683] ibid.
[684] The government gives no ID card without confirmation from an *Caaqil* to certify that the person belongs to the *Caaqil*'s kinship.
[685] Two chapters of this dissertation focus on children's right to nationality and sexual abuse.
[686] See https://somalia.unfpa.org/sites/default/files/pub-pdf/Population-Estimation-Survey-of-Somalia-PESS-2013-2014.pdf.
[687] Somali Civil Procedure Code, art. 37.
[688] In 2020 the police recorded 21,335 crimes in Somaliland. 8,986 were resolved through mutual agreement, and 6,730 went to trial. See the police report: https://www.youtube.com/watch?v=OCkcSXqoPyQ.
[689] Iqbal D Jhazbhay, *Somaliland: an African Struggle for Nationhood and International Recognition,* (Midrand: The Institute for Global Dialogue, 2017): 19.
[690] Rebecca Richards, "Fragility within stability: the state, the clan and political resilience in Somaliland", Third World Quarterly, 41:6, (2020): 1071; Lars Buur and Helene M. Kyed (eds), *State Recognition and Democratisation*

of independence in 1991.[691] In 1993, at the Borama Conference, a council of elders called the *Guurti*[692] was incorporated into the bicameral legislature of Somaliland.[693] This institutionalised the role of the *Guurti* in the national government.[694] The elders also played a role in the 1997 conference held in Hargeisa where a new government was formed, and elders and the Parliament approved a provisional Constitution. To a certain extent, *Xeer* regulates power-sharing in the government and in political parties.[695] Government ministries are, for example, shared along with a clan power-sharing scheme. The public mostly votes in parliamentary elections along clan lines.[696]

The *Guurti* in the Constitution is a house that stands as a balance to preserve traditions and customs. Article 59(2) of Somaliland's Constitution states that a member of the *Guurti*: "must be a person who has a good knowledge of the religion or be an old man who knows the tradition/culture."[697] As stated in Article 60 of the Constitution, the duties of the *Guurti* are to pass legislation related to religion, tradition (*culture*) and peace. They also review laws passed by the House of Representatives, except for the budget and advice on the shortcomings of the administration of the government, and provide assistance to the government in matters relating to religion, security, defence, traditions (*culture*), economy and society, whilst consulting the traditional heads of the clans.[698]

Xeer is concerned with "the rights and duties of Somali individuals and groups".[699] In that sense, it includes "values that shape gender and age-group relations".[700] Hence *Xeer* prescribes gender roles and the rights and duties of children.[701] As shown above, it also plays a role in enacting

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in Sub-Saharan Africa: A New Dawn for Traditional Authorities? (US: Palgrave, 2007): 165; Mark Bradbury, *Becoming Somaliland,* (London: James Currey, 2008).

[691] Rebecca Richards, "Fragility within stability: the state, the clan and political resilience in Somaliland", Third World Quarterly, 41:6, (2020): 1070; Lars Buur and Helene M. Kyed (eds), *State Recognition and Democratisation in Sub-Saharan Africa: A New Dawn for Traditional Authorities?* (US: Palgrave, 2007): 165.

[692] The Constitution of Somaliland uses the House of *Guurti* and House of Elders interchangeably. In Somali, it is *Golaha Odayada* (generally translated in English versions as the House of Elders). However, the Somali word *Oday* means old male person.

[693] Hussein Adam, *From Tyranny to Anarchy: the Somali Experience* (Asmara: Red Sea Press, Inc. 2008): 202; Mark Bradbury, *Becoming Somaliland,* (London: James Currey, 2008): 120.

[694] Lars Buur and Helene M. Kyed (eds), *State Recognition and Democratisation in Sub-Saharan Africa: A New Dawn for Traditional Authorities?* (US: Palgrave, 2007): 165.

[695] Mark Bradbury, *Becoming Somaliland*, (London: James Currey, 2008): 217; Michael Walls, *A Somalia Nation-State: History, Culture and Somaliland's Political Transition* (Pisa: Ponte Invisible 2014): 308.

[696] Academy of Peace and Development, *A Vote for Peace: How Somaliland Successfully Hosted its First Parliamentary Elections in 35 years* (2006): 43; Michael Walls, *A Somalia Nation-State: History, Culture and Somaliland's Political Transition* (Pisa: Ponte Invisible 2014): 213.

[697] Only once has a woman served in the *Guurti* after her husband, a *Guurti* member, died. Although some House members argued that only men could become members, she was sworn in and served in the *Guurti*. However, she voluntarily resigned, and her son has filled the position.

[698] Somaliland Constitution, art. 60.

[699] Lidwien Kapteijns, "Gender Relations and the Transformation of the Northern Somali Pastoral", The International Journal of African Historical Studies, Vol. 28, No. 2 (1995): 243.

[700] ibid.

[701] Judy el Bushra and Judith Gardner, ed, *Somalia - the Untold Story: The War Through the Eyes of Somali Women* (Pluto Press, 2004), https://doi.org/10.2307/j.ctt184qq8n.; 9; Michael Walls, *A Somalia Nation-State: History, Culture and Somaliland's Political Transition* (Pisa: Ponte Invisible 2014): 52; Lidwien Kapteijns, "Gender

formal laws and adjudicating cases. It also plays a role in the formation, enforcement and application of formal national laws.

5.4 Sharia law in Somaliland

Sharia means a path in Arabic.[702] Muslims believe that Sharia originated from "divine revelation".[703] Sharia law is not uniform across all Muslim countries and societies[704] and has developed over centuries.[705] Sunni and Shia are the two main sects in Islam.[706] Sources and interpretations concerning Sharia law are different in the Sunni and Shia sects.[707] Furthermore, Sharia law is not codified.

The development of the jurisprudence of Sunni Islam is primarily based on four schools[708] (*mad-hab* in Arabic).[709] Sunni Muslims across the world to a great extent follow one of the four schools. However, within one country, there is also a possibility of applying to different schools. The four schools are named after the founding jurists, namely, Hanbali, Maliki, Hanafi, and Shafi.[710] These schools are significant for the understanding and application of Sharia. What separates one school from the other is the jurisprudence it sets out on diverse issues such as contracts, criminal offences, ownership of property, and personal status. Centuries of writings of jurists have produced different rules. The four schools generally consider the Quran (the holy book of Muslims) and the Sunnah (actions and statements narrated from the Prophet Muhamed) as the two primary Sharia sources.[711] However, the interpretation and meaning of verses and the authenticity of narrations are contested.

Relations and the Transformation of the Northern Somali Pastoral", The International Journal of African Historical Studies, Vol. 28, No. 2 (1995): 249.

[702] Bradford J. Kelley, "Bad Moon Rising: The Sharia Law Bans", Louisiana Law Review 73, no. 2 (Winter 2013): 601-632.

[703] Anna C. Korteweg and Jennifer A. Selby, (eds), *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration.* (Toronto; Buffalo; London: University of Toronto Press, 2012); Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge University Press, 2008).

[704] Mackenzie Glaze, "Historical Determinism and Women's Rights in Sharia Law", Case Western Reserve Journal of International Law, Volume 50, Issue 1 (2018); Robert W, Hefner, *Shari'a Politics: Islamic Law and Society in the Modern World* (Bloomington: Indiana University Press, 2011).

[705] Anna C. Korteweg and Jennifer A. Selby (eds), *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration.* (Toronto; Buffalo; London: University of Toronto Press, 2012).

[706] James Moore, (2015) "The Sunni and Shia Schism: Religion, Islamic Politics, and Why Americans Need to Know the Differences", The Social Studies, 106:5, 226-235.

[707] Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge University Press, 2008).

[708] Kimberly Karseboom, "Sharia Law and America: The Constitutionality of Prohibiting the Consideration of Sharia Law in American Courts", Georgetown Journal of Law & Public Policy 10, no. 2 (Summer 2012): 663-680; Judith E. Tucker, *Women, Family, and Gender in Islamic Law.* (Cambridge: Cambridge University Press, 2008).

[709] Wael B. Hallaq, *The Origins and Evolution of Islamic Law*. (Cambridge University Press, 2005).

[710] ibid.

[711] Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge: Cambridge University Press, 2008); Karen Leonard, "American Muslims and Authority: Competing Discourses in a Non-Muslim State", Vol. 25 J. AM. (2005).

Similarly, other sources emerged. For instance, some schools accept *Ijma* (consensus), *Qiyas* (analogy)[712] and *Urf* (custom) as legitimate sources for Sharia law.[713]

Islam entered the Horn of Africa, including Somaliland, in its very early inception.[714] Islam has significance in Somaliland society.[715] The people of Somaliland adhere to Sunni Islam, and traditionally the majority follow Sufism, "a mystical view of the Muslim faith"[716] and the *Shafi* school in jurisprudence.[717] Those who have knowledge of Islam or "devote their lives to religion" are known as *wadaado* or sheikhs in Somali.[718] According to Sharia, sheikhs teach the Islamic faith, lead prayers and solemnise marriages.[719] Matrimonial disputes and inheritance are predominantly reserved for sheikhs. Over last three decades, the Hanbali School has gradually taken a notable place in Somaliland due to Salafism's arrival.[720] Salafism is not a school of thought per se, but it is a political and religious movement that revolves around a literal interpretation of the Quran, and "holds that the true Islam is what was practised by the earliest generations (*salaf*), disregarding later accretions."[721] The primary source of Salafi jurisprudence is the Hanbali School.

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[712] Anna C. Korteweg and Jennifer A. Selby (eds), *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration.* (Toronto; Buffalo; London: University of Toronto Press, 2012); Judith E. Tucker, *Women, Family, and Gender in Islamic Law.* (Cambridge: Cambridge University Press, 2008); Karen Leonard, "American Muslims and Authority: Competing Discourses in a Non-Muslim State", Vol. 25 J. AM. (2005).

[713] The following are the main sources of Sharia Law:

- Quran: the Holly Book of Muslims.
- Sunna: the narrated actions and words of the Prophet Mohamed. Hadith remained unwritten in the early stages of Islam.
- Ijma (consensus): this means a unanimous agreement of jurists.
- Qiyas (analogy).
- istihsan (juristic approbation),
- maslahah mursalah (considerations of public interest),
- Urf (custom),
- Istishab (presumption of continuity); and
- Sadd al-dhara'i (blocking the means).

[714] Afyare Abdi Elmi, *Understanding the Somalia Conflagration: Identity, Political Islam and Peacebuilding* (New York: Pambazuka Press, 2010): 48; Hussein Adam, *From Tyranny to Anarchy: the Somali Experience* (Asmara: Red Sea Press, Inc. 2008: 215-216; Mark Bradbury, *Becoming Somaliland* (London: Indiana University Press 2008): 19.

[715] Michael Walls, *A Somalia Nation-State: History, Culture and Somaliland's Political Transition* (Pisa: Ponte Invisible 2014): 59; Mark Bradbury, *Becoming Somaliland* (London: Indiana University Press 2008): 19.

[716] I. M. Lewis, *A Modern History of the Somali* (Ohio: Ohio University Press 2002): 63.

[717] Mark Bradbury*, Becoming Somaliland* (London: Indiana University Press 2008): 19; Michael Walls, *A Somalia Nation-State: History, Culture and Somaliland's Political Transition* (Pisa: Ponte Invisible 2014): 60; Afyare Abdi Elmi, *Understanding the Somalia Conflagration: Identity, Political Islam and Peacebuilding* (New York: Pambazuka Press, 2010): 50; Hussein Adam, *From Tyranny to Anarchy: the Somali Experience* (Asmara: Red Sea Press, Inc. 2008): 216; I. M. Lewis, *A Modern History of the Somali* (Ohio: Ohio University Press 2002): 63.

[718] Hussein Adam, *From Tyranny to Anarchy*: 217; I. M. Lewis, *A Modern History of the Somali*: 15. Sheikh, wadaad and aw are among the names given those with religious knowledge or devotion. Traditionally, sheikhs were not involved in clan affairs.

[719] ibid, 15.

[720] Mark Bradbury, *Becoming Somaliland*: 20; I. M Lewis, *Understanding Somalia and Somaliland* (New York: Colombia University Press, 2008): 20.

[721] Robert Hefner, *Shari'a Politics: Islamic Law and Society in the Modern World* (Bloomington: Indiana University Press, 2011); Quintan Wiktorowicz, "Anatomy of the Salafi Movement", Studies in Conflict & Terrorism, (2006) 29: 207–239.

Sharia is a source for formal laws in Somaliland, and the formal laws enacted by the Parliament may not conflict with Sharia law, according to the Somaliland Constitution.[722] This means that legislators enacting formal law through the constitutionally enshrined law-making process may derive rules from Sharia, and formal law can be challenged before the Constitutional Court for violating Sharia. However, it does not mean automatic application of Sharia in Somaliland.[723] Moreover, the principles on which the Constitution is grounded include Sharia.[724] The Constitutional Court can abrogate legislation that conflicts with Sharia. The Judiciary Organisation Act of Somaliland provides the district courts with the jurisdiction to hear and determine matrimonial cases, inheritance, wills and other personal status matters (*al-ahwal alshakhsiya*) under Sharia law.[725] Hence district courts apply Sharia law and the formal law as well. Sharia governs cases concerning children such as custody of children, foster families and inheritance.[726] The Judiciary Organisation Act states that "courts shall apply Islamic Sharia and laws that do not conflict it."[727] The Civil Code also stipulates that judges should apply the formal law on civil suits, but if there is no provision in the formal law on the subject in dispute, the judge should apply Sharia law.[728] In this regard, formal courts can utilise Sharia law in deciding civil cases.[729] Additionally, Sharia law experts and formal law-trained judges sit as judges in the regional court and appeal court assize sections that hear serious criminal cases such as murder.[730]

The Constitution provides for the establishment of the *Ulema*[731] Commission, which is an independent institution with the responsibilities of issuing declarations about religious matters and clarifications of any matter that is "contrary to Sharia".[732] The Commission has the power to review legislation before a law is passed to ensure it does not conflict with Sharia law. The Commission also has the power to screen existing formal laws, policies and educational books.[733]

Sharia law is also applied by sheikhs not associated with the judiciary. Individual sheikhs or Sharia-based offices set up by a group of sheikhs can hear and decide a case following Sharia law. Sharia-based offices are called *Ma'duun.* The Ministry of Justice register and license *Ma'duun* offices. Parties before a *Ma'duun* office or an individual sheikh have to consent before proceedings start. Courts might recognise and enforce decisions rendered by sheikhs or a *Ma'duun* office. Courts can also refer civil cases to sheikhs to arbitrate. Additionally, *Ma'duun* offices and sheikhs solemnise marriages and distribute inheritances. In rural and nomadic areas where government

[722] Somaliland Constitution, art. 5.
[723] For example, in criminal cases, judges have limited scope and can apply only a written law enacted by the Parliament (Article 26 of the Somaliland constitution and Article 1 of the Penal Code).
[724] Somaliland Constitution, Art. 5, 115, preamble.
[725] Judiciary Organisation Act.
[726] Judiciary Organisation Act, 23/2004. Art. 13.
[727] Judiciary Organisation Act, 23/2004. Art. 2.
[728] Somali Civil Code, Art. 1.
[729] There are formal laws that include components of Sharia law. For example, the Anti-Drug Act imposes a punishment of flogging on convicts of drug usage, selling or possession.[729] Enforcement of the punishment of lashing has not so far happened in Somaliland. The Zina (fornication), Rape and Related Offences Bill was recently passed by the House of Representatives. The Bill contains Sharia law punishment.
[730] Judiciary Organisation Act, 23/2004. Art. 11, 12.
[731] *Ulema* is a word derived from the Arabic language and means scholars. In the Constitution and day-to-day Somali language, it is used to refer religious scholars.
[732] Article 115.
[733] Article 60(1)(t).

legal institutions are not present, sheikhs play a significant role in personal status disputes, among other issues. In this regard, *Xeer* and Sharia law interact.

Sharia is related to the rights of children. The different schools in Sharia law have divergent positions on issues concerning children. For instance, in the Shafi School, the age of majority is 15 years. In contrast, the Hanafi School states that a child is any person under 18 years' old. Hanbali and Maliki assert that a child is any person under 16 years' old. However, in the four schools, the age of marriage is not fixed. Additionally, in Sharia, girls and boys do not have an equal share in the inheritance. Sons receive double of that of daughters in inheriting from a deceased parent. Courts, *Ma'dum* offices and sheikhs apply Sharia to subjects concerning children.

5.5 Formal legislation

5.5.1 Introduction

This section covers formal legislation relevant to children's rights. Formal legislation means laws enacted by the Parliament of Somaliland or accepted as an applicable formal law by the Constitution.[734] It does not include Sharia law and *Xeer*. However, there are laws enacted by the Parliament which were derived directly or indirectly from Sharia or *Xeer*. Because they have been incorporated in law legislated by Parliament, these are treated in this chapter as formal national law. Also, Sharia and *Xeer* interact with the formal law-making process and application of laws (see also section 5.5 above). Moreover, this section does not intend to cover the "law in books - law in action" dichotomy. The objective is to answer the following research question: what rights do children have in Somaliland's formal national laws? Laws related to nationality and sexual abuse are separately addressed in two other chapters and therefore are excluded from this section.

5.5.2 Definition of child

In Somaliland's formal laws, there is no uniform definition of child. The constitution does not define the age of the child. Under the Civil Code, a person reaches the age of majority upon the completion of 18 years.[735] The Juvenile Justice Law defines a child as a person below the age of 15.[736] A child who has not attained 15 years has no criminal responsibility.[737] However, a child who is 15 years of age, but has not attained 18 years may be liable for criminal responsibility but shall not have full criminal responsibility.[738] Under the Rape and Sexual Offences Act, a child is

[734] According to article 130(5) of Somaliland's Constitution, all of the laws which were in force when Somaliland declared independence in 1991 and "do not conflict with the Islamic Sharia, individual rights and fundamental freedoms shall remain in force in the country of the Republic of Somaliland until the promulgation of laws which are in accord with the Constitution of the Republic of Somaliland." In this regard, primary laws, including the Penal Code, the Criminal Procedure Code, the Civil Code, and the Civil Procedure Code fall under this category. These laws were enacted before Somaliland declared independence and largely remain in force. Exceptions are articles in the Penal Code repealed by subsequent laws such as provisions concerning drugs and corruption.

[735] Civil Code, art. 44.

[736] Juvenile Justice Law (2007), art. 1.

[737] Juvenile Justice Law (2007), art. 10(1).

[738] Juvenile Justice Law (2007), art. 10(2).

a person below 18 years.[739] The legal age to vote is 15.[740] The Prevention and Suppression of Human Trafficking Act defines a child as a person under the age of 15 years.[741] Under the Child Rights Protection Act (2022), a child is a person under 15 years of age.[742] The Labour Law prohibits the employment of children under the age of 15.[743] However, it permits children under 18 years' old to work if the task does not negatively affect a child's growth or physical or mental health.[744]

5.5.3 Child Rights Protection Act

5.5.3.1 Introduction

The Child Rights Protection Act (the CPA) came into force in 2022. It consists of six chapters of 39 articles. The CPA aims to protect the rights of children, to set out the general and specific responsibilities protecting the rights and care of children, and to establish specific government responsibilities in regard to the protection, implementation, promotion and welfare of the rights of children.[745]

According to the CPA, international children's rights treaties are "applicable as far as they do not contradict Islamic Sharia and Somaliland's constitution."[746] It stipulates that its provisions should be interpreted in a manner consistent with the "international law of the UN" as long as it does not conflict with Sharia. The interpretation should be based on the best interests of the children's rights that do not conflict with Sharia.[747]

The best interest of the child should be given the primary consideration in all actions concerning children taken by a government agency at all levels, district, regional and national, or by other private persons determining matters related to the growth or care of a child or the administration of child's property or income.[748] The CPA defines the best interests of a child as a "child's right to life, development, health and safety, and guarantees that the dignity, reputation, identity, religion and personality of the child are the fundamental objectives of any action."[749] In considering the best interests of the child, the CPA requires special consideration be given to the rights granted to children by Islamic Sharia in line with the age of maturity and the understanding of the child, the impact a change of conditions may have on the child, "the child's age, sex, identity, nationality, his/her practice in Islam, background, and other characteristics that might appear appropriate" and the right of the child to "life, development, health, and safety as well as guarantees for dignity,

[739] The President signed the Rape and Sexual Offences Act in 2018 but suspended its implementation after religious groups objected. The House of Representatives approved an amended version of the Act in August 2020. The Act is now pending before the *Guurti*. The amended version changes the age of the child. It says a child is "any person who reaches the age of puberty under Sharia, which is 15 years or shows the signs of puberty in accordance with the Shafi'i school of thought."
[740] General Law for Elections and Voter Registration (2020), art. 4.
[741] Prevention and Control of Human Trafficking Act, 2022: art. 2.
[742] Child Rights Protection Act, 2022: art. 2 (definitions).
[743] Somaliland Private Employment Act, 2020: art 46(1).
[744] ibid, art 46 (4).
[745] Child Rights Protection Act, 2022: art. 3.
[746] ibid, art. 3(1).
[747] ibid, art. 4(2).
[748] ibid, art. 11(1).
[749] ibid, art. 2 (definitions).

reputation, identity, religion and personality of the child are the fundamental objectives of any action."[750]

5.5.3.2 Government responsibilities

The CPA imposes a legal responsibility on the government of Somaliland. Article 7 imposes on the government the "general responsibility to respect the rights of children." The government's exercise of this responsibility should not conflict with the "Islamic Sharia, the constitution, applicable laws and general principles related to the protection of the rights of children."[751] The Ministry of Employment, Social and Family Affairs is tasked with performing the government's responsibility for protecting and caring for children and implementing the CPA.[752] This broad task includes "the establishment of any procedures, structures and standards protecting rights of children that do not conflict with Islamic Sharia, the constitution and other laws of the country."[753] Moreover, the CPA stipulates the specific responsibility of protecting and caring for a child if there are no parents or relatives to take care of the child.[754] The government should establish institutions to care for children without parents or relatives or who are not under *Kafala* (see sub-section 5.5.3.4 for the meaning of *Kafala)*.[755] The Ministry has the power to issue guidelines and procedures to supervise childcare institutions.[756]

The CPA establishes the Child Protection and Care Commission consisting of seven members drawn from different government agencies.[757] The Commission is responsible for gathering data and information pertaining to the infringement of child rights, issuing reports, assisting the National Human Rights Commission on the investigation of child abuse, monitoring childcare institutions, and coordinating information sharing.[758] The Commission is prohibited from engaging in investigative powers relating to child abuse or from engaging in the tasks of the National Human Rights Commission.[759] The Minister of Employment, Social and Family Affairs is given the power to issue a regulation detailing the powers and duties of the Commission.[760]

5.5.3.3 Responsibilities of parents and relatives

The "specific responsibility to protect the rights of children lies on the child's parents or the child's guardian."[761] According to the CPA, Sharia determines the duties of parents and guardians.[762] The CPAs transfer the responsibility to care for a child to relatives "when a child's parents die, neglect or are unable to care for" the child.[763] The CPA does not provide an elaborate definition of what

[750] ibid, art. 11(2).
[751] ibid, art. 7(2).
[752] Child Rights Protection Act, 2022: art. 7(3).
[753] ibid, art. 7(5).
[754] ibid, art. 10(3).
[755] ibid, art. 23(4).
[756] ibid, art. 23(5).
[757] ibid, art. 33(1).
[758] ibid, art. 34(1, 2, 3, 4, 5.)
[759] ibid, art. 34(7). The National Human Rights Commission was established by the Act of Parliament and has a wide range of powers to oversee the government's human rights commitments and to investigate and report on human rights abuses. Its members consist of seven members nominated by a selection committee and appointed by the president subject to the approval of the House of Representatives.
[760] ibid, art. 33(4).
[761] ibid, art. 8(1).
[762] ibid, art. 8(3).
[763] ibid, art. 10(1).

"a relative" means. The CPA defines relatives ambiguously as "the relatives of the child".[764] Sharia determines who among the relatives assumes the child's care.[765] The courts have the power to verify.[766]

5.5.3.4 Children's Bill of Rights in the CPA

Article 13 provides that children have the fundamental rights in the Islamic Sharia and the fundamental rights enshrined in the Constitution of Somaliland. The CPA prohibits discrimination based on physical appearance, nature, sex, clan and condition of life.[767] The CPA gives the following list of children's rights.

Article	Rights
Article 12	- Right to freedom of expression - Right to information
Article 14	- Every child has a right to the protection of his/her "Islamic faith" - Right to life - Right to development - Right to survival
Article 15	- Right to protection from neglect
Article 16	- Right to liberty and security of the person
Article 17	- Right to birth registration
Article 18	- Right to be Muslim
Article 19	- Right to guidance in accordance with Sharia
Article 20	- Right to name and identity - Right to nationality in accordance with the Somaliland Citizenship Act and the Constitution
Article 21	- Right to education, including religious education
Article 22	- Right to care
Article 23	- Right to parental care
Article 25	- Right to recreation and play
Article 26	- Right to privacy
Article 28	- Right to health
Article 29	- Right to protection from torture, degrading treatment and corporal punishment
Article 30	- Right to protection from abuse
Article 32	- Right to free legal aid

Article 24 grants special protection to children with special needs. According to the CPA, children with special needs include children without parental care, homeless children, critically ill children, children with a disability, internally displaced children, refugee children, migrant children, or any

[764] ibid, art. 1 (definitions).
[765] ibid, art. 10.
[766] ibid, art. 10(2).
[767] Child Rights Protection Act, 2022: art. 22(2).

other children in a circumstance deemed to pose vulnerability.[768] Children with special needs are entitled to:

- Special care
- Right to non-discrimination
- Access to services such as education, health, play/recreational places and general care
- Protection from exploitation.[769]

The right to access *Kafala* is guaranteed in Article 27. *Kafala* means "to provide for an orphaned or unparented child's basic needs"[770] and to provide support without establishing "a filial relationship".[771] It is the alternative to adoption of children in the Muslim world.[772] It is different from adoption in various ways, including that "the adopted child retains the surname of his or her biological parent and does not take the name or identity of the adoptive parent."[773] The child in *Kafala* "does not have any automatic entitlement to inheritance from the adoptive parents and inherits from the biological parents."[774] *Kafala* is provided in Article 20 (3) of the UN Convention on the Rights of the Child (CRC):

> Such care could include, inter alia, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Under the CPA, only a Muslim who is a citizen of Somaliland can care for a child in *Kafala*.[775] The process of *Kafala* and the rights of a child in *Kafala* are not elaborated on in the CPA but are referred to the jurisdiction of Sharia.

5.5.3.5 Limitations of children's rights by Sharia in the CPA

A total of 21 provisions out of 32 substantive articles in the CPA mention Sharia law. Yet, the CPA provides no explanation of the specific doctrines of Sharia. Sharia has numerous sources and schools of thought with divergent views on matters, including child-related issues and concepts (see section 5.3.3 of this chapter). Hence, generalisation of Sharia might pose a risk to children by creating uncertainties.

Article 4 of the CPA provides that the Sharia is the foundation of the CPA.[776] In the list of the catalogue of rights, the CPA requires that the exercise and interpretation of these rights should not

[768] ibid, art. 24.
[769] Child Rights Protection Act, 2022: art. 24(1, a, b, c, d).
[770] Karen Smith Rotabi, et al., "The Care of Orphaned and Vulnerable Children in Islam: Exploring Kafala with Muslim Social Work Practice with Unaccompanied Refugee Minors in the United States", J. Hum. Rights Soc. Work (2017): 17.
[771] Julie Malingreau, "International Kafala: A Right for the Child to Enter and Stay in the EU Member States", European Journal of Law Reform 16, no. 2 (2014): 403.
[772] Julie Malingreau, "International Kafala: A Right for the Child to Enter and Stay in the EU Member States", European Journal of Law Reform 16, no. 2 (2014): 4; Andele Pastena, *Recognition of Kafala in the Italian Law System from a Comparative Perspective* (Cambridge: Cambridge Scholars Publishing, 2020): 404.
[773] Javaid Rehman, "Religion, Human Rights Law and the Rights of the Child: Complexities in Applying the Sharia in Modern State Practices", Northern Ireland Legal Quarterly 62, no. 2 (Summer 2011): 163.
[774] ibid, art. 163.
[775] Art. 27(2).
[776] ibid, art. 4(1).

contradict Sharia. The responsibility of parents and guardians is based on Sharia. The definition of relatives and the determination of which relative assumes responsibility to care for a child when his or her parents die or is neglected are referred to Sharia law. The CPA specifically mentions Sharia as a limitation to children's rights to access information,[777] the right to protection from neglect,[778] and the right to a name.[779]

The CPA does not recognise the freedom of religion. Article 18, titled "Right to be Muslim", states: "children shall have a right to the protection of *Sha'air* Islam [customs and rules about Islam] and adherence to the righteous religion during growth and before reaching the age of maturity in which they are under the special responsibility of their parents." Article 19 imposes on parents the obligation to guide children in Islam and adhere to Islamic practices.

5.5.4 Juvenile Justice Law

The Juvenile Justice Law (the JJL) is a special law that applies to children in conflict with the law. It was enacted in 2007 and applies only to crime-related matters. It sets out procedures specifically applicable to children and does not contain substantive rules.

A child is defined in the JLL as "any human being below the age of fifteen years old",[780] and it sets the age for criminal responsibility under 15 years.[781] The JJL replaced the Penal Code provision, which put the age of criminal responsibility at 14 years. Older children (those aged 15–18 years) might be charged with an offence, but the criminal responsibility is limited.[782] The meaning and extent of limited criminal responsibility are not defined in the JJL. However, under the Penal Code, punishment should be reduced for a person who has not attained 18 years if the person had the capacity of understanding and of volition.[783] If there is no proof ascertaining the age of a child, the presiding judge determines this in a preliminary hearing "with the help of a recognised medical doctor".[784]

The JJL aims to "protect children's rights in accordance with the Convention on the Rights of the Child and the international human rights laws and in a manner consistent with Somaliland cultural and Islamic values."[785] The JJL states that the best interest of the child shall be given primary consideration.[786] According to article 2, the provisions in the JJL should be interpreted in a manner consistent with the Somaliland Constitution, Sharia, the Convention on the Rights of the Child and the international human rights laws.[787] The JJL aims to "harmonise" the formal law, Sharia law and *Xeer* concerning children in conflict with the law.[788] Moreover, the JLL's objective is to foster children's sense of dignity and worth, but also "by holding them accountable for their actions."

[777] Ibid, art. 12(2).
[778] Art. 15(1).
[779] Art. 20(1).
[780] Juvenile Justice Law, art. 1.
[781] ibid, art. 10.
[782] ibid, art. 10.
[783] Somali Penal Code, art. 60.
[784] Juvenile Justice Law, art. 64.1.
[785] Juvenile Justice Law, art. 5.
[786] ibid, art. 6.
[787] ibid, art. 2.
[788] ibid, art. 5.2.

Foundational principles in the JJL are: the non-discrimination principle (article 5),[789] the best interest of the child (article 6), the right to participate and express an opinion in judicial proceedings (article 14), the protection of the physical and mental wellbeing and personal development of children (article 5.3.a), children's right to dignity (article 5.3.b), and protection of privacy (article 7).

The JJL creates a separate system for juveniles to keep children away from the adult justice system. The juvenile justice system includes juvenile courts (*maxkamadda caruurta*), the social probation office, juvenile police, Juvenile Pre-trial Detention Centres, Juvenile Rehabilitation Centres, the Child Welfare and Protection Committee, and diversion measures based on restorative justice.[790] These institutions do not in practice exist.

A child might be deprived of liberty only as a measure of last resort, and only for the minimum necessary period.[791] Article 47 provides that a child under 15 should not be arrested unless his/her security necessitates the arrest.[792] The article does not elucidate the meaning of security. Article 49 stipulates that an arrested child should be held in a Juvenile Pre-trial Detention Centre. Nevertheless, a child might be arrested if "caught in the act of committing a crime or accused of committing offences set forth by law." In contrast, the Constitution states that a person cannot be deprived of liberty unless a competent judge issues a warrant of arrest or a person is caught in committing a crime.[793] It is worth mentioning that the JLL allows the police to arrest a child (a person under 15 years' old), yet at the same time states that a child does not have criminal responsibility.[794]

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[789] The JLL applies "to all children in Somaliland irrespective of sex, nationality, religion, ethnic or social origin, immigration or legal status or any other status of the child." It also states that "children shall be entitled to equal treatment when they commit a similar offence."

[790] Probation officers are affiliated with the juvenile courts and are appointed by the Minister of Justice. Children police are a special police unit for the protection of children. Rehabilitation Centres are divided by law into 1. The open facility is an institution such as Children Rehabilitation Centre with little movement restriction imposed on the child. It is also a facility where a child can fully interact with the community. 2. Closed facility: Means an institution where the child's movement in and out of the premises and his contact with the community is allowed but with surveillance. 3. High-security facility: an institution with strict regulations and where the child is placed under constant surveillance. See article 1 (definitions).

[791] Under the JLL, deprivation of liberty means any form of restriction of liberty including detention, arrest and commitment to a Children Rehabilitation Centre. See article 1 (definitions).

[792] In the Somali language, the article says "Ilmaha ka yar shan iyo toban sanno looma xidhi karo dembi, hadii aanay nabad gelyadiisa ahayn." The word *nabadgelyo* is translated as security.

[793] Somaliland Constitution, art. 25(2)

[794] Articles 47 and 55 point out that children in conflict with the law are entitled to bail.[794] However, the presiding judge has the discretion to grant bail or order detention of the child.[794] The JLL recognises rights of due process and other procedural guarantees. These rights include:[794] the right to inform the child, parents and guardians the charges; the right to presume innocent unless proven guilty; the right to have a legal counsel and to communicate with the counsel; the right to free legal assistance to "destitute children"; right to remain silent; the right to have a parent or guardian present during questioning, and the right to have parents or guardians present at all stages of the proceedings; the right to prompt appearance before court; right to cross-examine witnesses and examination in chief; right to appeal against any decision or sentence; right to free interpretation services if the language of the court is not his/her mother tongue; the right to be protected from any form of physical punishment and psychological harassment; be detained separately from adults and girls from boys; adequate food and water; sufficient clothing, bedding and blankets and medical treatment, care and support; education and reading material; regular visit from parents, relatives and lawyers; child who has a mental disability or is unable to speak who is deprived of liberty shall have the right to an expert to assist the child.

JJL gives exclusive jurisdiction to juvenile courts in all criminal cases concerning children.[795] Juvenile courts consist of one judge and two assessors selected from the public in consultation with the "parents, guardian or legal representative, victim and his/her legal representative."[796] The juvenile judges should "have adequate and appropriate training in juvenile justice, and adequate knowledge in Sharia."[797] The presiding judge selects the assessors from a list of names prepared annually by the Ministry of Justice to serve as assessors in the court.[798]

The JJL entitles children to be brought to court as speedily as possible, and a case is to be determined without delay.[799] A child capable of communicating views has the right to participate and express views in any judicial proceedings concerning the child.[800] The court has to consider the child's views and provide a lawyer or interpreter to the child who cannot express views, and that lawyer should not be absent from court proceedings. A judge might hold a closed hearing in the parents', guardian's, or lawyer's presence if a public hearing might harm the child's dignity.[801] To ask a child a hostile question is inadmissible. Article 81 requires separation of a child from an adult in instances where a child and adult are alleged to have committed the same offence "unless it in the interest of the justice."[802] If the court decides to hold a joint trial, the juvenile court has the jurisdiction to hear the case.[803] The judge might order the placement of a child in a rehabilitation centre.[804]

The JJL prohibits the use of torture, capital punishment and life sentences for children.[805] The maximum punishment a child might face should not exceed 15 years in aggravated

[795] The JJL requires the establishment of a juvenile court in every region and district. According to article 16, the regional juvenile courts constitute a regional court section, and district juvenile courts is a district court section. Additionally, appeal courts and the Supreme Court should have a juvenile appellate section that hears appeals from the district and regional juvenile courts. See article 17 and 18 of the JJL.
[796] Juvenile Justice Law, art. 19.
[797] Juvenile Justice Law, art. 18.1.
[798] Juvenile Justice Law, art. 19; Judiciary Organisations Act, art. 38.
[799] ibid, art. 82. Article 77 obligates the presiding judge of the juvenile court to explain to the child the substance of the alleged offence, and inform the child of his/her rights.
[800] ibid, art. 14.1.
[801] ibid, art. 57.3.
[802] The JJL prohibits the publication of the child's personal information such as her/his name and other information that might identify the child and information on the child's health and admission to or transfer from a facility. It demands files for children in conflict with the law to be kept in a separate location and access granted only to authorised persons. The JJL obliges recording information on children in a confidential individual file, and the various institutions involved in children in contact with the law should keep the information strictly confidential. A child has a right to contest any fact or opinion contained in a file.
[803] Juvenile Justice Law, art. 81.3.
[804] The rehabilitation centres are run by a board of members consisting of representatives from:
Ministry of Justice
Ministry of Education
Ministry of Health
Ministry of Family Affairs and Social Development.
National Human Rights Commission
Business Community
Ministry of Youth and Sports
Ministry of Religious Affairs and Endowments
Children Policy
Ministry of Interior.
[805] Juvenile Justice Law, art. 12.

circumstances,[806] and the punishment should be "proportionate to the circumstances of the child, the gravity and the nature of the offence."[807] Only Children Rehabilitation Centres can hold a child.[808] The JJL prohibits imprisoning a child with an adult.[809] The JJL encourages diversion, based on restorative justice to keep children away from the criminal system, "to other mechanisms such as *Xeer*s and restorative justice in line with the Somaliland Constitution and international human rights instruments."[810] Juvenile court judges have the power to divert a child during the preliminary hearing or after the conclusion of the case,[811] utilising "reconciliation, restitution and responsibility through the involvement of the child, parent, other family members of the child, victim and the community."[812]

5.5.5 The Public Order and Security Law

The Public Order and Security Law (POSL) came into force in 2012. It establishes security committees (national, regional and district level), governs demonstrations, private guards, management of licensing public gatherings and entertainments, and empowers security agencies in emergency situations.[813] The POSL contains articles related to children.

The POSL creates a commission responsible for licensing cinemas and films. The committee has the power to ban a child under 15 from working or taking an acting role in a drama or a film if such role might have a negative consequence to the "faith or discipline" of the child.[814] The commission can also disallow films featuring children if "it hurts Islamic Sharia and good behaviour."[815] However, permission might be given when "the drama or the film is about education, religion or the good culture to raise the awareness of society".[816]

Part five of the POSL is concerned with "Protection of Young Children".[817] According to Article 32, security agencies are in charge of protecting the security of "street children," and the State is

[806] Juvenile Justice Law, art. 12.
[807] Juvenile Justice Law, art. 11.
[808] Juvenile Justice Law, art. 48. Article 33 classifies rehabilitation centres into three categories: a. Open facility with minimum security; b. Closed security facility; and c. High-security facility. According to Article 34.3, the court while deciding on a child's placement in a rehabilitation centre should consider a. The age and gender of the child; b. The gravity and nature of the offence committed by the child; and c. The physical and mental conditions of the child.
[809] Juvenile Justice Law, art. 31.
[810] ibid, art. 67.
[811] ibid art. 85.
[812] Juvenile Justice Law, art. 1 (definition of restorative justice in relation to diversion). According to Article 70, the judge should give consideration to: a) the health and behaviour of the child, b) The education level, cognitive ability and domestic and environmental circumstances, c) The proportionality of the option recommended or selected to the child's circumstance, the nature of the offence, and d) The age and developmental needs of the child.
[813] The security committees' tasks include maintaining public order and national security and ensuring the implementation of administrative decisions related to the protection of security and public order. According to article 6, the committees do not have judicial powers. This is important because the POSL replaces 1963 Public Order Law and Security Committee created during the era of the Siad Barre regime which continued functioning since 2010, which gave judicial power of sentencing people accused of breaching public order law. The actions of the then security committees have attracted criticism from human rights advocacy groups. See Human Rights Watch Report, https://www.hrw.org/report/1990/01/31/government-war-its-own-people/testimonies-about-killings-and-conflict-north.
[814] Public Order and Security Law, art.27(1).
[815] ibid, art. 27(2).
[816] ibid, art. 37(3).
[817] ibid, art. 32, 33 and 34.

responsible for their care if there is no parent or guardian.[818] Article 33(1) punishes the parent who refuses to take care of or neglects a child. The POSL defines negligence as "a failure to take care, discipline, and not knowing the child's education or health."[819]

Article 33(3) of the POSL states that: "a parent may request the district court for reformative detention of his child aged more than 15 years and the court may, after consideration, and having satisfied itself of the reasons advanced by the parent, sentence the son to a detention of a period not exceeding six months."[820] The POSL does not require evidence for the commission of criminal conduct to imprison a child on a parent's request. The courts call these cases *waalid caasi* (parent disobedience). The term is not defined by law or court judgment. Children might be sentenced for "non-criminal conduct such as chewing qat, refusing to attend school and general misbehaviour."[821] The ordinary division of district courts hears cases under the POSL, but not the juvenile court.[822]

5.5.6 National Education Act

The right to education is not included in the human rights section of the Constitution.[823] Nevertheless, within the section on the general aspirations, Article 15 of the Constitution states:

- The State shall pay particular attention to the advancement, extension and dissemination of knowledge and education as it recognises that education is the most appropriate investment that can play a major role in political, economic and social development.
- Education is in the public interest and is rooted in the experience and the special environment of Somaliland's society.
- The learning of and training in the Islamic religion is a fundamental path and shall be compulsory at all education levels. At the same time, the promotion of Koranic schools is the responsibility of the State.
- Citizens and resident foreigners may open schools and educational or training projects at all levels in accordance with the Education Law.
- The State shall accord first priority to primary education, and shall endeavour to spread primary education to the regions and the districts.
- The eradication of illiteracy and the *(provision)* of adult education is a national obligation, and the efforts of the public and the State shall be combined to fulfil this obligation.
- The national policy is that primary education shall be free.
- In order to ensure a healthy physical and mental growth of the young, and to improve their wellbeing and maturity, the State shall give special attention to the promotion and encouragement of physical education and sports which will be recognised as one of the basic subjects in the educational curriculum of both State and other schools.[824]

The Parliament enacted the National Education Act (the NEA) in 2018. Article 5 notes that education is a right, and the government shall provide access to education to all citizens.[825] Special

[818] ibid, art 32(1).
[819] ibid, art 33(2).
[820] The Parliament passed public Order and Security Law in 2012 to replace Somalia's Public Order Law of 1963.
[821] Horizon Institute, *Juvenile Violence and Delinquency in Somaliland Why Incarceration is the Wrong Response*, June 2018: 7.
[822] The article's lack of details created a different practice in dealing with children whose parents request imprisonment under the POSL. There is no uniform approach.
[823] See section 5.2.3 if this dissertation.
[824] Somaliland Constitution, art. 15.
[825] National Education Act, art. 5 and 6.

attention is given to the development and expansion of education.[826] The core principle of education is making primary education compulsory and free.[827] Every child has a right to education.[828] The objectives of education are to build a society founded on Islamic culture, to eliminate illiteracy, promote Islamic education, science and technology, to attain knowledge and skills protecting the environment and sustainability, to develop education that encourages economic growth, justice, responsibly, and valuing of peace, train children to love and respect the dignity of work, and teach children hardworking, honesty, co-existence, tolerance, cooperation, volunteerism, truth-telling, the balance of thinking based on justice, fairness and peace.[829]

The NEA also provides:

- The minimum age limit for formal education is 6, and the maximum age is 14. Children older than 14 can enrol in informal schooling. However, age should not be used to restrict access to education.[830] The Strategic Plan of the Ministry of Education defines non-formal education as "a practical and functional mix of fundamental literacy, numeracy and skills for life."[831] It not based on a structured curriculum. The objective is "to prepare them [students] to improve their life opportunities and/or successfully enter high growth occupations and careers."[832] It focuses on raising literacy and providing skills required for jobs.[833] Informal education is accessible for adults and children who are not able to attend formal education.[834]
- The Somali language is the official medium of instruction for primary education. Teaching in foreign languages might be allowed by the Ministry.[835] Teaching in other languages requires special permission from the Ministry.
- Inclusive education: people with a mental or physical disability have a right to education, and the government must establish special needs schools up to secondary level.[836]
- Article 120 of the NEA states that: "the student who violates the law and school rules or transgresses to other student or teacher or school staff or commits crimes within the school or damages the property of the school shall be punished. The Disciplinary Committee of the school shall prescribe the punishment."

5.5.7 Employment laws

Somaliland has two employment-related laws; the Private Sector Employment Act as amended in 2020 (commonly referred to as the Labour Law) and the Civil Service Law (Law No. 97/2022). The latter law governs all government employees except the security sector personnel (the military,

[826] Ibid.
[827] ibid, art. 6(5).
[828] ibid, art. 6(15).
[829] National Education Act, art. 5. Titled "the Objectives of Education" the article lists the objectives which the education system of Somaliland has to be founded on and should realise.
[830] ibid, art. 16(2).
[831] Ministry of Education and Higher Studies, the Republic of Somaliland, Education Sector Strategic Plan, (ESSP 2017-2021), October 2017: 70.
[832] ibid.
[833] Art. 34.
[834] ibid, art. 16(3) and 33.
[835] ibid, art. 18(1).
[836] ibid, art. 36.

police, correctional officers and custodial guards).[837] The Labour Law applies to employees with the private sector (businesses, non-governmental organisations, etc.).

Article 46(1) of the Labour Law prohibits employing children under 15 years of age. In article 46(2), however, the Labour Law states: "if children under the age of 15 years are employed, the work must be light that does not diminish the child's growth and physical and mental health." The Labour Law permits children under 18 years (15-17) to work if the work does not negatively affect a child's growth or physical or mental health.[838] The Labour Law prohibits employing children under 18 in tasks involving underground or on-water activities.[839] In any case, the law requires that work does not hinder a child's continuation of fundamental education.[840]
According to article 8 of the Civil Service Law, employment in government agencies is open only to citizens who are at least 18 years of age. Hence, children under 18 are not allowed to work in the government's different branches – the executive, judiciary and Parliament.

5.5.8 Press Law

The Press Law has no articles about the freedom of expression and access to information for children. The articles in the Press Law concerning children are expressed in negative language. The Press Law forbids journalists to interview or take pictures of a child under 15 years of age, and to discuss matters concerning the welfare of the child or other children without the presence or consent of a parent or an adult guardian.[841] Article 24 stipulates that: "the press must not reveal the identity of children, aged less than 15 years, who have been involved in cases of sexual abuse as victims, witnesses or accused persons." The law requires the media to take measures to ensure that the identity of a child is not exposed.[842]

5.6 Conclusion

This chapter illustrates the existence of positive developments in legislating rights that protect children. This chapter discussed the national legal framework relating to children's rights[843] and found that the Constitution and five formal laws contain varying degrees of provisions about children. Whilst the Constitution lacks justiciable articles guaranteeing child rights, the following formal laws exist:

1. Child Rights Protection Act (CPA): The CPA contains the Bill of Rights for children and is the most expansive law concerning children's rights. It sets out the responsibility of the government, the parents and the relatives of children.
2. Administration of juvenile justice: the Juvenile Justice Law contains provisions governing children's rights who are in conflict with the law. It includes a prohibition of torture or other cruel, inhumane and degrading treatment or punishment.
3. Right to education: The National Education Act states children have a right to education.
4. The Public Order and Security Law requires the State to care for "street children" who have no parents or guardians and to ensure their security.

[837] Civil Service Law (Law No. 97/2022): art. 4.
[838] Somaliland Private Employment Act: art. 46(4).
[839] ibid, art. 46(4).
[840] ibid art. 46(3).
[841] Somaliland Press Law (2014), art. 23.
[842] ibid, art. 24(b.)
[843] Chapter 6 and Chapter 7 examine legal protection from sexual abuse and the right to nationality respectively, and therefore these topics are not included in this chapter.

5. The Labour Law sets the minimum age for employment and stipulates protection of children from doing hazardous jobs.

The Child Rights Protection Act (CPA) contains the Bill of Rights for children. The best interest of the child and non-discrimination are fundamental principles in the CPA, which also permits the interpretation of child rights in the CPA in accordance with international child rights law. A list of rights is recognised in the CPA. It constitutes an essential legal framework for the rights of the child under national law.

Compared to the tenets in the UN Convention on the Rights of the Child (CRC), the provisions of the CPA reflect the existence of legal gaps in formal law. The CPA, the main substantial child rights law, imposes undefined limitations on child rights, which it states should be defined by Shari law. Sharia law is a core component of the CPA in terms of assigning responsibilities, defining and limiting child rights, and making interpretations. Due to the fact that Sharia law is not codified and is subject to various sects and schools, the CPA's reference to Sharia might create legal ambiguity.

The main challenge to children's rights in Somaliland's formal national law is the lack of a uniform definition of the child. A definition of the child is key in protecting children and ensuring their rights are protected, respected and realised. The CPA, which is the newest child-related law, has not solved the lack of definition.

Of the existing laws, some laws may violate children's rights. For example, the Public Order and Security Law (POSL) gives parents the authority to ask a court to apprehend a child for disobeying the parent. With no clear definition of disobedience and the absence of the due process of law (as it is based on the request and testimony of a parent), children may end up in prison. There is a discrepancy in the wording of the POSL and the practice of the courts, as evidenced by court judgments.

There remains an empirical question on the impact of laws on children's day-to-day lives and the intersection of the plural legal system regarding children's rights. However, the CPA already demonstrates an overlap of Sharia and the formal national law when it comes to the rights of children and the duties of a parent, relatives and the State.

6 Children's Right to Nationality in Somaliland

6.1 Introduction

This chapter examines the right of nationality for children living in Somaliland. The chapter looks at both the laws of Somaliland and the laws of Somalia. At the same time, it traces the historical legal development relevant to the changes in nationality laws and how they shaped or impacted children's nationality rights. The chapter starts with a brief introduction to the right to nationality under international law (section 6.2). Historical legal development follows (section 6.3). Section 6.4 details the nationalities children living in Somaliland can obtain, and section 6.5 concludes.

This chapter is linked to Chapter 5, which examines children's rights in formal national laws to demonstrate the legal mechanism that protects or violates children's rights in Somaliland. This chapter is a case study focusing on children's nationality rights. It is essential to understand the child's right to nationality in Somaliland, an unrecognised State, a status that is significant for exercising other rights.[844] The chapter aims to examine the nationality laws applicable to children living in Somaliland and how children could acquire nationality under these laws. The question is: what are the nationality laws that apply to children living in Somaliland? This chapter does not discuss State succession with respect to nationality in Somaliland and Somalia's opposing claims of sovereignty.[845] The law concerning the acquisition and loss of nationality for the people living in Somaliland is essential in understanding the rights accorded to Somaliland's children by the formal laws. Statelessness is generally associated with difficulties in accessing other rights, lack of (or minimum) State protection for individuals, and prevention of discrimination.[846]

Statelessness, *de facto* or *de jure*, means lack of nationality. Moreover, being in an unrecognised State itself may amount to *de facto* or *de jure* statelessness.[847] Therefore, research on the child's right to nationality in Somaliland's formal laws may show the extent of protection or lack thereof for children.

A complex set of laws govern the citizenship status of children living in Somaliland. The following are the applicable formal nationality laws examined in this chapter.[848]

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[844] Jeffrey L. Blackman, "State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law", Michigan Journal of International Law 19, no. 4 (Summer 1998): 1148, 1150; Alice Edwards, "Meaning of nationality in international law in an era of human rights: procedural and substantive aspects" in *Nationality and Statelessness under International Law*, edited by Alice Edwards and Laura van Waas (Cambridge University Press, 2014: 12.

[845] As Somaliland argues it is independent of Somalia and the latter insists that Somaliland is part of Somalia, nationality is important, but that is linked to recognition and statehood, which are not the subject of discussion in this chapter. Hence nationality is discussed in this chapter only in relation to Somaliland's national formal laws. Nevertheless, the history of Somaliland is linked to nationality. Therefore, nationality laws that precede 1991, when Somaliland declared "restoration of independence", will be examined as they are directly concerned with Somaliland nationality under its laws.

[846] Douglas Hodgson, "The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness", International Journal of Law and the Family 7, no. 2 (1993): 256; Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law*, (Cambridge University Press, 2014): 144.

[847] As illustrated in the definition above, this dissertation does not assume having the nationality of an unrecognised State as statelessness. However, the status complicates an already complex issue, and it takes into account that others may disagree.

[848] This chapter is focused on the formal national laws and is not concerned with customary law (*Xeer*) and Sharia law. For more information, see Chapter 5 of this dissertation.

Law	Date	Legislature	Applicability
Somaliland Nationality and Citizenship Ordinance	21 June 1960	The Legislative Council of the Somaliland Protectorate	The Ordinance was effective from 26 June 1960 to 1962.
Somali Citizenship Act	22 December 1962	The Somali Republic (also known as Somalia).	From the perspective of Somalia, this Act applies to the people in Somaliland.
Somali Citizenship Regulation	February 1963	The Somali Republic	The Regulation is sub-ordinate to the 1962 Somali Citizenship Act. From the perspective of Somalia, this Regulation applies to the people in Somaliland.
Somaliland Constitution	2001	The Republic of Somaliland[849]	The Constitution is applicable in Somaliland. Article 4 sets out the basis for Somaliland's citizenship law.
Somaliland Citizenship Act	2002	The Republic of Somaliland[850]	The Act governs the acquisition and loss of nationality in Somaliland.

In the context of unrecognised States, nationality is a particularly politically-charged concept. Conflicting views and claims fuel a debate about who has the legitimacy and jurisdiction to legislate for the people living in an unrecognised State.[851] Therefore, the laws of Somalia and Somaliland are discussed in this chapter as they both have a bearing on the rights of children in Somaliland.

6.2 Definitions

6.2.1 Nationality vs citizenship

The terminology used in relation to membership in a State varies, and there are several ways nationality and citizenship are applied.[852] Some use citizenship and nationality interchangeably.[853]

[849] The Constitution was approved in a referendum held in May 2001.
[850] The bicameral Parliament of Somaliland approved the Citizenship Act, and the President signed the Act into law as required by the Constitution.
[851] This chapter does not intend to answer or analyse questions that are related to legitimacy and sovereignty.
[852] UNHCR, *Handbook on Protection of Stateless Persons*: 21: Paul Weis, *Nationality and Statelessness in International Law* (Alphen aan den Rijn: Springer, 1967): 3.
[853] Paul Weis, *Nationality and Statelessness in International Law* (Alphen aan den Rijn: Springer, 1967): 3; Bronwen Manby, *Citizenship Law in Africa* (New York: Open Society Foundations, 2016): ix.

The two terms "emphasise two different aspects of the same notion: State membership. Nationality stresses the international, citizenship the national, municipal aspect."[854] From a national law perspective, citizenship refers to a person's legal status and emphasises the internal aspect of membership in a State.[855] Citizenship is a 'legal bond between a person and a State."[856]

Whether nationality and citizenship are synonymous partly depends on the national laws.[857] The national laws state if there is a distinction between citizens and nationals or if the two terms are interchangeable. In this chapter, citizenship and nationality are employed interchangeably.

The Somaliland Citizenship Act (2002) uses the Somali terms *jinsiyadda* and *muwaadin* interchangeably. Both are derived from the Arabic terms جنسية (nationality) and المواطنة (citizenship). The Somaliland Constitution uses *jinsiyadda (*جنسية).

6.2.2 Defining statelessness

Who is stateless? Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons defines a stateless person as follows:

> For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.

The definition of stateless person under the Convention is commonly interpreted to cover *de jure* statelessness.[858] According to Paul Weis: "a person not having a nationality under the law of any State is called stateless."[859] A *de jure* stateless person "has no membership in any state whatsoever."[860] Therefore, a stateless person does not enjoy State protection. The Convention's definition emphasises the law which "should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law and, where appropriate, customary practice."[861]

A State may consider a person a national under the operation of its laws but yet unable to provide entitlement and protection associated with nationality or is incapable of providing passports, birth certificates and other necessary documents.[862] This situation poses a *de facto* statelessness. In *de*

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[854] Paul Weis, *Nationality and Statelessness in International Law* (Alphen aan den Rijn: Springer, 1967): 3.
[855] Raylene Keightley, "The Child's Right to a Nationality and the Acquisition of Citizenship in South African Law", South African Journal on Human Rights 14, no. 3 (1998): 412.
[856] Carola A. Batchelor, "Statelessness and the Problem of Resolving Nationality", International Journal of Refugee Law Vol. 10 No. ½, Oxford University Press (1998).
[857] Paul Weis, *Nationality and Statelessness in International Law* (Alphen aan den Rijn: Springer, 1967): 6.
[858] Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (London: Routledge, 2013): 38: David Weissbrodt and Clay Collins, "The Human Rights of Stateless Persons", Human Rights Quarterly, Vol. 28, No. 1 (Feb., 2006): 251.
[859] Paul Weis, *Nationality and Statelessness in International Law* (Alphen aan den Rijn: Springer, 1967): 161.
[860] Matthew J. Gibney, "Statelessness and citizenship in ethical and political perspective" in *Nationality and Statelessness under International Law*, edited by Alice Edwards and Laura van Waas (Cambridge University Press, 2014: 46.
[861] UNHCR, *Handbook on Protection of Stateless Persons*, Geneva 2014: paragraph 22.
[862] Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (London: Routledge, 2013): 38: David Weissbrodt and Clay Collins, "The Human Rights of Stateless Persons", Human Rights Quarterly, Vol. 28, No. 1 (Feb., 2006): 251; UNHCR and IPU, *Nationality and Statelessness, A Handbook for Parliamentarians*, 2005: 11.

facto statelessness, a person is stateless in practice.[863] "Persons who are *de facto* stateless often have a nationality according to the law, but this nationality is not effective, or they cannot prove or verify their nationality."[864]

Determining if a person is *de facto* or *de jure* stateless may be difficult, and the causes of statelessness vary. The category of stateless persons is broad and includes "all persons who have a citizenship yet do not receive the concomitant benefits and protection that typically accompany citizenship."[865]

In the context of an unrecognised State, the question of defining who is and who is not a national is a challenging one that is linked to conflicting claims of sovereignty and possible conflict of laws. Another State often claims the territory of the unrecognised State. Hence a conflict of laws may cause statelessness. The matter further becomes complicated in the event the law of the unrecognised State denies nationality to an individual inhabiting its territory while the law of the other State provides nationality by operation of its law. In this context, the individual may have a nationality of a State that cannot provide protection. In such a situation, the person becomes *de facto stateless* but not *de jure* stateless because he/she may have nationality under the operation of law of the other State.

6.3 Right to nationality under international human rights laws

This section provides an overview of the international human rights laws concerning children's right to nationality. However, it does not analyse the application of international human rights law vis-à-vis nationality in Somaliland (Chapter 3 of this dissertation discusses this topic).[866] This sub-section introduces the position various international human rights instruments take on the right to a nationality.

Nationality is essential for the exercise of other human rights.[867] In the *Nottebohm* case, the International Court of Justice (ICJ) stated that: "nationality serves above all to determine the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals." Although national laws generally govern nationality, States do not have exclusive authority, and international law imposes

[863] Indira Goris, Julia Harrington and Sebastian Köhn, "Statelessness: what it is and why it matters", Forced Migration Review, Oxford, vol. 1, num. 32, (2009): 4; Carol A. Batchelor, "Statelessness and the Problem of Resolving Nationality Status", International Journal of Refugee Law, Vol. 10 No. ½ Oxford University Press, (1998): 172.
[864] David Weissbrodt and Clay Collins, "The Human Rights of Stateless Persons", Human Rights Quarterly, Vol. 28, No. 1 (Feb., 2006): 252.
[865] David Weissbrodt and Clay Collins, "The Human Rights of Stateless Persons", Human Rights Quarterly, Vol. 28, No. 1 (Feb., 2006): 252.

[866] Nationality "as a "politico-legal term denoting membership of state" according to Weis, relates to the question of statehood, recognition and state succession, which are not topics elaborated in this section. Therefore, this section is deliberately restricting itself when explaining what international law states about the right to a nationality. See Paul Weis, *Nationality and Statelessness in International Law*, (London: Stevens and Sons, 1956): 3.
[867] Jeffrey L. Blackman, "State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law", Michigan Journal of International Law 19, no. 4 (Summer 1998): 1148, 1150; Alice Edwards, "Meaning of nationality in international law in an era of human rights: procedural and substantive aspects" in *Nationality and Statelessness under International Law*, edited by Alice Edwards and Laura van Waas, (Cambridge University Press, 2014: 12.

restrictions and sets out standards.[868] After the UN's formation and ensuing human rights treaties and declarations, international human rights law's growth has expanded its scope in regulating nationality.[869]

Article 15 of the Universal Declaration of Human Rights (UDHR) stipulates that "everyone has the right to a nationality" and that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." The UDHR does not elaborate on which State is obligated to grant the right to nationality and its procedure. Nor does it mention children. However, Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) uses stronger language by guaranteeing that "every child has the right to acquire a nationality." The Human Rights Committee, in its General Comment No. 17, stated:

> While the purpose of [Article 24] is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or stateless parents or based on the nationality status of one or both of the parents.

In addition, the Convention on the Rights of the Child (CRC) addresses specifically the child's right to a nationality. According to Article 7 of the CRC: "the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents." The CRC requires States to implement these rights to prevent children from becoming stateless. According to **A**rticle 8 of the CRC**: "**States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

Article 5 of the Convention on the Elimination of all Forms of Racial Discrimination (CEDAW) requires States to "prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights . . . the right to a nationality." The CEDAW contribution is the prohibition of discrimination in nationality governance. Article 9 of the Convention on the Reduction of Statelessness prohibits depriving "any person or group of persons of their nationality on racial, ethnic, religious or political grounds." The 1954 Convention relating to the Status of Stateless Persons states that: "stateless person means a person who is not considered as a national by any State under the operation of its law." The Convention requires States to prevent statelessness.

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[868] James Crawford*, Brownlie's Principles of Public International Law* (Oxford University Press, 2012): 509; Malcolm N Shaw, *International Law* (Cambridge: Cambridge University Press, 2008): 1004; Jeffrey L. Blackman, "State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law", Michigan Journal of International Law 19, no. 4 (Summer 1998): 1148.

[869] The Permanent Court of International Justice, in its Advisory Opinion on the Tunis and Morocco Nationality Decrees of 1923, already stated 100 years ago: "The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends on the development of international relations."

In the context of Africa, Article 6 of the African Charter on the Rights and Welfare of the Child (ACRWC) guarantees that every child has the right to acquire a nationality. Article 6(4) states:

> States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

The paragraphs above show that while various human rights treaties recognise the right to nationality, domestic laws usually regulate nationality, and attribution of nationality is the domain of States.[870] The fact that Somaliland, as an unrecognised State, is not a member of any of the treaties above makes it significant to learn about children's nationality rights in the formal laws of Somaliland.[871] Hence, the following sections examine the formal nationality laws applicable in Somaliland that regulate the acquisition and loss of nationality.

6.4 Historical legal development

The nationality law of Somaliland is intertwined with its historical development since gaining independence from the United Kingdom, the union with Somalia and the declaration of independence in 1991. This section starts off by briefly analysing the nationality law of Somaliland in the short period between the date Somaliland secured independence from the UK (26 June 1960) and the date it entered the union (1 July 1960).

Somaliland gained independence from Great Britain on 26 June 1960. Before the independence, the Legislative Council of the Somaliland Protectorate passed the Somaliland Nationality and Citizenship Ordinance (the Ordinance).[872] The Ordinance remained in force until 1962, when the Somali Republic enacted a new citizenship law. The idea of having Somaliland nationality law emerged during the decolonisation period. This law was adopted in a political context in which the Somaliland Protectorate was transitioning to achieve independence and, as such, needed a law to determine the citizenship of its population.[873]

Article 3 of the Ordinance states that: "every Somali who does not possess any other nationality or citizenship" and who was born or whose father was born in the territory of Somaliland shall become a citizen of Somaliland.[874] A child born out of wedlock would become a citizen if the mother was born in the territory of Somaliland.

Article 3 provides three requirements:

1. A person who wants to acquire nationality should be Somali. This is defined by article 2 of the Ordinance, which says Somali "means any person whose mother tongue is the Somali language and who follows Somali customs."[875]

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[870] See Mónika Ganczer, *The Right to a Nationality as a Human Right?* in Hungarian Yearbook of International Law and European Law (2014): 15.
[871] Article 15 of the UDHR may be applicable to Somaliland as a norm of customary international law.
[872] The Ordinance came into force on 26 June 1960. However, it was passed on 21 June 1960. The Legislative Council of the Somaliland Protectorate, which consisted of 33 members elected by the people in February 1960.
[873] Somaliland gained independence from the United Kingdom on 26 June 1960. It joined a union with Somali on 1 July 1960. The passing of the Ordinance was part of the preparations to hand over the Protectorate to the Somaliland administration when the colonial administrators left.
[874] The Somaliland Nationality and Citizenship Ordinance 1960 came into force on 26 June 1960, art 3.
[875] ibid, art. 2.

2. That person should be born in the Territory of Somaliland. Article 2 defines the Territory of Somaliland as the "territory which until the coming into operation of this Ordinance was known as British Somaliland or the Protectorate of British Somaliland or the Somaliland Protectorate and which on the coming into operation of this Ordinance will be known as Somaliland."[876]
3. Only a person whose father is Somali born in Somaliland was recognised as a national by the Ordinance. The exception is a child born out of wedlock to a Somali mother born in the territory of Somaliland. Therefore, mothers were generally excluded from passing nationality to their children.

The Ordinance adopted *jus sanguinis* with an element of *jus soli* in determining nationality. However, birth within the territory did not entail an automatic acquisition of nationality. Paternal linkage is a determining factor that served as a salient feature of the nationality governance enshrined in the Ordinance.

A woman who has a nationality under the Ordinance (who fulfilled the requirements set out in article 3) loses her Somaliland nationality if she marries a person who possesses the nationality of a "foreign State provided that she thereupon acquires her husband's nationality or citizenship by operation of the law of that State and renounces her Somali citizenship."[877] In contrast to that, a foreign woman who marries a Somalilander becomes a Somaliland national by marriage.[878]

Although the Somaliland Protectorate joined a union with Somalia within five days of gaining independence, this law remained effective until 1962, and its implications remain to this day because all subsequent nationality legislation has been based on its notion.

6.5 The nationalities children living in Somaliland can obtain

Somaliland and Somalia, separately, accord nationality to children living in Somaliland. The nationality of the children in Somaliland is related to the conflicting claims of sovereignty. Somalia claims that it has jurisdiction over the territory and the population in Somaliland. Somaliland views itself as an independent State, and as such, issued a separate nationality law. The children living in Somaliland can, in theory, obtain the following two nationalities:

NATIONALITY	LAW	LEGISLATURE
Somali Nationality	Somali Citizenship Act of 1962 (see section 6.4.1). Under the 1962 Act, children living in Somaliland who fulfil the Act's requirements have a right to Somali nationality.	The Somali Republic (also known as Somalia)
Somaliland Nationality	The Somaliland Constitution and the Somaliland Citizenship Act of 2002 (see section 6.4.2).	The Republic of Somaliland

[876] ibid art. 1.
[877] Somaliland Nationality and Citizenship Ordinance 1960, art. 7.
[878] Somaliland Nationality and Citizenship Ordinance 1960, art. 6.

6.5.1 Obtaining Somali nationality

6.5.1.1 Background

Although Somaliland and Somalia's union occurred in 1960, harmonisation of laws was made gradually, and each territory continued using its previous laws.[879] As a British Protectorate, Somaliland had laws from the common law system, and Somalia (a former Italian colony) adopted the civil law system.

The Act of Union passed on 31 January 1961 to retroactively formalise the union between Somaliland and Somalia addressed nationality.[880] It stated that all nationals holding Somaliland or Somalia nationalities were declared nationals of the Somali Republic.[881] This refers to the regulation of nationality by laws effective in the two territories before the date of the union, 1 July 1960.

The Somali Republic passed the 1962 Somali Citizenship Law and the 1963 Regulations to implement the Citizenship Law. The 1962 Law repealed the 1960 Somaliland Nationality and Citizenship Ordinance.[882] People who had acquired Somali nationality under legislation that was effective before the 1962 Law came into force retained their nationality.[883] This was a succession of the nationalities granted under the Somaliland Nationality and Citizenship Ordinance 1960 and Somalia's nationality law before the union.[884]

The Identification and Registration Act, Somalia, 2023, establishes the National Identification and Registration Authority and governs the registration of nationals and foreigners.[885] This Act obligates the government of Somalia to provide identity cards to every person in Somalia without discrimination.[886] It does not define who are the citizens of Somalia.

6.5.1.2 Somali Citizenship Law (1962)

The 1962 Somali Citizenship Law grants acquisition of citizenship by operation of law to "any person whose father is a Somali citizen [and] who is a Somali residing in the territory of the Somali Republic or abroad and declares to be willing to renounce any status as citizen or subject of a foreign country."[887] A Somali is defined as "any person who by origin, language or tradition belongs to the Somali Nation."[888] Under the 1962 Act, only Somalis were granted Somali

[879] Most of these laws were inherited from the colonial powers except the few enacted by the Somaliland Legislative Council before the union on 1 July 1960. The Citizenship and Nationality Ordinance of 1960 includes the laws passed before the union that remained effective per the Act of Union until the Somali Republic legislated new laws.
[880] The union occurred on 1 July 1960. However, the Act of Union was not passed until 31 January 1961. Historians differ on the legality of the Act of Union that postdates the date of the union. The Parliament formed after the union passed the Act of Union.
[881] Article 5 of the Act of Union states that: "all persons who on the date of the establishment of the Union possessed the citizenship of Somaliland or Somalia shall become a citizen of the Somali Republic."
[882] Somali Citizenship Law (1962) article 17.
[883] Somali Citizenship Law (1962) article 18. The Provisional Constitution of Somalia (2012) permits dual nationality.
[884] The succession of nationality by the Somali Republic under the 1962 Law reinforced the wording of article 5 of the Act of Union.
[885] The Identification and Registration Act, Somalia, 2023: art: 4.
[886] The Identification and Registration Act, Somalia, 2023: art: 5 and 8.
[887] Somali Citizenship Law (1962) art. 2.
[888] Somali Citizenship Law (1962) art. 3.

nationality by operation of the law.[889] However, only fathers can automatically pass citizenship to their children.[890]

The law grants nationality to foreign women who marry Somali nationals.[891] A Somali woman who marries a foreigner and acquires her husband's nationality loses her Somali nationality.[892] Moreover, a woman whose husband lost his Somali nationality also loses her nationality "unless the husband has become stateless or the new citizenship acquired by him cannot be extended to her."[893]

6.5.1.3 A child's right to nationality under the Citizenship Law of the Somali Republic

According to article 14 of the 1962 Somali Citizenship Law, children do not have nationality rights separate from their fathers' nationality. Any child "whose father acquires, loses or recovers Somali citizenship, shall follow his father's citizenship." A child is "any person under fifteen years of age."[894] A child who lost citizenship may recover it after attaining the age of majority.[895] However, article 14 has a positive clause. It states: "if the father is stateless, the minor shall follow the mother's citizenship." Children whose parents are unknown, who were born or found in the territory of the Somali Republic, are considered Somali nationals.

The 1963 Regulation provides that the child of a Somali male citizen shall automatically acquire Somali citizenship by birth.[896] The "officer in charge of the Registry of births upon notification of the birth of a child" enters the records of the birth of the child.[897]

The 1962 Citizenship Law provided a process for granting discretionary naturalization for a person aged 15 or above, who has established residence for a period of at least seven years, with good civil and moral conduct and who renounces "any status as citizen or subject of a foreign country."[898] The seven years may be reduced to two years, "where the person concerned is the child of a Somali mother even if she is not a citizen."[899]

The Somali nationality law seems to, on the one hand, address statelessness of children by allowing children of a stateless father to acquire that of the mother as well as allowing children who attain the age of majority to apply for Somali nationality, and considers children whose parents are unknown, who were born or found in in the territory of the Somali Republic, as Somali nationals. Also, the law by regulations grants the child the right to birth registration.

On the other hand, there may be instances in which children would become stateless. A child's nationality is tied to that of the father. Moreover, mothers generally cannot pass nationality to

[889] Somali Citizenship Law (1962) art. 2.
[890] In that regard, it was also similar to the Somaliland Nationality and Citizenship Ordinance 1960. The Ordinance also provided that only fathers can transmit nationality to their children.
[891] Somali Citizenship Law, 1962, art. 13.
[892] ibid, art. 9.
[893] ibid, arti. 9.
[894] ibid, art. 16.
[895] In regard to determining the age for recovering lost citizenship, the law of the State to which the child belonged will determine citizenship. This is related to when a child whose father lost citizenship intends to recover Somali nationality upon reaching the age of majority.
[896] Regulations for the implementation of Citizenship Law No. 129, of 19 February 1963, art. 1.
[897] Regulations for the implementation of Citizenship Law No. 129, of 19 February 1963, art. 1.
[898] Somali Citizenship Act, 1962, art. 4, 16.
[899] The 1963 Regulation for the Implementation of Citizenship Law details the process of applying for citizenship by grant. It also creates a Special Commission for the Scrutiny of the Applications for Citizenship by Grant.

children, a situation that may put some children at risk of being *de facto* or *de jure* stateless. Stating that a child can apply for lost citizenship after attaining majority does not necessarily protect children.[900] Applying to recover nationality does not guarantee automatic recovery.[901] The Somali Republic nationality law accepts the nationalities granted under the Somaliland Nationality and Citizenship Ordinance of 1960. As seen in section 6.3, children whose fathers were not Somaliland nationals could not gain Somaliland nationality even if they were born in the territory and the mothers were Somaliland nationals. Individuals who were stateless under the 1960 Ordinance transferred such status to their children under the 1962 Citizenship Act due to the automatic succession enshrined in the Act.

6.5.1.4 Access to Somali nationality by the children living in Somaliland

From the perspective of Somalia's government, Somalia's nationality laws and regulations apply to Somaliland's people in matters of acquisition and loss of nationality. This is because Somalia does not recognise Somaliland as an independent and separate State. From Somaliland's position, the nationality laws of Somalia are old regulations that do not apply to its nationals.[902] The assertion of the independence of Somaliland is grounded on a claim of a separate population and defined territory.[903]

Can children living in Somaliland access the nationality of Somalia? From a legal perspective, those who fulfil the requirements detailed above can acquire Somalia nationality. The challenge is how children can in practice access identity papers, including passports. The authorities of Somaliland prohibit the government of Somalia from opening registration and immigration offices in the territory it controls. Therefore, children and adults alike find it difficult to access Somalia's documents unless they travel to the areas controlled by Somalia's government.[904]

The international community recognises Somalia's government as the sole legitimate government for the people living in the territory of the Somali Republic, including the territories under the control of Somaliland. Children then find themselves in a situation where the documents provided by the authority controlling their areas (Somaliland) are not recognised outside of its border, and the recognised government (Somalia) that can give recognised identity papers and registration certificates does not have physical control, making it difficult to access. Moreover, passport applications cannot be made online. There is no data on the percentage of the Somaliland population that has Somali nationality.

6.5.2 Obtaining Somaliland nationality

The Constitution (2001) and the 2002 Citizenship Act regulate the acquisition and loss of Somaliland nationality. Before the 2001 Constitution was approved, the 1962 Somali Citizenship

[900] The definition of child under the 1962 Citizenship Act.

[901] A process is followed, which ends up as a presidential decree. Only the President has the power to grant nationality for a person who makes an application. Many legal and factual hurdles make the process complicated for the average person who lives, for example, in a small town, village or rural area.

[902] Articles 1, 37 and 130 of the Somaliland Constitution address the laws applicable in Somaliland. These articles give the Parliament of Somaliland the power to enact new legislation. Somalia's laws before 1991 are applicable in Somaliland as far as they do not conflict with Sharia or human rights or Somaliland law has not repealed them. In the context of nationality laws, the Somaliland Citizenship Act repealed the Somali Citizenship Act of 1962.

[903] Somaliland Constitution, 2001, article 1.

[904] Sometimes travel agencies facilitate access to Somali passports. Nevertheless, these arrangements are unofficial, secret, expensive and interrupted by the Somaliland government whenever it learns of its existence.

Act remained effective and applicable in Somaliland.[905]This section analyses the nationality laws of Somaliland concerning children's rights. Somaliland regards the laws that are discussed in this section as the laws applicable to the people living in its territory.

6.5.2.1 The Constitution of Somaliland (2001)

The 2001 Constitution declares the independence of Somaliland and defines its territory and population. While Article 1 specifies the borders of Somaliland, the Constitution contains one provision (art. 4) dealing with citizenship questions. Article 4 states that a person acquires Somaliland nationality if she/he is a descendant of a person residing in Somaliland on 26 June 1960 or earlier. The Constitution uses the gender-neutral word "person (*qof*)."

The article does not elaborate on defining those who were residing in Somaliland on 26 June 1960 or earlier. As stated in paragraph 2 of Article (4), a law is to "determine the acquisition or loss of the citizenship of Somaliland." That law is the Somaliland Citizenship Act of 2002.

Article 4 seems to restrict automatic conferral of citizenship to persons who had been Somaliland citizens before the union of Somaliland and Somalia on 1 July 1960. After gaining independence on 26 June 1960, Somaliland united with Somalia, and a single State was formed. Therefore, migration and intermarriage occurred, and people were born between 26 June 1960 and 18 May 1991, the day Somaliland declared the restoration of independence. What nationality do they bear now? Is it different if one of the parents is not a descendant of a person residing in Somaliland on 26 June 1960 or earlier? These questions are unanswered by Article 4 of the Constitution.

6.5.2.2 Children's right to Somaliland nationality: Somaliland Citizenship Act (2002)

The Child Rights Protection Act (2022) guarantees every child the right to registration, name and nationality that is in conformity with the Citizenship Act and the Constitution.[906] The Citizenship Act in 2002 (the 2002 Act) provides that a person acquires Somaliland nationality by birth if the *father* is a descendant of a person residing in Somaliland on 26 June 1960 or earlier (emphasis added). The Act uses a father instead of a person in contradiction to Article 4 of the Constitution. Under the 2002 Act, descendants of male Somaliland nationals who are outside of Somaliland gain nationality by virtue of descent.

A foreign woman who marries a Somaliland national acquires Somaliland nationality unless she expressly retains her original nationality.[907] She is entitled to remain a Somaliland national even after divorce. In contrast, a woman with Somaliland nationality who marries a foreign national and acquires his nationality, automatically loses her Somaliland nationality.[908] The Act defines foreign as "any person who is not a Somaliland citizen."[909]

To prove that a person is a descendant of a person who resided in the territory of Somaliland on 26 June 1960 and before, a clan membership should be proven by the head of the sub-clan the

[905] According to article 151 of the 1997 Provisional Constitution, all laws passed by Somalia that do not conflict with the Islamic Sharia shall remain in force until the promulgation of laws that are in accordance with the Constitution of the Republic of Somaliland.
[906] Child Rights Protection Act: art. 17 and 20.
[907] Somaliland Citizenship Act (2002) art. 9(1).
[908] ibid, art. 9(2).
[909] ibid, art. 1.

person belongs to.[910] Only an *Caaqil* registered with the Ministry of Interior can confirm the identity of the person in his sub-clan.[911] In Somali inhabited areas of the Horn of Africa, clans are concentrated in different parts. Clan members who live in Somaliland but of whom the bulk of their clan members live in Somalia, for instance, may not have a registered *Caaqil* in Somaliland.

There are no guidelines concerning the implementation process, and the 2002 Act's regulations are not yet issued.[912] This gives officials discretion when interpreting and enforcing the 2002 Act. A person who wants to obtain the National Identity Card of Somaliland has to bring a *Caaqil* to the Ministry of Interior to prove his/her nationality.[913] The Caaqil is required to confirm that the person belongs to his clan and is a descendant of a male member of the clan. Consequently, the Ministry registers the applicant along with the information of the *Caaqil* and the sub-clan. Genealogy links the member to the sub-clan.[914] The lineage system establishes a vertical hierarchy of clan structure, and it is patrilineal.[915]

A foreign person may acquire nationality by applying to the Ministry of the Interior. The applicant is required to prove the attainment of the age of majority (15),[916] at least ten years of uninterrupted residence in Somaliland, certification of absence of criminal conviction and not taking part in acts against the statehood of Somaliland, being a person of good character and integrity, renunciation of the original nationality, and proof of payment of taxation during the period he/she resided in Somaliland.[917] The Act establishes a ministerial commission to advise on granting a Somaliland nationality.[918] The President has the final say with discretion after hearing the advice of the Commission.

A person who enters into the military service of a foreign State or joins another government's service, an act which is considered detrimental to the sovereignty of Somaliland, and who refuses to relinquish such service when so informed, loses Somaliland nationality.[919] A national can also voluntarily renounce Somaliland nationality and obtain another nationality.[920] Additionally, a naturalised national loses nationality if the Commission is convinced that the person is unworthy or one of the requirements is infringed. A naturalised national would lose nationality if the person obtained the nationality by fraud.

According to article 1 of the 2002 Act, a child is a person who has not yet attained the age of 15 years. A child acquires Somaliland nationality by birth if the father is a Somaliland national.

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[910] ibid, art. 3.

[911] The Ministry of Interior's registration of *Caaqil*s is based on the clans the government recognised as Somalilanders. If the person fulfils all the requirements of article 4 of the Constitution, but he/she does not belong to a clan recognised by the Ministry, the person cannot get Somaliland nationality. In this regard, nationality is tied to and determined by clan membership.

[912] Article 13 of the Somaliland Citizenship Act (2002) requires the Minister of the Interior to issue regulations and guidelines for implementing the Act.

[913] Somaliland Citizenship Act (2002), art. 3.

[914] Lineage is also used to identify people. For example, when a person wants to marry or pay for a house, his/her sub-clan is asked.

[915] Afyare Abdi Elmi, *Understanding the Somalia Conflagration: Identity, Political Islam and Peacebuilding* (New York: Pambazuka Press, 2010): 29.

[916] ibid, art. 1.

[917] Somaliland Citizenship Act (2002), art. 4.

[918] ibid, art. 5. In the absence of regulations and guidelines, the process of granting nationality to a foreigner is not straightforward. However, the fulfilment of the requirements does not guarantee automatic acceptance.

[919] Somaliland Citizenship Act, 2002, art. 7(2). The meaning of sovereignty is not defined in the law.

[920] ibid, art. 7(1).

Children born outside of Somaliland to a Somaliland father acquire Somaliland nationality through *ius sanguinis*.

Article 10(1) of the 2002 Act states: "children under the age of majority whose father acquired or lost or re-acquired Somaliland citizenship shall, in all these circumstances, be treated like their fathers under this Act." This may create *de jure* or *de facto* statelessness. For example, the child of a father who enters into a foreign State's military service may lose Somaliland nationality. When a child who lost nationality under this circumstance is in the territory of Somaliland, and the father has not obtained another nationality or could not pass the nationality under the laws of the other State, the child may become stateless.[921]

According to article 4(2) of the 2002 Act, "any person whose mother is a Somaliland citizen and has been proven to have no father may be granted citizenship if she/he applies for it and fulfils the conditions set out in this Act." A child who has not attained the age of majority cannot apply for the nationality under this paragraph. Even when the child reaches the age of majority, there is no guarantee of obtaining Somaliland nationality.[922] According to the paragraph, the person is required to make an application as a foreign person and to fulfil the requirements set out in paragraph 1 of article 4 of the Act (see section 6.4.2).

The President has discretionary power to reject or grant nationality applied for by a foreign person, including persons whose mother is a national of Somaliland and has been proven to have no father.[923] Children born in Somaliland, who do not have any other nationality and were born to a Somaliland national mother, are not considered nationals by the 2002 Act, effectively rendering them stateless unless the President decided otherwise.

Article 11 of the 2002 Act addresses "children in special circumstances" born in the Somaliland territory and whose parents are not known. The article states that nationality may be granted to them upon the application of "the persons who have custody of or are caring for the child." The article uses may (*waxa la siin karaa*), which lacks the strong connotation 'shall' has elsewhere in the Act.

6.5.2.3 Registration and national identity cards of Somaliland

The Child Rights Protection Act states that every child has a right to registration,[924] name and national identity card that contains information about the child's name, birth and family roots.[925] The Voter Registration Act governs registrations of the nationals of Somaliland and the process of issuance of national identity cards (National ID Cards).[926] National ID Cards are *prima facie* evidence of nationality of Somaliland. This Act required the government to conduct a nationwide registration of nationals and issuance of ID Cards. The exercise was done in two ways. First, along

[921] The nationality laws of Somalia may still apply to them, although inaccessibility raises the issue of *de facto* statelessness.
[922] The Act defines the age of the majority as the person who has attained 15 years or more. Hence persons between 15 to 18, who are children in some jurisdictions, are eligible to apply for nationality.
[923] ibid, art. 4(2).
[924] Child Rights Protection Act: art. 17.
[925] Child Rights Protection Act: art. 20.
[926] Somaliland Voter Registration Act, Law No. 37/2007, last amendment made in 2016. In 2020 the Parliament approved the Elections and Voter Registration Act which specifically addresses voter registration. Accordingly, provisions regarding voter registration in Law No. 37/2007 have been repealed, and Law No. 37/2007 is left to apply on civil registration and issuance of national identity cards.

with the voter registration, nationals were also registered, and National IDs were given.[927] Second, the Ministry of Interior opened an office to register nationals to provide national ID Cards.[928] Children under the age of 15 are not allowed to vote or register for voting. The nationwide exercise for registration then targeted only nationals that had reached the age of 15.[929]

The Voter Registration Act states that the Citizenship Act (2002) determines the acquisition of nationality. It established a registrar office[930] tasked with recording the information of nationals and provision of IDs to Somaliland nationals who gained nationality under the Citizenship Act.[931]

Article 17 of the Voter Registration Act contains the process of verifying the nationality of a person to register and receive a National ID Card. The article follows a similar approach to that of the Citizenship Act by requiring the head (*Caaqil*) of the sub-clan to verify the person's nationality. However, the article expands the people who can attest to the person's identity before he/she is registered as a national. It includes members of the Parliament, local councillors, heads of villages, business persons and imams (religious leaders).[932]

6.6 Conclusion

This chapter has sought to understand children's right to nationality in Somaliland. The chapter illustrates that different rules and practices regulate the acquisition and loss of nationality in Somaliland. There is an overlap of Somaliland and Somalia citizenship laws. Legally the children in Somaliland are entitled to Somalia's nationality, which provides specific modes of acquiring nationality. In contrast, Somaliland has its own nationality law that defines the conditions and criteria to grant citizenship. It has institutions such as border control and a national registrar office, and it issues identity documents (e.g., passports). The phenomenon is not only a matter of conflict of laws but also a conflict of sovereignty.[933]

The application of the two laws may result in dual nationality. Nevertheless, there could be instances when Somaliland's nationality legislation does not confer nationality on a child, and the child cannot access Somalia's nationality for practical reasons. Travelling to Somalia to acquire nationality is a privilege.[934]

Somaliland's lack of international *de jure* recognition raises a question concerning the status of citizenship acquired under its laws. Passports[935] and other legal identity papers are not recognised externally but have internal functions. The latter permits citizens to access rights and protection

[927] The exercise was conducted in 2016.
[928] Somaliland Voter Registration Act, Law No. 37/2007, art. 2.
[929] Political rights are exclusively reserved for Somaliland nationals. Only nationals can access registration and national identity cards. As Somaliland is in the process of ascertaining its "statehood", these papers are becoming increasingly important.
[930] Somaliland Voter Registration Act, Law No. 37/2007, art. 4.
[931] Somaliland Voter Registration Act, Law No. 37/2007, art. 6.
[932] Somaliland Voter Registration Act, Law No. 37/2007, art. 17. *Caaqil*s, sultans and all clan leaders are men. *Caaqil*s count only the male members of their sub-clans. Women are not seen as full members of kinships. The majority of parliamentarians, business persons, local councillors and all heads of villages are also men.
[933] Both Somalia and Somaliland claim sovereignty over the land and people in Somaliland.
[934] It is involved in the ability to have money to travel.
[935] Some States accept granting visas to Somaliland passport holders. This is changing and a State that used to grant visas for Somaliland passport holders might change that. So, it is not similar to recognised passports with legal validity.

within the borders of Somaliland. However, the absence of external recognition affects the diplomatic protection of Somaliland's citizens and reciprocity.[936]

While Somalia is a member of the United Nations and the African Union, Somaliland is physically present on the territory and restricts children's access to Somalia's nationality.[937] Citizenship is constituted in Somaliland through the lens of independence and located in the broader political discourse of gaining recognition. This is linked to the emphasis put on the criteria of statehood stipulated in the Montevideo Convention, namely defined territory, a permanent population, government, and capacity to enter into international relations.[938] Nationality sets the connection between the population, at least the nationals, and the State.

Whatever view one may take on the significance of citizenship granted by an unrecognised State, the existence of a conflict of laws and conflicting claims of sovereignty may result in statelessness. Furthermore, this chapter shows that the laws of Somaliland and of Somalia have loopholes that may create difficulties for children to access nationality.

The gendered language in the laws of Somaliland and Somalia adds another layer of challenge as mothers are not allowed in essence to transmit nationality to their children and spouses on the same terms as the father.[939] For example, in the event a woman with Somaliland nationality marries a stateless man, the children fall under the peril of becoming stateless and might transfer statelessness to their children, perpetuating generations of statelessness.

[936] "A state whose national has suffered an injury caused by an international wrongful act of another state may exercise diplomatic protection." James Crawford, *Brownlie's Principles of Public International Law* (Hampshire: Oxford University Press, 2012): 509.
[937] The fact that Somalia does not have a physical presence means it cannot make birth registrations or provide other documents that evidence nationality.
[938] Montevideo Convention on the Rights and Duties of States, 1933. Art. 1.
[939] Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women states: "1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children."

Chapter 7 Protection of Children from Sexual Abuse

7.1 Introduction

What constitutes child sexual abuse, the age of consent, and the protection laws offer or do not offer to children vary in jurisdictions. What laws are applicable to the obligation to protect children in Somaliland from sexual abuse? Answering this question requires looking if child sexual abuse is addressed in Somaliland's laws and if legal protections are in place. Legal protection is a form of protecting children and establishing a legal framework to prevent the commission of abuse, prosecute when it is committed, and offer legal assistance.[940] National laws are important in providing the domestic law definition of what constitutes abuse and setting out the legal responsibilities of government institutions.[941] Protection is a broad term encompassing a wide range of child rights issues. This chapter is about the protection of children from sexual abuse in general and examines Somaliland's laws to identify if there are laws concerning the protection of children from sexual abuse and what they say.

Chapter 6 and chapter 7 of this dissertation reflect on two case studies: the nationality rights of children and the right to protection from sexual abuse. The two case studies were selected from the catalogue of child rights in the CRC to analyse Somaliland's domestic law aspect of the rights of children. It is also related to Chapter 5, which provides a general overview of Somaliland's formal laws concerning children. The analysis of the domestic laws in Somaliland and Somalia relevant to children's rights assesses the current situation of the law and whether the law grants rights to children and which of these rights are enshrined in legislation. Laws are important tools for understanding the State's fulfilment of a legal obligation.

After reviewing applicable laws, those related to sexual abuse are then identified and examined. Somaliland has no special act of parliament that is specific to child sexual abuse. Therefore, this chapter analyses laws that lay down sexual offences in general, to explore if and how children are protected from sexual abuse. Additionally, this chapter examines Somalia's laws concerning child rights to understand the formal national law protection that is in place in Somalia in relation to child sexual abuse.

This chapter starts, in section 7.2, with a definition of child sexual abuse and is followed, in section 7.3, with a brief outline of the articles in the CRC that deal with child sexual abuse. Section 7.4 identifies and analyses laws in Somaliland that protect children from sexual abuse. The laws of Somalia concerning the protection of children from sexual abuse are analysed in section 7.5. Section 7.6 summarises the conclusions of this chapter.

7.2 Definition of child sexual abuse

There is no definition under Somaliland's domestic law concerning what constitutes sexual abuse. Under Somaliland's criminal law, various sexual activities committed against children and adults are criminalised. No specific legislation exists to protect children from sexual abuse. The UN

[940] Susan Bennett, et al., "The need for a General Comment for Article 19 of the UN Convention on the Rights of the Child: Toward enlightenment and progress for child protection,", Volume 33, Issue 11, 2009: 784.
[941] Edward L. Rowan, *Understanding Child Sexual Abuse* (Mississippi: University Press of Mississippi, 2006): 3; Karen L. Kinnear, *Childhood Sexual Abuse: A Reference Handbook*, 7th ed. (Santa Barbara: ABC-CLIO, 2007): 1.

Convention on the Rights of the Child also does not provide a definition of sexual abuse, and scholarly writings adopt different definitions.[942]

> In General Comment No, 13, the Committee on the Rights of the Child provided a non-exhaustive list of activities it deems as sexual abuse and exploitation. The Committee states that
>
> > Sexual abuse and exploitation includes:
> >
> > (a) The inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity;
> >
> > (b) The use of children in commercial sexual exploitation; and
> >
> > (c) The use of children in audio or visual images of child sexual abuse;
> >
> > Child prostitution, sexual slavery, sexual exploitation in travel and tourism, trafficking (within and between countries) and sale of children for sexual purposes and forced marriage. Many children experience sexual victimisation which is not accompanied by physical force or restraint but which is nonetheless psychologically intrusive, exploitive and traumatic.[943]

In the footnote, the Committee elucidates the meaning of sexual activity and stipulates that:

> > Sexual abuse comprises any sexual activities imposed by an adult on a child, against which the child is entitled to protection by criminal law. Sexual activities are also considered as abuse when committed against a child by another child, if the child offender is significantly older than the child victim or uses power, threat or other means of pressure. Sexual activities between children are not considered as sexual abuse if the children are older than the age limit defined by the State party for consensual sexual activities.[944]

The Committee's definition puts the criteria for determining sexual abuse within the protection of the criminal justice system. Therefore, the State is required to define and criminalise sexual abuse.[945]

The Committee on the Rights of the Child classifies child trafficking and the sale of children for sexual purposes as sexual abuse and exploitation.[946] Children are trafficked globally within and

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[942] Adem Arkadas-Thibert, "Article 34: The Right to Protection from All Forms of Sexual Exploitation and Sexual Abuse" in *Monitoring State Compliance with the UN Convention on the Rights of the Child, Children's Well-Being: Indicators and Research*, edited Ziba Vaghri et al. (Switzerland: Springer, 2022): 340; Ben Mathews and Delphine Collin-Ve´zina, "Child Sexual Abuse: Toward a Conceptual Model and Definition", Trauma, Violence, & Abuse Vol. 20(2), 2019: 131; *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse adopted by the Interagency Working Group in Luxembourg* (2016): 18.

[943] Committee on the Rights of the Child, General Comment No, 13 (2001), The right of the child to freedom from all forms of violence: paragraph 25: 10.

[944] Committee on the Rights of the Child, General Comment No, 13 (2001), The right of the child to freedom from all forms of violence: paragraph 25: 10, fn 9.

[945] Adem Arkadas-Thibert, "Article 34: The Right to Protection from All Forms of Sexual Exploitation and Sexual Abuse" in *Monitoring State Compliance with the UN Convention on the Rights of the Child, Children's Well-Being: Indicators and Research*, edited by Ziba Vaghri et al. (Switzerland: Springer, 2022): 344.

[946] Committee on the Rights of the Child, General Comment No, 13 (2001), The right of the child to freedom from all forms of violence: paragraph 25: 10.

between countries for sexual purposes.[947] According to the United Nations' (2000) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: "trafficking in persons includes trafficking a person 'for the purpose of exploitation' and exploitation includes sexual exploitation."[948]

Article 27 of the African Charter on the Rights and Welfare of the Child does not also define child sexual abuse, but provides a legal obligation of State Parties in regard to child sexual abuse. Article 27 states:

> States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent a) the inducement, coercion or encouragement of a child to engage in any sexual activity; b) the use of children in prostitution or other sexual practices; c) the use of children in pornographic activities, performances and materials.

The Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse adopted by the Interagency Working Group in Luxembourg provides the following definition of child sexual abuse:

> The sexual abuse of children requires no element of exchange, and can occur for the mere purpose of the sexual gratification of the person committing the act. Such abuse can be committed without explicit force, with other elements, such as authority, power, or manipulation being determining factors. Moreover, it is noteworthy that, when the child has not reached the age of sexual consent, there is no legal requirement to establish any of these elements. The mere fact of the sexual activity taking place is sufficient to constitute abuse. Furthermore, child sexual abuse can take the form of both contact and non-contact abuse. Child sexual abuse is a broad category that, at its core, defines the harm caused to children by forcing or coercing them to engage in sexual activity, whether they are aware of what is happening or not.[949]

This chapter employs the definition by the Committee on the Rights of the Child and defines child sexual abuse as any sexual activity with a child that has not reached the age of sexual consent. This includes "when committed against a child by another child, if the child offender is significantly older than the child victim or uses power, threat or other means of pressure."[950] Moreover, this chapter evaluates how Somaliland's criminal law deals with child sexual abuse and how the age of sexual consent is defined or not defined.

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[947] David R. Hodge and Cynthia A. Lietz, "The International Sexual Trafficking of Women and Children: A Review of the Literature", Afilia: Journal of Women and Social Work Volume 22 Number 2 Summer 2007: 163; V. Jordan Greenbaum, Katherine Yun, and Jonathan Todres, "Child Trafficking: Issues for Policy and Practice", The Journal of Law, Medicine & Ethics Volume 46, Issue 1, March 2018: 159.

[948] United Nations' (2000) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000: art. 3(a).

[949] *The Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse adopted by the Interagency Working Group in Luxembourg* (2016): 19-20.

[950] Committee on the Rights of the Child, General Comment No, 13 (2001), The right of the child to freedom from all forms of violence: paragraph 25: 10, fn 9.

7.3 The Convention on the Rights of the Child and the protection of the child from sexual abuse

The Convention on the Rights of the Child (CRC) addresses the issue of the protection of children from sexual abuse[951] by requiring States to protect children from all forms of physical and mental violence, including sexual abuse, "while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." Sexual abuse is not defined in the Convention. The domestic legislation of States varies in the way they define sexual abuse. Article 19 obligates State Parties to "take all appropriate legislative, administrative, social and educational measures." Article 19 further elucidates by stating that:

> Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide the necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

The legal obligation in Article 19 includes taking legislative measures, which involves enacting laws that deal with the substantive aspect of criminal provisions and also relates to procedural guarantees, including preventive measures, referral and investigation. The broad obligation in Article 19 necessitates States to formulate special legislation that tackles child sexual abuse or to expand existing laws. Criminal law might not suffice to satisfy the requirement in Article 19 that requires States to take protective measures, including "effective procedures for the establishment of social programmes". In this regard, civil and administrative laws are essential to ensure these programmes are in existence and are accessible to children.

The Convention makes no distinction between sexual abuse and sexual exploitation. Authors disagree on what these terms entail and if they are interchangeable.[952] Sexual exploitation is addressed by Article 34 of the CRC, which requires States "to protect the child from all forms of sexual exploitation and sexual abuse". The CRC obligates States to prevent "the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices [and] the exploitative use of children in pornographic performances and materials."

The CRC additionally obligates States to provide treatment to children who are victims of sexual abuse and exploitation. Article 39 commits State Parties to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim…. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect

[951] The African Charter on the Rights and Welfare of the Child also requires State Parties to take measures to protect children from sexual abuse.

[952] Ben Mathews and Delphine Collin-Ve´zina, "Child Sexual Abuse: Toward a Conceptual Model and Definition", Trauma, Violence, & Abuse 2019, Vol. 20(2): 13; Gail Elizebeth Wyatt and Stefanie Doyle Peters, "Issues in the definition of child sexual abuse in relevant research", Child Abuse and Neglect Vol. 10: 232; Brian G. Fraser "Sexual Child Abuse: The Legislation and the Law in the United States" in *Sexually Abused Children and Their Famili*es, edited by Patricia Beezley Mrazek and C. Henry Kempe (New York: Pergamon, 1987): 58; Erna Olafso, "Child Sexual Abuse" in *Sexualized Violence against Women and Children: A Psychology and Law Perspective,* edited by B. J. Cling (New York: Guilford, 2014): 151; Karen L. Kinnear, *Childhood Sexual Abuse: A Reference Handbook*, 2nd ed. (Santa Barbara: ABC-CLIO, 2007): 1.

and dignity of the child." The article does not clarify the manner in which States "should protect a child from sexual exploitation."[953]

Article 35 also uses broad language and states: "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."[954]

The Optional Protocol to the Convention on the Rights of the Child on the sale of children and child prostitution and child pornography, 2000 (the Protocol) came into force in January 2002. The Protocol "is more specific in terms of its definitions and its obligation on signatory states."[955] It focuses on three forms of commercial sexual exploitation: child trafficking, child prostitution and child pornography. The Protocol imposes an obligation on State signatories to criminalise and establish jurisdiction over child sexual exploitation and to assist victims of child sexual exploitation. Somalia is not a signatory of the Protocol.

7.4 Protection of the child from sexual abuse in the formal national law of Somaliland

7.4.1 Identification of relevant formal laws

As section 7.2 demonstrates, domestic legal systems are crucial for the protection of children from sexual abuse. Therefore, it is important to start with identifying relevant laws in Somaliland to see if there are laws in place to protect children from sexual abuse and if these laws sufficiently address the issue.

Somaliland's Constitution is silent about the protection of children from sexual abuse and does not have children's rights in the Bill of Rights.[956] This section identifies relevant laws that govern sexual abuse. Formal national laws applicable in Somaliland are of two categories. The first category is laws passed by the Parliament of Somaliland since its declaration of independence from Somalia in 1991. The second category is the laws of Somalia that were in force before 1991 and remain applicable in Somaliland until their replacements are enacted.

Historically, the Somali Penal Code, a consolidated legislative act that contains various crimes, was the only criminal law applicable in Somaliland. It is arranged into several chapters, each systematically governing a separate subject. The Penal Code includes criminal provisions concerning sexual offences (see section 7.4.2). In 2018 special legislation, the Rape and Sexual Offences Act, was approved by the Parliament of Somaliland to replace the provisions in the Penal Code related to rape and other sexual offences. However, when the President signed it into law, the Act was opposed by religious leaders who said it conflicted with Sharia law and should be annulled. The President suspended the Act, which resulted in the Office of the Attorney General and the courts setting aside the 2018 Rape Act and continuing to apply the Penal Code provisions on rape and other sexual offences. The 2018 Rape Act contains expansive provisions related to sexual offences, recognises forensic science in the rules of evidence and mentions children in its substantive criminal clauses.

[953] Buck Trevor, et al., *International Child Law*, (New York: Routledge, 2005): 270.
[954] UN Convention on the Rights of the Child, 1989: art. 35.
[955] Buck Trevor, et al., *International Child Law*, (New York: Routledge, 2005): 273.
[956] See Chapter 5 of this dissertation.

The Constitution stipulates that laws must be grounded on and may not be contrary to Islamic Sharia.[957] If a law that has completed the legislation process is deemed to conflict with Sharia, any interested party can refer it to the Supreme Court (the Constitutional Court) to annul the sections that are found to be contrary to Sharia or the entire law if the Court decides so.[958] The Rape Act was not challenged before the Court.

After the suspension, the Cabinet proposed and approved an amendment. The modification gave the Act a new name, namely the Rape, *Zina* and Related Offences Bill, and incorporated Sharia provisions that criminalised, *inter alia*, consensual sex between a man and a woman who are not married to each other and changed the age of a child from under 18 to under 15. The amended version was approved by the House of Representatives and is currently with the Upper House of the Parliament, the *Guurti* (see section 7.4.4).

The research found that the following laws are relevant to child sexual abuse.

	Name	**Year**	**Legislator**
1	The Somali Penal Code	1962	The Somali Republic
2	The Rape and Sexual Offences Act	2018	The Republic of Somaliland
3	The Rape, *Zina* and Related Offences Bill	2019	The Republic of Somaliland
4	The Prevention and Suppression of Human Trafficking Act	2022	The Republic of Somaliland

The chapter explains each of the above four legal documents and analyses how they relate to each other and to child sexual abuse.

7.4.2 Somali Penal Code

When the union between Somaliland and Somalia happened in 1960, the two had separate laws inherited from the colonists, the United Kingdom and Italy, respectively.[959] The difference between the two legal systems, the British common law and the Italian continental law, necessitated their harmonisation. A legal committee was appointed to harmonise the laws, and the 1962 Penal Code, *inter alia*, resulted from the committee's work. [960] The Penal Code came into force in 1964. Currently, it is the main substantive criminal law in both Somaliland and Somalia. Although Somaliland announced the restoration of sovereignty, including making its own laws, Article 130 of Somaliland's Constitution states that Somalia's laws: "which do not conflict with the Islamic Sharia, individual rights and fundamental freedoms shall remain in force in the country of the Republic of Somaliland until the promulgation of laws…" by the Parliament of

[957] Somaliland Constitution, 2001: art. 5(2)
[958] Somaliland Constitution, 2001: art. 77.
[959] Martin R. Ganzglas, *The Penal Code of the Somali Democratic Republic: with cases, commentary, and examples* (New Brunswick: Rutgers University Press, 1971): xix.
[960] Renato Angeloni, *The Somali Penal Code: with comments and annotations based on preliminary studies* (Milan: Giufre Editore, 1967): 5.

Somaliland.[961] The Penal Code is among the laws of Somalia that remain applicable because Somaliland has not approved a replacement.

The Penal Code is relatively old and predates the Constitution (2001) and the UN Convention on the Rights of the Child (1989), and most of the main human rights instruments, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966).

The Penal Code applies equally to citizens, stateless persons and nationals of foreign States who are in the territory of Somaliland.[962] Offences under the Penal Code are classified into crimes and contraventions. The latter governs minor crimes and carries lesser punishments. Part 4 of Book 1 covers "crimes against morals and decency." Chapter 1 contains "crimes of sexual violence", which are:

- Article 398: Carnal violence (rape)
- Article 399: Acts of lust committed with violence
- Article 400: Unnatural offences committed with violence
- Article 401: Abduction for the purpose of lust or marriage

Chapter 2, titled "Offences against modesty and sexual honour", governs:

- Article 402: Obscene acts
- Article 403: Publication of obscene acts
- Article 404: Definition
- Article 405: Prostitution
- Article 406: Incitement to lewd acts
- Article 407: Instigation, aiding or exploitation of prostitution

The use of violence or threat is the requirement needed to prove the commission of rape and other sexual offences stated in the Penal Code.[963] Rape is defined as the penetration of the male sexual organ with a person of the other sex by use of violence or threat.[964] The punishment is increased when rape is "committed against a person of the same sex or a person of a different sex, against nature."[965] Other sexual acts not involving penetration are also crimes, whether it is against a person of the same sex or different sex.[966]

When an injured party is "incapable of giving consent", the elements of the use of violence or threat do not apply to prove rape or other sex acts enshrined in the Code.[967] The Code postulates

[961] Somaliland Constitution, 2001: art. 130(5)
[962] Art. 3(1); It is also applicable to citizens or foreigners outside of the territory of Somaliland when it is so provided by domestic law or international law. Articles 7, 8 and 9 of the Penal Code list special situations in the Penal Code applicable outside of the territory.
[963] Somalia Penal Code: art. 398-401.
[964] Somali Penal Code: art. 398(1,4).
[965] ibid, art. 400.
[966] ibid, art. 399 and 400.
[967] ibid, art. 398(2).

that people incapable of giving consent include[968] children under the age of 14.[969] The Juvenile Justice Law (2008) repealed this clause and replaced it with: children under the age of 15 years are not capable of giving consent.[970]

Abduction or detaining a person incapable of giving consent "for the purpose of carnal violence or lust or marriage" is a criminal act.[971] "Prostitution" is prohibited, and punishment therein is increased when the acts of "prostitution, or aids or in any manner facilitates prostitution or exploits, wholly or in part, the proceeds of prostitution" is committed "against a person incapable of giving consent." Similarly, the compulsion to prostitution is criminal.[972]

It is criminal to manufacture, distribute or publicly exhibit or introduce into the territory of Somaliland or purchase, hold or put into circulation obscene publications or performances.[973] The prohibition includes holding "public theatrical or cinematographic performance, or public concerts or recitals, which have an obscene character." Obscene acts and objects as those "deemed to be obscene where they, in the general opinion, are offensive to modesty."[974] The Penal Code gives a broad and subjective definition of obscene acts and objects. This gives courts "broad discretion to determine what is the acceptable social behaviour and what offends the good taste and morals of the people."[975]

There are no articles in the Penal Code specific to protecting children from sexual abuse. Nevertheless, on the grounds that children are "incapable of giving consent", the following sexual offences against children under 15 years of age, as well as adults, are crimes under the Penal Code:

- Rape (Article 398)
- Acts of lust other than rape (Article 399)
- Abduction for the purpose of lust or marriage (Article 401)
- The exploitation of a child for the purpose of prostitution (Article 407)
- The compulsion to prostitution (Article 408)
- Pornography (Article 403).

7.4.3 The Rape and Sexual Offences Act of 2018

On 25 August 2018, the President of Somaliland signed the Rape and Sexual Offences Act, Law No. 78/2018 (in Somali *Xeerka Kufsiga iyo Xadgudubyada Jinsiga ah, Xeer* Lr.78/2018)[976] after the two Houses of Parliament approved it.

[968] The other situations that preclude capacity are mental illness (art. 50 and 51), drunkenness due to accident or force majeure, (art. 53), chronic intoxication (art. 57), and deaf and dumb conditions (art. 58). See Martin R. Ganzglas, *The Penal Code of the Somali Democratic Republic: with cases, commentary, and examples* (New Brunswick: Rutgers University Press, 1971): 443.
[969] Somalia Penal Code: art. 59.
[970] See Chapter 5.
[971] Somali Penal Code: art. 401.
[972] ibid, art. 408.
[973] ibid, art. 403.
[974] ibid, art. 404.
[975] Martin R. Ganzglas, *The Penal Code of the Somali Democratic Republic: with cases, commentary, and examples* (New Brunswick: Rutgers University Press, 1971): 449.
[976] Presidential Law for the Promulgation of the Rape and Sexual Offences Act, JSL/XM/WM/222-191/08/2018, dated 25/8/2018.

The Act's objectives include the enactment of a law that is consistent with Islamic Sharia, the Constitution, general principles of justice, and the values and culture of Somaliland society,[977] and "to provide the most appropriate protection and care to the vulnerable people in the society including women, children and people with disability."[978]

It contains conflicting stipulations in terms of defining the age of a child who is incapable of giving consent. The Act defines a child as a person under the age of 18 years and states that a child under the age of 15 years is incapable of giving consent. In the substantive clauses, the Act employs various ages for determination of the age at which a child is considered incapable of giving consent. For example, articles dealing with rape and exploitation recognise a child as a person aged 15 years or younger. Other articles, such as the commission of the act of rape as a result of abuse of power,[979] abduction and arbitrary detention for sexual abuse,[980] and exposure of pornography to children,[981] use the term child without stating age in relation to incapacity to give consent. This might mean a person under the age of 18 years because that is how a child is defined in the definitions clause or a child under the age of 15 years because that is the age at which a child is incapable of giving consent under the definitions clause of the Act. Under Article 11 (drugging a person for the purpose of sexual abuse), a child is a person who is under 15 years.

The Act covers the following sexual abuses:

- Rape, including gang rape and rape as a result of abuse of power (Articles 4, 5, 6)
- Sexual exploitation (Article 7)
- Sexual assault (Article 8)
- Forced marriage (Article 9)
- Abuse of responsibility (Article 10)
- Drugging a person for the purpose of sexual abuse (Article 11)
- Abduction and arbitrary detention for sexual abuse (Article 12)
- Exposure of pornography to children (Article 13).
- Obscene acts (Article 14).
- Recording, distribution and publication of videos of sexual offences (Article 15).

It is rape when a person has sexual intercourse with a child who attained 15 years or is under 15. The punishment is increased if a group commits the rape. Sexual exploitation of a child is defined as when a person, for the purpose of gaining financial, social, political or other benefits, intentionally forces a person to engage in sexual intercourse or sexual act or forces them to fall under the control of others who exploit them for sexual purposes, or invests, manages or rents a place or dwelling house that is used for sexual exploitation, or trafficking a person for sexual exploitation or uses vulnerability or economic situation of a person or abuses status of power or trust for sexual exploitation.[982]

The Act does not address instances of sexual activities committed by a child against another child if the latter is older than the victim. The Committee on the Rights of the Child considers sexual

[977] Rape and Sexual Offences Act, Law No. 78/2018: art. 3(1).
[978] Rape and Sexual Offences Act, Law No. 78/2018: art. 3 (4).
[979] ibid, art. 6.
[980] ibid, art. 12.
[981] ibid, art. 13.
[982] Rape and Sexual Offences Act, Law No. 78/2018: art. 7.

abuse when sexual activities are "committed against a child by another child if the child offender is significantly older than the child victim or uses power, threat or other means of pressure."[983]

The criminal activities in the Act also apply when committed against adults. The elements of the offence and the punishment are different when committed against a child. When the victim is a child incapable of giving consent, there is no need to prove the use of force. The fact that one of the persons involved in the sexual activity is a child incapable of consent suffices to prove the commission of the offence.

Sexual assault against a child is also criminal.[984] The Act imposes punishment on a person in a position of power, responsibility or trust who rapes a child under 15 years old.[985] The Act also criminalises drugging a child under the age of 15 for sexual abuse or exploitation.[986] Abduction, kidnapping or detention of a child to be abused sexually is criminal. Moreover, forcing or causing a child to watch a third party person engage in sexual intercourse is a criminal act.[987] Production, distribution and broadcasting of pornographic videos and pictures are prohibited.[988]

The Act establishes the Commission for the Supervision of Sexual Offences, which is responsible for managing matters relevant to sexual offences and ensuring the Act is implemented. The Commission consists of the Ministers of Social Affairs, Internal Affairs, Health and Justice, the Attorney General, the Police Commissioner and representatives from local non-government organisations.[989] The Commission was never established due to the reason that the implementation of the Act was suspended.

7.4.3.1 Reporting procedure for a sexual offence

The injured party, a person who has power of attorney, or the parent or guardian of the injured party when the injured party is a child or a person with a disability, might report or submit a complaint concerning the commission of a crime under the Act.[990] Moreover, a doctor, health professional or social service provider might submit a complaint or report the commission of a sexual offence if the injured party is a child under the age of 15 or a person with a disability, and it is in the injured party's best interest.[991] There is no statute of limitations in reporting sexual offences.[992]

The court shall not separate a child under the age of 15 from his/her parents or guardians unless it is in the child's best interest or the accused is the parent or guardian of the child.[993] The injured

[983] Committee on the Rights of the Child, General Comment No, 13 (2001), The right of the child to freedom from all forms of violence: paragraph 25: 10, fn 9.
[984] ibid, art. 8.
[985] ibid, art. 10.
[986] ibid, art. 11.
[987] ibid, art. 13.
[988] ibid, art. 15.
[989] ibid, art. 24.
[990] ibid, art. 16(1).
[991] ibid, art. 16(2).
[992] ibid, art. 17.
[993] ibid, art. 27(1)(t).

party of a sexual offence has a right to free healthcare, psycho-social support and free medical examination,[994] free legal aid,[995] and the right to protection of privacy.[996]

7.4.3.2 The suspension of the Rape and Sexual Offences Act 2018

The Constitution states that law comes into force 30 days after the President has signed the law.[997] When the President signed the Act, religious leaders accused the Act of violating the tenets of Islam and called on the government not to enforce it. The Minister of Religious Affairs stated that the Act was suspended by the President, although the President signed no written suspension order.[998] The Act was never published in the Official Bulletin and has not been enforced by the prosecution and the courts, despite being valid law – theoretically.[999]

A policy change of the executive might change the application status of the Act. Therefore, it is a law that might have an impact on the rights of children. Moreover, it shows the intricate procedure in which formal national laws operate, the interactions between the formal national law and Sharia law, and the dichotomy between law on the books and law in practice.

The Act repealed articles 398 (rape), 399 (acts of lust committed with violence), 400 (unnatural offences committed with violence), and 401 (abduction for the purpose of lust or marriage) of the Penal Code covered in section 1.3.2 of chapter 1.[1000] Legally, articles abrogated by subsequent legislation can no longer be used.[1001]

7.4.4 Rape, *Zina* and Related Offences Bill

In 2019, the Cabinet approved a proposal to amend the suspended Rape and Sexual Offences Act (2018). The proposed Bill has been approved by the House of Representatives and is being forwarded to the *Guurti*. The Bill is still within the lawmaking process and has not come into force. Nevertheless, it is important legislation that needs to be briefly discussed because it might become applicable law. This section's objective is not to explain all the articles of the Bill but to highlight how it might affect and impact children.

The Bill renamed the 2018 Act as the Rape, *Zina* and Related Offences Bill (*Xeerka Kufsiga, Sinada iyo Xadgudubyada La Xidhiidha*). *Zina* (زِنًا) is an Arabic term from Sharia law and is commonly defined as sexual intercourse between a man and a woman who are not married to each

[994] Rape and Sexual Offences Act, Law No. 78/2018: art. 28.
[995] ibid, art. 29.
[996] ibid, art. 30.
[997] Somaliland Constitution, art. 76-78.
[998] Minister of Religious Affairs and Endowment, Press Conference, 10 September 2018, Hargeisa,
[999] The Constitution requires the President to publish signed laws in the Official Bulletin.
[1000] Rape and Sexual Offences Act, Law No. 78/2018: art. 45.
[1001] No one has submitted a case to the Constitutional Court challenging the suspension of the Rape Act. From my personal experience and discussions with activists and lawyers, the concern is that if such a case is filed, the court may take a decision that annuls the Act due to political sensitivity. Therefore, they prefer to lobby within the executive, hoping they may change their opinion and apply the Act.

other.[1002] The main sources for the criminalisation of *Zina* are the *Quran* and *Hadith*, which prohibit any sexual activity between individuals who are not married to each other.[1003]

The Bill covers *Zina* and rape in a single article and defines *Zina* as every form of sexual intercourse between a man and a woman who are not married to each other.[1004] Rape is every form of sexual intercourse between two individuals who are not married to each other by use of force, power, threat, weapon or abduction. The punishment for *Zina* is *Huduud* and imprisonment. *Huduud* (Arabic: حدود Ḥudūd, also transliterated *hadud*, *hudood*; plural of *hadd*, حد) is an Arabic word meaning boundaries or limits.[1005] It refers to punishments under Sharia that are mandated and fixed in the Quran.[1006] The Bill does not explain the meaning of *Huduud* and the related punishment. However, under Sharia, the *Huduud* punishment for *Zina* is lashing for an unmarried person or stoning to death for a married person.[1007] The source of the latter punishment is not found in the Quran.[1008]

A child is "a person whose age is under 15 years or who does not manifest the signs of maturity." In defining, the Bill states that "maturity means every person who is at the age of maturity determined by Sharia, which is 15 years or who has manifested the signs of maturity as stated by the *Shafi* School." This means if physical characteristics such as menstruation are seen, the person becomes an adult even if she is under 15 years of age.

The Bill permits child marriage. The guardian has the power to marry off a child if the guardian believes it is in the child's interest.[1009] The Bill sets no minimum age of marriage. The concept of guardian is based on Sharia. There is no formal marriage law in Somaliland, and Sharia applies to matters related to family affairs, such as marriage, divorce, and inheritence. The Sharia principles related to marriage are enshrined in books of *fiqh*. *Fiqh* literally means "understanding." In Sharia law, "*fiqh* is a legal science with its own distinct body of legal theories and methodology as developed by *fuqaha* [jurists] over the course of centuries and in dialogue with other branches of

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[1002] Elyse Semerdjian. 'Off the Straight Path*': Illicit Sex, Law, and Community in Ottoman Aleppo (Gender, Culture, and Politics in the Middle East),* (Syracuse, NY: Syracuse University Press, 2008): 6; laf Köndgen. *The Codification of Islamic Criminal Law in the Sudan : Penal Codes and Supreme Court Case Law Under Numayrī and Bashīr. Studies in Islamic Law and Society* (Leiden: Brill, 2018): 180; Ziba Mir-Hosseini, "Criminalizing Sexuality: Zina Laws as Violence against Women in Muslim Contexts", Sur - International Journal on Human Rights 15, no. 1 (December 2011): 7.

[1003] Quran: 24:2 Says "ۖ ٱلۡأٓخِرِ وَٱلۡيَوۡمِ بِٱللَّهِ تُؤۡمِنُونَ كُنتُمۡ إِن ٱللَّهِ دِينِ فِي رَأۡفَةٞ بِهِمَا تَأۡخُذۡكُم وَلَا ۖ جَلۡدَةٖ مِاْئَةَ مِّنۡهُمَا وَٰحِدٖ كُلَّ فَٱجۡلِدُواْ وَٱلزَّانِي ٱلزَّانِيَةُ ٢ ٱلۡمُؤۡمِنِينَ مِّنَ طَآئِفَةٞ عَذَابَهُمَا وَلۡيَشۡهَدۡ".

[1004] Rape, Zina and Related Offences Bill: art 2.

[1005] Mohammad Hashim Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation* (New York: Oxford University Press, 2019): 21; Michael Skjelderup, "Ḥudūd Punishments in the Forefront: Application of Islamic Criminal Law by Harakat Al-Shabaab Al-Mujahideen", Journal of Law and Religion, Vol. 29, No. 2, June 2014: 320.

[1006] Ziba Mir-Hosseini, "Criminalizing Sexuality: Zina Laws as Violence against Women in Muslim Contexts", Sur - International Journal on Human Rights 15, no. 1 (December 2011): 12.

[1007] Olaf Köndgen. *The Codification of Islamic Criminal Law in the Sudan : Penal Codes and Supreme Court Case Law Under Numayrī and Bashīr. Studies in Islamic Law and Society*. (Leiden: Brill, 2018): 181; Ziba Mir-Hosseini, "Criminalizing Sexuality: Zina Laws as Violence against Women in Muslim Contexts", Sur - International Journal on Human Rights 15, no. 1 (December 2011): 14; Elyse Semerdjian. *'Off the Straight Path' : Illicit Sex, Law, and Community in Ottoman Aleppo (Gender, Culture, and Politics in the Middle East),* (Syracuse, NY: Syracuse University Press, 2008): 4.

[1008]Rape, Zina and Related Offences Bill: art: 4.

[1009] ibid art. 12.

religious and non-religious science."[1010] The jurists (*fuqaha*) apply juristic methodology (*usul al-fiqh*) to set *fiqh*.[1011] *Fiqh* is diverse,[1012] and there are four *fiqh* schools in Sunni Islam (namely *Shafi, Hanbali, Hanafi* and *Maliki*). Somaliland applies the *Shafi* school of thought.

Under the *Shafi* school, the requirements for a marriage contract (*nikah*) include the consent of the woman's male guardian, *wali*.[1013] In the *Shafi* school, the father and grandfather have compulsory guardianship, *wali ajbur*,[1014] meaning he can marry off women and minor girls under his guardianship.[1015] The marrying off of a child is based on a *hadith*, a narration from the Prophet, which states that *Aisha bint Abu Bakr*, one of the wives of Prophet Mohamed, the Prophet of Islam, was six years' old when she was married to the Prophet and nine when the consummation took place.[1016] Although reformists and Islamic feminists reject the authenticity of the *hadith,*[1017] it is widely believed and is written in books of *fiqh*.

The Bill does not differentiate between acts involving two consenting adults and acts of rape. By treating rape as a *Zina*, the Bill sets out evidentiary requirements difficult to prove, that is, at least two male eyewitnesses who can attest to the occurrence of the rape. Moreover, it does not grant children protection from sexual offences because the Bill considers children as persons capable of consenting to sexual activities – although consensual sex is also criminal under the Bill. Contrary to the Penal Code and the 2018 Rape Act, the Bill does not consider children as minors without the capacity to consent to sexual activity. Under the Penal Code and the 2018 Rape Act, if a person engages in sexual activity with a child incapable of consent, it becomes automatically a criminal act; whether the child consented or not is irrelevant.

In the Bill, if an adult person engages in sexual intercourse with a child or a mentally ill person, the child and the mentally ill person are not criminally liable but would not be treated as victims of a crime either. The Bill states: "it is the responsibility of the guardian of the child or the mentally ill person to conduct disciplining and ethical correction that is consistent with Sharia." This

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[1010] Ziba Mir-Husseini, *The Construction of Gender in Islamic Legal Thought and Strategies for Reform*, (Koninkhjke Brill NV, Leiden, 2003): 2.

[1011] Nevin Reda, "*Reform of Usul al-Fiqh and Marriage: a Spiritually Integrative Approach"* in *Justice and Beauty in Muslim Marriage: towards egalitarian ethics and laws,* edited by Ziba Mr-Hosseini et al (London: Oneworld Academia, 2022): 233-234.

[1012] Muhammad Khalid Masud, *"*Ikhtilaf al Fuqaha: Diversity in Fiqh as a social construct*" in Wanted: Equality & justice in the Muslim family* (Musawa: Selangor, 2009): 65.

[1013] In the Shafi school, the requirements for marriage are: offer from the woman through her guardian, the acceptance by the man, the payment of dowry (*mehr*), and two witnesses.

[1014] Mohsen Kadivar, "Rethinking Muslim Marriage Rulings through Structural Ijtihad" in *Justice and Beauty in Muslim Marriage: towards egalitarian ethics and laws*, edited by Ziba Mr-Hosseini et al (London: Oneworld Academia, 2022): 222; Nevin Reda, "Reform of Usul al-Fiqh and Marriage: a Spiritually Integrative Approach" in *Justice and Beauty in Muslim Marriage: towards egalitarian ethics and laws*, edited by Ziba Mr-Hosseini et al (London: Oneworld Academia, 2022): 239.

[1015] Ziba Mir-Husseini, *The Construction of Gender in Islamic Legal Thought and Strategies for Reform*, (Koninkhjke Brill NV, Leiden, 2003): 9; Mohsen Kadivar, "Rethinking Muslim Marriage Rulings through Structural Ijtihad" in *Justice and Beauty in Muslim Marriage: towards egalitarian ethics and laws*, edited by Ziba Mr-Hosseini et al (London: Oneworld Academia, 2022): 222; Nevin Reda, "Reform of Usul al-Fiqh and Marriage: a Spiritually Integrative Approach" in *Justice and Beauty in Muslim Marriage: towards egalitarian ethics and laws*, edited by Ziba Mr-Hosseini et al (London: Oneworld Academia, 2022): 23.

[1016] Mohsen Kadivar, "Rethinking Muslim Marriage Rulings through Structural Ijtihad" in *Justice and Beauty in Muslim Marriage: towards egalitarian ethics and laws*, edited by Ziba Mr-Hosseini et al (London: Oneworld Academia, 2022): 222.

[1017] Musawa, *CEDAW and Muslim Family Laws: In Search of Common Ground* (2011): 30.

requires the guardian to discipline the child, which is blaming the child for engaging in a sexual activity with an adult person. To differentiate a rape case from a *Zina* case in relation to a child, the prosecution is required to prove the elements of the use of force, power, threat, weapon or abduction, regardless of whether the victim is a child or adult.

The acceptable evidence for the sexual offences under the Bill is the evidence enshrined in Sharia.[1018] Different classifications of evidence for *Huduud* and punishment by imprisonment punishment are provided in the Bill. Evidence is either confession or four male eyewitnesses to enforce a *Huduud* punishment. For punishment by imprisonment, the prosecution has to present either a confession or two male witnesses. Medical evidence and police investigations might be used as corroboratory evidence but cannot be used for a conviction.[1019]

If a woman cannot prove that the sexual act occurred due to force or compulsion by presenting two male eyewitnesses, the sexual activity becomes a *Zina*, and the woman might become liable for the crime of *Zina or qadf* (false accusation or slander).[1020] *Qadf* is "making an accusation of Zinā against a Muslim of upright character or denying a person's legitimate descent, and the charge so made is not proven by four witnesses."[1021] Article 22 of the Bill stipulates that if the person accused of rape "is a person known of goodness and integrity, he shall not be arrested unless found guilty, and the person who made the accusation deserves to be disciplined to protect the dignity of the people with goodness and integrity." Unfounded allegations of sexual offences might result in the punishment of the complainant.[1022] These two stipulations might lead victims to refrain from reporting, particularly children who could be accused of engaging in consensual sex or making false accusations.

The other sexual offences enshrined in the Bill are:

- Homosexuality
- Abuse of power or position of responsibility for sexual purposes
- Extortion and blackmailing
- Prostitution
- Sexual exploitation
- Sexual assault
- Drugging for sexual abuse
- Administering witchcraft to engage in sex
- Abduction or detention for sexual abuse
- Publicly showing the human body (Arabic: عورة' awrah) obliged by Islam to be covered
- Recording, distribution and publication of videos of sexual offences.

The understanding, interpretation and sources of Sharia law vary,[1023] and depend on one's adherence to the different schools of thought in Sunni Islam.[1024] The approach adopted in the Bill

[1018] Rape, Zina and Related Offences Bill: art. 34(1).
[1019] ibid, art. 23(3).
[1020] Under Sharia the punishment of *qadf* is 80 lashes.
[1021] Mohammad Hashim Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation* (New York: Oxford University Press, 2019): 150.
[1022] Rape, Zina and Related Offences Bill: art. 19(3).
[1023] See Chapter 1 of this dissertation.
[1024] Somaliland is Sunni Islam. Generally, Muslims are divided into Shia and Sunni.

is unprecedented in Somaliland's lawmaking process. No other formal law in Somaliland incorporates Sharia punishments in *fiqh* to the extent of the Bill.

7.4.5 Prohibition of child sex trafficking

Trafficking of a child may occur for a sexual abuse and exploitation. The Prevention and Suppression of Human Trafficking Act[1025] prohibits all forms of trafficking of children, including trafficking to exploit for prostitution. The Act defines a child as a person who does not attain puberty or whose age is younger than 15 years.[1026] The Act considers aggravating circumstances if a child is subjected to human trafficking and the punishment is increased.[1027] Child sex trafficking refers to the trafficking of a child to exploit for prostitution.

Human trafficking is the recruitment, transportation, delivery, or housing of a person by use of intimidation, coercion, or threatening to use force or other forms of force, abduction, deception, cheating, or abuse of power or exploitation of a vulnerability by giving or receiving payments or other benefits, on the purpose of exploitation including exploitation for prostitution, forced labour, slavery, removal of organs or forcing people to pay a ransom.[1028] Recruitment, transportation, delivery or housing of a child or person who does not have the capacity of volition or will for the purpose of exploitation is considered by the Act as human trafficking even if it does not involve the use of force or coercion.[1029]

The scope of the Act in terms of the jurisdiction of Somaliland's courts covers crimes that occur in the territory of Somaliland, crimes committed in another country but started in the territory of Somaliland, and if the crime took place in another country but the accused person entered Somaliland's territory or the accused was transiting through borders of Somaliland.[1030] The Act has extra-territorial application when the accused person or the victim is a Somaliland citizen or the accused is a person with a residence permit in Somaliland at the time of the commission of the crime.[1031]

7.5 Protection of children from sexual abuse under the laws of Somalia

The section briefly outlines the laws applicable in Somalia that are related to the protection of children from sexual abuse. Somalia ratified the UN Convention on the Rights of the Child and its provisions related to sexual abuse and exploitation. Chapter 4 discussed the legal obligation of Somalia in the territory of Somaliland. This section, therefore, does not cover that subject again and confines itself to illustrating which laws are in place in Somalia to protect children from sexual abuse.

The Somali Penal Code of 1963 (detailed in section 1.4.2) is applicable in Somalia. The following Penal Code provisions govern sexual offences committed against both adults and children:

[1025] Prevention and Suppression of Human Trafficking Act, Law No. 101/2021 was signed into law by the President of Somaliland on 27 June 2022.
[1026] Prevention and Suppression of Human Trafficking Act: art. 2.
[1027] Prevention and Suppression of Human Trafficking Act: art. 8(b).
[1028] ibid, art. 6(1).
[1029] ibid, art. 6(2).
[1030] ibid, art. 4.
[1031] Prevention and Suppression of Human Trafficking Act: art. 5.

- Rape
- Acts of lust other than rape
- Abduction for the purpose of lust or marriage
- An exploitation of a child for the purpose of prostitution
- A compulsion to prostitution
- Child pornography.

Article 29(2) of the Provisional Constitution of Somalia states: "every child has the right to be protected from mistreatment, neglect, abuse or degradation." In its 2019 report to the Committee on the Rights of the Child, the government of Somalia stated that the abuse stipulated in article 29(2) of the Provisional Constitution includes "all forms of sexual abuse and exploitation."[1032] Several bills are currently in the drafting stage. These are the Child Rights Bill, the Sexual Offences Bill and the Juvenile Justice Bill.[1033] None of them has, however, been approved yet by the Parliament.

The Sexual Offences Act was approved by the Cabinet in 2018.[1034] "The Bill addresses the protection of vulnerable persons such as children, and persons with disability; defines sexual offences and sexual exploitation; sentencing of offenders; and assistance available to victims and witnesses."[1035] The Bill has provisions specific to the protection of children from sexual abuse. These articles are:

- Child rape (Article 23)
- Child gang rape (Article 24)
- Sexually assaulting a child ((Article 25)
- Causing or inciting a child to engage in sexual activity (Article 26)
- Child marriage (Article 27)
- Child sexual exploitation (Article 28)
- Child sexual slavery (Article 29)
- Child sex tourism (Article 30)
- Child sex trafficking (Article 31)
- Child sexual harassment (Article 32)
- Meeting or grooming a child for a sexual purpose (Article 33)
- Child pornography, including the production, sale, distribution, purchasing and possession of pornography. (Articles 34, 35 and 36).

In 2020, Members of the House of the People, the Lower House of the Parliament, presented the Sexual Intercourse Related Crimes Bill to replace the Sexual Offences Bill. The Sexual Intercourse

[1032] Committee on the Rights of the Child, Initial report submitted by Somalia under article 44 of the Convention, submitted 16 October 2019: paragraph 158: 23.
[1033] Committee on the Rights of the Child, Initial report submitted by Somalia under article 44 of the Convention, submitted 16 October 2019: paragraph 34: 8.
[1034] Committee on the Rights of the Child, Initial report submitted by Somalia under article 44 of the Convention, submitted 16 October 2019: paragraph 165: 24.
[1035] Initial report submitted by Somalia under article 44 of the Convention, Committee on the Rights of the Child, 16 October 2019, CRC/C/SOM/1: paragraph 161: 23.

Related Crimes Bill had provisions contrary to the UN Convention on the Rights of the Child.[1036] The UN High Commissioner for Human Rights states that the Sexual Intercourse Related Crimes Bill "constitutes serious breaches of international human rights norms and standards."[1037] However, the Bill was later withdrawn[1038] after UN agencies, international non-governmental organisations, and Somali civil society groups rejected the proposal.[1039]

In 2021, the People's House, the Lower House of the Parliament, returned the Sexual Offences Bill to the Cabinet and instructed them to resubmit it to the House after the 2022 parliamentary and presidential elections took place.[1040] No further explanation was given by the House for the grounds of the reversal of the Bill, and at the time of writing this chapter, the Bill has not been resubmitted to the Parliament.

7.6 Conclusion

The following laws in Somaliland are related to child sexual abuse.

Name	Provisions related to child sexual abuse	Legislature	Applicability
Somali Penal Code (1962)	• Rape • Acts of lust other than rape • Abduction for the purpose of lust or marriage • Exploitation of a child for the purpose of prostitution • Compulsion to prostitution • Child pornography	Somali Republic	Applicable temporarily
Rape and Sexual Offences Act (2018)	• Rape, including gang rape and rape as a result of abuse of power • Sexual exploitation • Sexual assault • Forced marriage • Abuse of responsibility • Drugging a person for the purpose of sexual abuse	Somaliland	Approved, but suspended.

[1036] Concluding observations on the initial report of Somalia, Committee on the Rights of the Child, CRC/C/SOM/CO/1, June 2022: paragraph 40: 8; A comparative review of Somalia's controversial sexual offences bills, Governance, Somali Public Agenda, Governance Brief 11, January 2021: 3.
[1037] The UN High Commissioner for human rights, Michelle Bachelet statement https://news.un.org/en/story/2020/08/1070022, last accessed 10 January 2023.
[1038] ibid.
[1039] https://plan-international.org/news/2020/08/13/concern-over-bill-normalising-violence-against-girls-and-women-in-somalia/, last accessed 10 January 2023; https://www.legalactionworldwide.org/gender-equality-gbv/somalia-sexual-intercourse-bill-a-brief/, last accessed 10 January 2023; https://www.reuters.com/article/us-somalia-women-rights-idUSKCN257200, last accessed 10 January 2023.
[1040] Returning Bills and Agreements, House of the People of Somalia, Office of the Speaker, 417/2/B-10/21, dated 25 September 2021.

	• Abduction and arbitrary detention for sexual abuse • Exposure of pornography to children • Obscene acts • Recording, distribution and publication of videos of sexual offences		
The Prevention and Suppression of Human Trafficking Act (2022)	The trafficking of a child to exploit for prostitution	Somaliland	Applicable
Rape, *Zina* and Related Offences Bill (2019)	• Rape • Consensual sex • Abuse of power or position of responsibility for sexual purposes • Extortion and blackmailing • Prostitution • Sexual exploitation • Sexual assault • Drugging for sexual abuse • Administering witchcraft to engage in sex • Abduction or detention for sexual abuse • Publicly showing the human body (Arabic: عورة' awrah) obliged by Islam to be covered • Recording, distribution and publication of videos of sexual offences	Somaliland	In the law-making process.[1041]

The legal analysis of existing laws on sexual offences demonstrates an apparent ambiguity in how laws deal with child sexual abuse. The absence of special legislation or provisions addressing child sexual abuse places the subject within the broader context of sexual offences. In this regard, only criminal laws govern the issue. Criminal laws concerning sexual offences are riddled with complexities. The conflicting enactment of laws and the discrepancies between law in theory and law in practice creates confusion and legal uncertainties. There are difficulties regarding, *inter alia*, what constitutes child sexual abuse, age of consent and age of the child.

The Penal Code (1962), which is at present applicable to sexual offences, recognises limited sexual offences. The Rape and Sexual Offences Act (2018) is in suspension. The newly introduced amendment is still in the law-making process without a clear timeline for its approval. The amendment proposes drastic changes that would not serve the best interests of the child. The Child

[1041] At the time of writing this dissertation, the Rape, Zina and Related Offences Bill is before the Upper House of the Parliament.

Rights Protection Act (2022) has no clauses on sexual abuse or what services should be offered to children who are survivors of sexual abuse.[1042] The criminal laws are narrow to the extent that they focus on the criminalisation of actions and do not address protective measures, prevention, referral, follow-ups and establishment of special programmes that help children who are survivors of sexual abuse.

The sexual offences laws demonstrate the interplay of the formal law and Sharia and how the hybrid system impacts children's rights in Somaliland. The mixed system affects the definition of abuse, the age of the child and what sexual activities are criminal if children are involved. The approach of the Penal Code and the Rape and Sexual Offences Act (2018) is the total criminalisation of any sexual activity involving children under the age of consent. The 2019 amendment incorporates Sharia doctrines that permit child marriage and treat children of all ages as agents capable of giving consent to sexual activities. Although the amendment does not require the State to punish children, it does not consider having sex with a child rape.

[1042] See Chapter 5 of this dissertation.

8 Conclusion and Recommendations

8.1 Introduction

This chapter concludes this dissertation by answering the research questions. The main research question is: how do international and national laws protect the rights of children living in Somaliland? To answer this main question, this study has addressed the following specific sub-questions.

1. What type of entity is Somaliland?
2. What obligation does Somaliland, as an unrecognised State, have under the international human rights laws to protect the rights of the children living in Somaliland?
3. What is the obligation of Somalia – a recognised State – to protect the rights of the children living in Somaliland?
4. What rights do children have in Somaliland's formal national laws?
5. What does a child's right to nationality mean for children living in Somaliland?
6. What is the meaning of a right to protect children in Somaliland from sexual abuse?

The first three questions were discussed in Chapters 2, 3 and 4 of the dissertation from the international legal perspective. Chapters 5, 6 and 7 analysed the formal national laws.

This chapter is divided into three sections. Section 8.2 reflects on the first part of the dissertation, the international human rights law. Section 8.3 discusses the national law, and the main research question is answered in section 8.4.

8.2 International child (human) rights law

This section concludes the international human rights law aspect of this dissertation. Section 8.2.1 concludes Chapter 2. Chapter 3 and Chapter 4 are covered in sections 8.2.2 and 8.2.3 respectively. Each section focuses on one question and summarises the findings.

8.2.1 What type of entity is Somaliland?

Chapter 2 looked at international legal persons to locate and define Somaliland. The existing scholarship divides international legal persons, States and non-State actors. The latter encompasses all entities that are not State, and "the problem with the label 'non-state actors' is that it is too broad and establishes a false dichotomy between States and all other actors capable of acquiring rights and duties on the international plane."[1043] The dichotomy is insufficient to define and categorise unrecognised States. Despite the State being the most powerful legal person, international law has yet to provide a legal framework that governs the births and deaths of States. Therefore, entities with attributes of statehood that made a declaration of independence and seek recognition fall in a grey area. Due to the lack of universal recognition, they are not considered a State, and the debate between the declaratory and constitutive theories of recognition does not help solve the quandary.

Chapter 2 concluded that Somaliland is an unrecognised State. This means an entity that fulfils the criteria of statehood under the Montevideo Convention, that has declared independence, and has

[1043] Jure Vidmar and Lea Raible, "State creation and the concept of statehood in international law" in *Research Handbook on Secession,* edited by Jure Vidmar, Sarah McGibbon and Lea Raible, (Edward Elgar, 2022): 22.

not gained collective recognition or UN membership. The latter two are withheld due its contested nature.

8.2.2 The obligations of Somaliland under international child (human) rights law

Chapter 3 analysed the application of international human rights law in Somaliland as an unrecognised State. The sources of international law are [recognised] States centric and impose a legal obligation on States primarily. Although other legal persons exist in international law – for example, intergovernmental organisations – the lack of *de jure* recognition makes unrecognised States anomalous and contested. They do not fit a typology of State and non-State actors. A recognised State that is a member of the international community is always involved and claims the territory of the unrecognised State and invokes the principle of territorial integrity. International human rights law is less developed in giving rules that respond to the challenges posed by the uniqueness of Somaliland.

Somaliland is not a party to the UN Convention on the Rights of the Child (CRC) or any other human rights treaty. Theoretically, the 'Vienna Formula' regarding the deposition of treaties applies to Somaliland if it satisfies the following criteria: (a) it is admitted to the UN as State Member, (b) it is accepted as a member in any of the UN specialised agencies, (c) it becomes a party to the International Atomic Energy Agency, (d) it joins the Statute of the International Court of Justice, and/or (e) it is invited by the General Assembly of the United Nations to become a party to the CRC.[1044] Presently, none of these criteria has been met by Somaliland.

This research examined Somaliland's applicability of international law from different aspects:

a. Somaliland as a separate State
b. Somaliland as a subnational level of Somalia
c. *Jus cogens* and customary international law
d. Voluntary self-imposed obligation. It examined Somaliland's self-imposed obligation through its acknowledgement of human rights treaties in its constitution and laws. Does the voluntarily imposed obligation have a legal effect under international human rights law?

a. Somaliland as a separate entity

The concept of State succession of treaties explains the status of a successor State in the event of separation or secession. If Somaliland is considered a secessionist or separatist entity, can Somaliland become a party to international human rights treaties ratified by Somalia as a way of a succession of treaties? Are these treaties automatically applicable to Somaliland? The research finds that fundamental human rights protected by ratified international human rights treaties belong to the individuals living in the territory, irrespective of the status of who controls it. The Vienna Convention on Succession of States in respect of Treaties and international human rights bodies accepts that treaties in force at the date of the succession of States that concern the entire territory of the predecessor State, continue to be in force in the successor State. In addition it states

[1044] The Vienna Convention on the Law of Treaties, Art. 81.

that once the people are accorded the protection under a treaty, that protection continues to belong to them even if the State changes.[1045]

The lack of recognition hinders the practicality of applying the rules of State succession to an unrecognised State. For instance, how can Somaliland deposit accession with the Secretary-General? There is no record of Somaliland attempting to notify the UN Secretary-General of a decision to a succession of human rights treaties or acceding to others. In that context, State succession does not directly apply as long as the question of recognition is pending or Somaliland accedes to treaties through the 'Vienna Formula.' Human rights treaties ratified by Somalia are applicable to the territory under the control of Somaliland. Treaties, however, impose a legal obligation on Somalia, not on Somaliland. As a consequence, rights enshrined in treaties lack corresponding obligations and enforceability against Somaliland authorities.

b. Somaliland as subnational administration

The research also looked at Somaliland from the perspective of the UN and the AU, which view Somaliland as an autonomous region of Somalia and, as such, consider it a sub-national entity.[1046] Are the UN Convention on the Rights of the Child and other human rights treaties ratified by Somalia applicable to Somaliland as a subnational administration? International human rights obligations on States are not restricted to the national government, but subnational State authorities are also under obligation as part of the State. In the meaning of Article 4 of the CRC, the territory of Somaliland is located within the *de jure* jurisdiction of Somalia, and as a result, the CRC is applicable to the territory under the control of Somaliland. Nevertheless, there is a difference between the territorial applicability of a treaty and the attribution of wrongful conduct and legal obligation on a State. The first involves that the CRC applies to all the territories internationally recognised to constitute Somalia. The enforcement of rights and assuming the legal obligations enshrined in the CRC concern whether the territory is under the recognised State's control. Once a State loses control of a territory, wrongful conducts are not attributable to the State.

Somaliland, which has effective control, rejects the categorisation of Somaliland as a subnational level of Somalia and conducts itself separately with no affiliation with Somalia. The classification does not, therefore, impose a direct obligation on Somaliland. According to the African Commission on Human and Peoples' Rights, Somaliland has "a completely separate existence…." And also it is not recognised as a State.[1047]

c. *Jus cogens* and customary international law

Having seen the shortcomings of treaties in issues concerning Somaliland, it is essential to look beyond human rights treaties and study customary international law and *jus cogens* norms to

[1045] Vienna Convention on Succession of States in respect of Treaties, done at Vienna on 23 August 1978. Entered into force on 6 November 1996. United Nations, Treaty Series, vol. 1946, p. 3: art. 34(1(a): General Comment No. 26: Continuity of Obligations Adopted at the Sixty-first Session of the Human Rights Committee, on 8 December 1997 CCPR/C/21/Rev.1/Add.8/Rev.1, General Comment 26. (General Comments) (Contained in Document A/53/40, annex VII): paragraph 4; Menno T. Kamminga, "Impact on State Succession in Respect of Treaties" in *The Impact of Human Rights Law on General International Law*, edited by Menno T. Kamminga and Martin Scheinin (Oxford: Oxford University Press, 2009): 107.

[1046] In the UN Human Rights Commission's statement on Las Anod war, he states that Las Anod is claimed by both Somaliland and Puntland regions. UN High Commissioner for Human Rights, press statement, 07 February 2023, Türk urges investigation after scores killed in Somalia clashes | OHCHR, last accessed 22 March 2023.

[1047] The African Commission on Human and Peoples' Rights, Abdullahi Ali Ismail v The Federal Republic of Somalia, Communication 663/17, the 22nd Extra-Ordinary Session, 29 July to 7 August 2017: paragraph 14, page 3

examine whether individuals living in an unrecognised State can derive human rights from customary international human rights law, thus implying duties to respect, protect and fulfil these rights for the authorities. Customary international law and *jus cogens* are binding on all States. Identifying and ascertaining customary international law is difficult, and no list of rights is agreed to constitute customary international law. The examples of customary international law, given in different contexts, include the prohibitions of torture, genocide, racial discrimination, and slavery.[1048] The Human Rights Committee's General Comment No. 24 makes a list[1049] of clauses in the ICCPR that represent customary international law, and *jus cogens* are not subject to reservations.[1050] There is an argument that the UDHR or some of its provisions now constitute customary international law.[1051]

There is an overlap between rules of *jus cogens* and customary international law. Despite the difficulties in identification, the existence of *jus cogens* norms and their binding character is based on strong evidence. The International Court of Justice found that genocide is a peremptory norm of general law.[1052] Other bodies, including the European Court of Human Rights (ECtHR), reinforced the norms of *jus cogens* and stated, for instance, that prohibition of torture is a *jus cogens* norm. *Jus cogens* norms have universal application[1053] and are norms that are not restricted by the status of the State – recognised or unrecognised. The list in the International Law Commission's Draft Conclusions protects children and adults alike, but are not especially children's rights, and covers a limited aspect of human rights and *jus cogens* norms are narrowly

[1048] Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge: Cambridge University Press, 2015): 3; Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 3rd ed. (Cambridge: Cambridge University Press, 2019): 88; Shaw, International Law: 275.

[1049] The list of such provisions in the General Comment are:
Slavery,
Torture,
Cruel, inhuman or degrading treatment or punishment,
Arbitrarily deprive persons of their lives,
Arbitrarily arrest and detain persons,
Denying freedom of thought, conscience and religion,
Presuming a person guilty unless he/she proves his innocence,
Execute pregnant women or children,
Permit the advocacy of national, racial or religious hatred,
Deny to persons of marriageable age the right to marry,
Denying minorities the right to enjoy their own culture, profess their own religion, or use their own language, and the right to a fair trial.

[1050] Human Rights Committee, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant Adopted at the Fifty-second Session of the Human Rights Committee, on 4 November 1994: paragraph 8.

[1051] John P. Humphrey, "The International Bill of Rights: Scope and Implementation", 17 Wm. & Mary L. Rev. 527 (1976): 529; Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 3rd ed. (Cambridge: Cambridge University Press, 2019): Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff, 1991): 337: Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* 8th ed. (New York: Routledge, 2019): 353.

[1052] Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006: 6.

[1053] International Law Commission, Peremptory norms of general international law (jus cogens) Seventy-first Session Geneva, 29 April–7 June and 8 July–9 August 2019: Draft conclusion 3 [3(2)]: Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff, 1991): 342.

defined.[1054] Although it protects human beings, including children, from the most heinous crimes, many violations of children's rights are not included in the *jus cogens*. Because of their unique character, the *jus cogens* norms apply to Somaliland.

d. Voluntary imposition of a legal obligation

Somaliland voluntarily endorsed some human rights treaties in its Constitution (2001). In doing so, Somaliland self-imposed legal obligations justiciable only in its domestic legal order. Somaliland's unilateral commitment to respect the UN Charter, the Universal Declaration of Human Rights, treaties entered into by Somalia before May 1991, and other international human rights instruments carries legal obligations in accordance with its domestic law, but it is not a proper mechanism permitting Somaliland to accede to human rights treaties in the special *modus operandi* of State succession of treaties.

8.2.3 Somalia's obligations under the CRC in relation to children living in Somaliland

Chapter 4 focuses on the obligation of the recognised State, Somalia, in relation to the rights of children living in Somaliland. That chapter examined if the loss of effective control by Somalia reduces or eliminates its jurisdiction over the territory of Somaliland in the meaning of the CRC and in relation to its international obligation emanating from the human rights treaties to which it is a party.

The question here is: under international human rights, is there a legal obligation on Somalia regarding the rights of children living in Somaliland? The legal obligation of Somalia, a party to the CRC since 2015, is to respect, protect and fulfil the rights of the CRC for the children within its jurisdiction. Is there a legal obligation on Somalia under the CRC and general international human rights law in relation to the children in the territory under the control of the government of Somaliland? Does the lack of effective control over the territory mean Somalia has no jurisdiction over this territory?

Except in the instances of extraterritorial jurisdiction, the jurisdiction is primarily territorial. The complexity arises when a State loses effective control over a part of its territory. The loss of control could be a result of an intervention by another State, such as occupation, or due to internal violence. There is extensive jurisprudence related to situations where a State exercises control over a territory without a title and, as a consequence, bears the responsibility for activities undertaken in the territory but without gaining the title in relation to that territory.[1055] In the context of Somalia, it lost effective control over the territory of Somaliland in 1991 after the collapse of the central government due to civil war, not to occupation by a foreign State. The loss of control does not cause Somalia to cease its *de jure* jurisdiction over the territory or eliminate the State's positive obligation.

The State of Somalia is subject to the obligations under the CRC in relation to the acts or omissions that occur in the territory of Somaliland and by the authorities of Somaliland to the extent of fulfilling a positive obligation resulting from its *de jure* jurisdiction. Somalia's positive obligation is general in terms of its overall obligation covering the entire population of the territory and

[1054] Robert Kolb*, Peremptory International Law – Jus Cogens: A General Inventory* (Oxford: Hart Publishing Ltd, 2015: 7.
[1055] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* (New York: Routledge, 2019): 123.

special as far as it concerns individual complainants. Somalia exercises prescriptive jurisdiction, but it is unable to enforce laws enacted by the Federal Government of Somalia on the territory of Somaliland – and to a large extent to other parts of its territory controlled by armed groups.

The African Commission on Human and Peoples' Rights decided that complaints cannot be filed against Somalia by an individual claiming that Somaliland violates his rights because Somaliland is "not a region within Somalia, as it has a completely separate existence and therefore, in reality, Somalia has no effective control over Somaliland nor the courts of Somaliland."[1056] The Commission further goes on to state that it does not also entertain cases from Somaliland because it is "not recognised by the African Union" as a sovereign State.[1057]

The limited jurisdiction of Somalia may not mean much in reality to the children in Somaliland. The State of Somalia has limited practical options to discharge its human rights obligation vis-à-vis the territory under the control of Somaliland. The evaluation of the extent to which Somalia has attempted to fulfil its positive obligations in good faith has to be evaluated empirically. The government of Somaliland is the one with the direct impact on the enjoyment or violation of children's rights. The limited capacity of Somalia's government rules out any direct involvement, negative or positive, in the ongoing affairs in Somaliland. It would be futile to overlook Somaliland in this context..

8.2.4 How does international law protect the rights of children living in Somaliland?

The answers to the above research sub-questions demonstrate that international human rights law does not provide adequate protection to children living in Somaliland. On the one hand, human rights treaties to which Somalia is a party apply to all the territories recognised as part of Somalia. On the other hand, the loss of effective control reduces Somalia's legal obligation and jurisdiction, particularly its enforcement jurisdiction. Somalia's loss of effective control either reduces its obligation or makes the discharge of the obligation unattainable. Moreover, Somaliland's separate existence and lack of recognition means that it is not considered a State to bear the legal duties and exercise rights attached to statehood as far as treaty law is concerned. It is not also considered a subnational authority due to its separate existence.

The complexity of Somaliland manifests a situation of limbo where international human rights law is unable to address this unrecognised State in a manner that benefits rights holders. The universalistic language of international human rights treaties and the slogan "leave no one behind"[1058] by the UN Member States as pledged in the Sustainable Development Goals are not converted to binding international legal norms that recognise the delicate situation of children living in Somaliland. The classification of entities as State and non-State locates Somaliland as an ostracised outcast because it is neither a non-State actor nor a State as far as the lack of recognition is concerned.

[1056] The African Commission on Human and Peoples' Rights, Abdullahi Ali Ismail v The Federal Republic of Somalia, Communication 663/17, the 22nd Extra-Ordinary Session, 29 July to 7 August 2017: paragraph 14, page 3.
[1057] The African Commission on Human and Peoples' Rights, Abdullahi Ali Ismail v The Federal Republic of Somalia, Communication 663/17, the 22nd Extra-Ordinary Session, 29 July to 7 August 2017: paragraph 14, page 3.
[1058] UNSDG | Leave No One Behind, last accessed 21 March 2023.

8.3 National law protection

8.3.1 Introduction

The following subsections conclude this dissertation's findings concerning Somaliland's national law. Subsection 8.3.2 addresses Somaliland's national laws related to children's rights. The research identified and analysed all formal laws related to children. Two case studies, covered separately in Chapter 6 and Chapter 7, have been concluded in subsections 8.3.3 and 8.3.4, respectively. Subsection 8.3.5 compares the CRC articles with the domestic laws of Somaliland.

8.3.2 Children's rights in Somaliland's formal national laws.

Chapter 5 identified and examined the formal national laws of Somaliland concerning children's rights. There is a plurality of legal systems in Somaliland with a high degree of interaction. Sharia, *Xeer* and formal national law do not operate in separation but interact at various levels and to various degrees. A hierarchy of laws – between the Sharia, *Xeer*, and formal law – cannot be established. The three systems impact each other, compete and complement. Sharia and *Xeer* have an impact, influence and role in the formal national law-making, interpretation and enforcement. *Xeer*, which is made by and binding in or between clans and is particularly strong in the closest kinship of the clan, which is the *jilib*, has political, legal, economic, cultural and social roles in Somaliland society and governance. It has concepts and doctrines about the rights and duties of children, parents and kinships. The values and outlook of *Xeer* shape the gender roles and the conceptions of how rights are defined and duties assigned. Sharia law is a source for formal laws in Somaliland per the Constitution, and laws enacted by Parliament may not conflict with Sharia law. If formal law conflicts with Sharia law, the Constitutional Court has the power to invalidate. Moreover, Sharia law governs custody of children, foster families, inheritance and all matters of personal status (*al-ahwal alshakhsiya*). Sharia is therefore applied in formal courts. Chapter 5 demonstrated that all the formal laws related to children, one way or another, cite or refer to Sharia law.

Formal national laws legislated by the Parliament may be suspended on the grounds of contradicting Sharia. Here, it is not about the lack or weak enforcement of formal law but a direct clash where Sharia superseded legislated enactment concerning children, as happened to the Rape and Sexual Offences Act (see Chapter 7). The President suspended the Rape and Sexual Offences Act of 2018 on the basis that it "contradicts Sharia". In this context of a plural legal system with no clear demarcation of jurisdiction or hierarchy, it is challenging to define children's rights, including who is considered a child.

Since the declaration of independence in 1991, Somaliland passed two main parliamentary acts that are specifically related to children: the Juvenile Justice Law (JJL) and the Child Rights Protection Act (CPA). These two laws stipulate a list of rights for children, prohibit discrimination, and recognise the principle of the best interest of the child. They also cite and refer to the UN Convention on the Rights of the Child (CRC) and other human rights treaties. Four other laws, namely the Public Order and Security Law, National Education Act, Labour Law, and Press Law have clauses that govern some aspect of children's rights. The formal law lacks a uniform definition of child.

The JJL and CPA demonstrate Somaliland's willingness to enact laws that protect children and enshrine their fundamental rights and freedoms. The JJL contains clauses governing the rights of children in conflict with the law. It sets the minimum age of criminal responsibility for children

below the age of 15 and limits criminal responsibility for children aged 15-18. The CPA contains the children's Bill of Rights and is an essential law considering that the Bill of Rights in the Constitution does not include children's rights.

The legal framework that is related to children contains ambiguities and conflicting concepts that are not clearly defined. For example, the JJL and CPA state children's rights shall be interpreted in a manner that does not contradict Sharia law. That is a broad stipulation that can be used to limit children's rights. The Bill of Rights in the CPA explicitly states that children's rights can be limited in accordance with Sharia.

The plural legal system with no hierarchy of legal norms necessitated a process of negotiation when formal laws are drafted. This may lead to conflicting norms being incorporated into a single piece of legislation, as the case is with the CPA. The universalistic approach of the UN Convention on the Rights of the Child and Sharia law's doctrines are both enshrined in the CPA, not in a complementary manner, but in a way that weakens the enforcement, interpretation and application of the CPA. My suspicion is that because Somaliland is seeking international recognition, it acknowledges international law in its domestic law to prove its commitment to adhering to the international system and its rules. It also responds to local demands and institutions that aspire to more roles for *Xeer* and Sharia in the formal laws.

In the absence of formal family law, the courts apply Sharia law in deciding all matters related to family affairs, such as marriage, divorce, and the rights and duties of parents, relatives, and children. Also, Sharia governs the duties of government authorities in relation to children. Within the process of application of Sharia, there is also a role for clan elders and *Xeer*.

The following legal systems govern domestically in Somaliland and administer children's rights:

	Name of the law	**Legislature**	**Writer/unwritten**	**Area of influence**
1	Formal law	Somaliland Parliament	Written	Formal system
2	Sharia law	Religious law	Mainly written but not codified.	Formal system and the "informal system."
3	*Xeer*	Clan elders (*Guurti*, *Xeerbeegti*)	Unwritten	Formal system and the "informal system."
4	International law	States	Mainly written except customary international law.	Influences formal national law-making.

All four laws govern some aspects of children's rights in Somaliland. Formal national law either directly cites or states that its interpretation should be based on international law. For example, the Constitution states that the Bill of Rights should be interpreted in a manner consistent with international human rights law, despite the fact that Somaliland has not ratified any human rights treaty.

Empirical research would better explain the extent of the coverage of each of the four legal systems, how they in practice function on the ground daily, and how people engage with them. It would be a particularly interesting area of empirical research to study how the application of *Xeer* and Sharia law is displayed within children's rights.

8.3.3 Case study one: children's right to nationality

Conflicting claims of sovereignty by Somalia and Somaliland complicate the accessibility of nationality by the children living in Somaliland. Somaliland has a separate nationality law that governs the acquisition and loss of nationality. Somaliland's promulgation of nationality law is connected to its declaration of independence and fulfilment of the Montevideo Convention, where having a permanent population is a requirement Somaliland intends to prove with the existence and enforcement of nationality, refugees and migration laws.[1059] It issues passports and identity papers to its citizens and requires visas for foreigners. It also has a legal framework to deal with refugees. Somalia also has nationality laws that apply to children in Somaliland. The existence of these laws creates the possibility of dual nationality. However, they also raise serious questions regarding (a) the meaning of the nationality granted by Somaliland, an unrecognised State, and (b) the accessibility of Somalia's nationality to children living in Somaliland.

The nationality of Somaliland has effective internal functions but limited external functions due to the lack of recognition. Having Somaliland nationality gives holders rights and privileges associated with being Somaliland citizens domestically. Somaliland's lack of recognition means it may not be able to accord protection to its citizens outside of Somaliland, and very few States accept its passport as a travel document.[1060] Its citizens face challenges in engaging in international trade, and accessing education abroad and the international financial/banking system.

Somalia's nationality does not give holders rights or privileges within Somaliland. A Somali passport holder is considered a foreigner in Somaliland. Somalia citizenship has relative external recognition.[1061] Having the nationality of a recognised State is not a guarantee of automatic protection of citizens abroad. The consular services a State can provide depend on its capacity and presence in the foreign State and its willingness. So, possessing a Somalia passport does not mean adequate external protection – Somalia is a weak State to the extent that it is ranked the 1st weakest in the "Fragile States" index[1062] and the 4th weakest in the Global Passport Power Ranking.[1063] But, it is a State that is a member of the international community (UN and AU). Its right to grant nationality and the *prima facie* evidence of its passports and identity papers are recognised by other States.

The accessibility to Somalia's nationality is in practice limited and is a privilege because the Somaliland government does not allow Somalia to open offices in the territory to issue passports and identity papers. A resident in Somaliland seeking a Somali passport has to travel to Somalia or seek a secret office that provides Somali passports within Somaliland, which is illegal under the laws of Somaliland.

The children living in Somaliland are at risk of *de facto* statelessness. It is *de facto* stateless, not *de jure*, because, under the operation of Somalia's law, those who fulfil the requirements under the nationality laws of Somalia are citizens of Somalia, an internationally recognised nationality.

[1059] Somaliland has the Citizenship Act and the Migration Law. It also enacted the Refugees Act.

[1060] Currently, Ethiopia, the United Kingdom and the United Arab Emeritus include the States that issue a visa to Somaliland passport holders without recognising Somaliland as a State.

[1061] The weakness of the government of Somalia since the collapse of the central government in 1991 means it has a weak capacity to protect its citizens outside its territory. Moreover, its passport is among the five weakest passports in the world's passport power index. Global Passport Power Rank 2023 | Passport Index 2023, last accessed 23 March 2023.

[1062] Country Dashboard | Fragile States Index, last accessed 3 March 2023.

[1063] Global Passport Power Rank 2023 | Passport Index 2023, last accessed 23 March 2023.

Even those who access Somali nationality papers cannot establish a genuine connection, and there are no "reciprocal rights duties"[1064] between the nationality holder and Somalia due to the loss of effective control. Furthermore, Somaliland's nationality cannot be automatically discarded on the basis of the lack of recognition. It is a nationality that is effective internally and establishes a legal bond, and its holders might not feel a problem until they start engaging with the outside world.

Can Somaliland grant nationality under international law? In the legal sense, nationality is associated with statehood. The nationality acquired from a contested State becomes a contested nationality. The right to nationality is a right mainly affected by the disputed status of unrecognised States because nationality, unlike most other rights, needs reciprocal recognition to function externally. A child's right to education does not need recognition from other States to access schools in Somaliland. But a child who wants to travel – say for education purposes – is obligated to have a valid passport. The nationality acquired, e.g. passports, from the authority controlling the population in Somaliland is not widely recognised outside its borders. The recognised State, Somalia, is unable to give access to nationality to children living in Somaliland due to its loss of effective control.

Furthermore, the existing nationality laws of Somalia and Somaliland contain gendered language that does not allow, in essence, mothers to transmit nationality to their children and spouses on the same terms as the father. The enforcement of these laws may create statelessness. Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons defines stateless as: "a person who is not considered as a national by any State under the operation of its law." Also, the conflict of laws between Somaliland and Somalia is a potential source of statelessness as well.

8.3.4 Case study two: the right to protect children from sexual abuse

Somaliland's laws do not define what constitutes child sexual abuse, and no special law governs the protection of children from sexual abuse. This dissertation analysed laws that lay down sexual offences, in general, to explore if and how children are protected from sexual abuse. The research identified that the following laws and bills are applicable to sexual offences in Somaliland: the Somali Penal Code (1962), the Rape and Sexual Offences Act (2018), the Rape, Zina and Related Offences Bill (2019), and the Prevention and Suppression of Human Trafficking Act (2022). These laws contradict each other, and their legal status is contested and challenged. Some violate children's rights, for example, the Rape, Zina and Related Offences Bill (2019).

The plural legal system has a dramatic effect on child sexual abuse. The sexual offences laws demonstrate the interplay of *Xeer*, formal law and Sharia and how the hybrid system impacts children's rights in Somaliland. The mixed system affects the definition of abuse, the age of the child and what sexual activities are criminal if children are involved. The approach of the Penal Code and the Rape and Sexual Offences Act (2018) is the total criminalisation of any sexual activity involving children. The latter was suspended on the ground that it "contradicts" Sharia. The 2019 amendment (named the Rape, Zina and Related Offences Bill) incorporates Sharia doctrines that permit child marriage and treat children of all ages as agents capable of giving consent to sexual activities. Although the amendment does not require the State to punish children, it does not consider having sex with a child rape. The 2019 amendment was approved by the Cabinet and the House of Representatives (the lower house of the bicameral parliament) and is at

[1064] See the definition provided in Permanent Court of International Justice, Tunis and Morocco Nationality Decrees, Advisory Opinion of 1923.

the time of writing of this dissertation with the *Guurti* (the upper house). The *Guurti* consists primarily of traditional elders and religious men and often views laws from Sharia and *Xeer* perspectives.

The laws on sexual offences contain apparent ambiguities in how formal laws deal with child sexual abuse. It manifests the competition of norms and doctrines regarding children's rights from three legal systems that do not have observable hierarchies, and their jurisdiction is not clearly delineated.

8.3.5 Comparing formal national law with the CRC

This section compares the CRC and formal national law to examine areas of conformity and differences. A substantial difference between the CRC and Somaliland's formal national law related to children is the emphasis on Sharia law by the latter. The Child Rights Protection Act (CPA) stipulates that the interpretation of the CPA should be construed in a manner that does not contradict Sharia.[1065] The government's responsibilities under the CPA and in relation to children shall be carried out "in compliance with and shall not contradict Islamic Sharia…."[1066] Article 13(1) of the CPA further states: "children have the fundamental rights that are instructed in Islamic Sharia." The responsibilities of parents and guardians shall be performed in compliance with Sharia, according to the CPA.[1067] Many rights enshrined in the CPA are subject to the limitations of Sharia. The general principle in the CPA that requires that all articles in the CPA shall be interpreted in a manner that does not contradict Sharia poses a challenge to the formal national law provisions that comply with the CRC. This does not mean Sharia is against children's rights *per se*, but referring children's rights to another unspecified legal system presents considerable ambiguities and creates unnecessary confusion for the implementation and interpretation of children's rights.

The following table compares the CRC's 38 substantive articles with their equivalent provisions in formal law or lack of it. The comparison in this section is based on a comparison of legal texts and does not cover a comparison with other sources of domestic law. Articles 28 and 29 of the CRC are grouped into one category, "the right to education," because they are about different aspects of education. Formal laws are graded as (a) in conformity with (√), which means it is largely in conformity with the CRC, meaning the formal law protects children's rights; (b) not in conformity (×), which means there is no formal law on the right or the law in place is not in conformity with the CRC ; or (c) partially in conformity with (≤), which means there is a law on the substance, but it does not entirely fit the CRC. At the end of the table, a chart illustrates the percentage of conformity, not conformity and partially conformity.

	Article in the CRC	Equivalent article in domestic law	Explanation	G
1	Definition of the age of a child (art. 1)	The formal national laws provide contradictory definitions of the age of a child.	Domestic jurisdictions often have different definitions for different areas affecting children, for example, age of criminal responsibility, age of consent etc. The issue in Somaliland's legal	(×)

[1065] Child Rights Protection Act: art. 4(2).
[1066] ibid, art.7(2).
[1067] Child Rights Protection Act: art. 8.

			system is that within a single piece of legislation, different definitions are presented, creating confusion.	
2	Non-discrimination (art. 2)	The Constitution (art. 8), the CPA (art. 22) and the JJL (art. 5) prohibit discrimination.		(√)
3	The best interest of the child (art. 3)	Article 11 of the CPA state that "the best interest of the child shall be given primary consideration in all actions related to children undertaken by a court or a public institution (national, regional or district levels) or by any other person who is taking a decision on an issue related to the growth or welfare of a child or management of child's property or income and in accordance with Islamic Sharia."[1068] Article 6 of the Juvenile Justice Law (JJL) also recognises the child's best interest.	The CPA's approach to the best interest of the child is that it shall not contradict Sharia. Sharia supersedes the best interest of the child. The Sharia limitation to the best interest of the child is not included in the JJL.	(≤)
4	The Right to Parental Direction and Guidance (art. 5)	Under Articles 8 and 19 of the CPA, the parents are granted the responsibility to protect their children's rights and to give direction and guidance in accordance with Sharia.	Article 5 in the CRC is "a child rights-focused approach" that recognises the child as a right holder.[1069] So, it is about the children's rights, not the parent, and children are treated as active members.[1070] The CPA is, however, about the rights and	(×)

[1068] Art. 11(1)

[1069] Garton Kamchedzera. *A Commentary on the United Nations Convention on the Rights of the Child, Article 5: The Child's Right to Appropriate Direction and Guidance*. (Leiden: Brill | Nijhoff, 2012): 13.

[1070] John Tobin and Sheila Varadan, "Art.5 The Right to Parental Direction and Guidance Consistent with a Child's Evolving Capacities," in *The UN Convention on the Rights of the Child: A Commentary*. Edited by John Tobin (Oxford, United Kingdom: Oxford University Press, 2019): 159; Garton Kamchedzera. *A Commentary on the United Nations Convention on the Rights of the Child, Article 5: The Child's Right to Appropriate Direction and Guidance*. Commentary on the United Nations Convention on the Rights of the Child (Leiden: Brill | Nijhoff, 2012): 5; UN Committee on the Rights of the Child (CRC), *General Comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/; page 3, paragraph 5.

			responsibilities of parents. The options are limited: a child can be raised only as a Muslim, and the direction and guidance a parent can give are only those stated in the religion of Islam.[1071]	
5	Right to life, survival and development (art. 6)	Right to live, survival and development (art. 14, CPA)	The wording and the approach of the CPA are different from the CRC. Paragraph 1 of Article 13 states that "every child of a Somaliland national has the right to protection of his/her faith of the Islamic religion, life and development."	(≤)
6	Right to registration, and nationality (art. 7)	The right to nationality, identity and nationality are enshrined in CPA, the Citizenship Act and the Voter Registration Act.		(√)
7	Right to identity (art. 8)	The right to nationality, identity and nationality are enshrined in CPA, the Citizenship Act and the Voter Registration Act.		(√)
8	Right not to separate a child from parents (art. 9)	No article in the national law.		(×)
9	Right to family reunification (art. 10)	No article in the national law.		(×)
10	Combating illicit transfer and no-return of children (art. 11)	Illicit transfer is prohibited by the Prevention and Suppression of Human Trafficking Act.		(√)
11	- Freedom of expression (art. 12) - Right to be heard (art. 12(2).	The child's opinion and needs should be respected (art. 12(1), CPA). - The right to be heard, to participate and express an opinion in judicial proceedings (article 14, JJL),	The freedom of expression in formal laws employ language similar to the CRC.	(√)

[1071] Child Rights Protection Act: art. 19.

12	Right to information (art. 13)	Children's right to information is in Article 12(2) of the CPA, but as far as it does not contradict the scope set by Sharia.	Children's right to information is limited by the rules of Sharia.	(×)
13	Freedom to thought, conscience and religion (art. 14)	No article in the CPA.	Article 18 of the CPA covers the right of the child to become Muslim. A child in Somaliland is entitled to become a Muslim. Article 19 states that the child should be guided and directed to become a Muslim, and it is the responsibility of the parent to do so.	(×)
14	Freedom to assembly (art. 15)	No article in the CPA.	The Constitution generally guarantees freedom of assembly. But that is not specifically about children.	(×)
15	Right to privacy (art. 16)	Article 26 of the CPA and Article 7 of the JJJ guarantee the right to privacy.	The protection of privacy rights is similar to the CRC.	(√)
16	Mass media and children's right to information (art. 17)	No similar article in national laws.		(×)
17	Common responsibilities of both parents (art. 18)	No similar articles in the CPA or other laws.	Article 8(3) of the CPA sets out that each parent shall carry out her/his responsibilities as demarcated by Sharia.	(×)
18	Right to protection from abuse, violence and neglect (art. 19)	Article 15 of the CPA: a child has a right to protection from neglect of all aspect of the child's life, including parental care, physical and mental growth, healthcare, education and other rights enshrined in the Law and in any manner that appears to be in the best interest of the child that does not contradict with Sharia.	There is no law that governs the protection of children from sexual abuse. The National Education Act is silent about the issue of corporal punishment. The sexual offences laws in Somaliland lack special provisions for children and are not in compliance with the CRC.	(×)

		Article 30(1) guarantees the protection of the child from "all actions that are physical or emotional violence."		
19	Alternative care, including *Kafala* (art. 20)	*Kafala* is covered in Article 27 of the CPA. Article 10 gives way to placing a child with a guardian in case the parents are dead, neglect the child, or cannot take care of the child. Article 23 governs when the government establishes childcare institutions to place children without parents, guardians or *Kafala*.	Only a Muslim person who is a Somaliland citizen can provide Kafala to a child. The other forms of alternative care in the CPA are vague and lack details and proper protection.	(≤)
20	Adoption (art. 21)	No article on adoption.		(×)
21	Rights of refugee children (art. 22)	Refugees and Asylum Seekers Act respect the rights of refugees rights.		(√)
22	Rights of children with disability (art. 23)	Article 24 of the CPA.	Article 24 of the CPA (rights of children with special needs) covers groups of children, including children with disability, homeless children, terminally ill children, children with no parents, and children who are refugees, migrants or internally displaced.	(√)
23	Right to health (art. 24)	A child has a right to health service when s/he faces a medical condition that appears incurable, or the family of the child cannot cover the medical expenses. Every child has a right to vaccination against transmissible diseases (Article 28 of the CPA).	The right to health in the CPA is extremely confined to special circumstances. That is not the case with Article 24 of the CRC, which states, *inter alia*, "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her	(×)

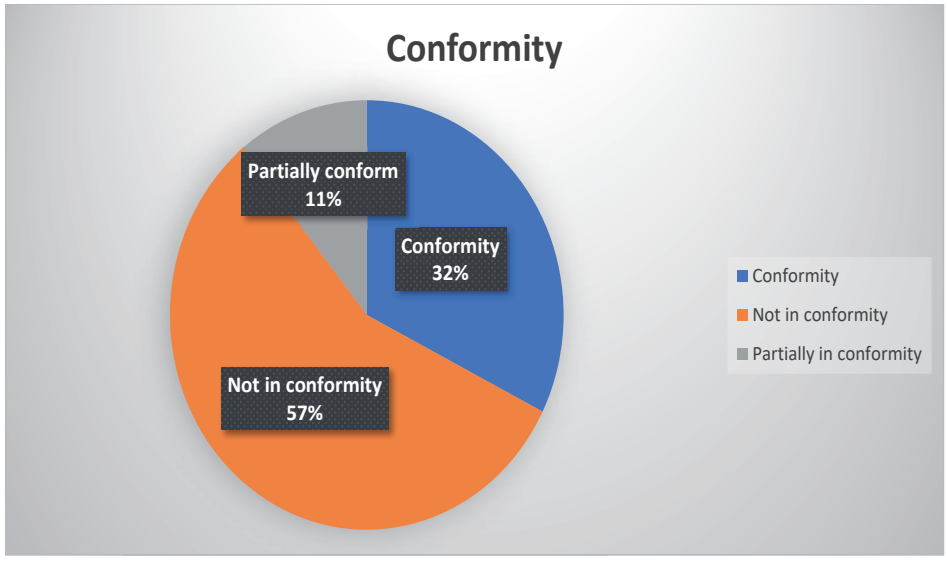
			right of access to such health care services."	
24	Periodic review of children placed (art. 25)	No article in the formal national laws.		(×)
25	Social security (art. 26)	No article in the formal national laws.		(×)
26	Adequate standard of living (art. 27)	No article in the formal national laws.		(×)
27	Right to education (art. 28 and 29)	Article 21 of the CPA and Article 5 of the National Education Act guarantee the right to education.		(√)
28	Rights of children from minorities (art. 30)	No article in the formal national laws.		(×)
29	Right to rest and leisure (art. 31)	Article 25 of the CPA.	Article 25 of the CPA mandates the government to establish rest and leisure facilities that are appropriate for the body and mental growth of children, encourage leisure facilities for children with special needs, and promote children's participation in cultural events, art and other activities appropriate for children's guidance.	(√)
30	Protection of children from economic exploitation (art. 32)	The Labour Law prohibits employing children under 18 years' old in tasks involving underground or on-water activities.[1072] The law requires that work does not hinder a child's continuation of fundamental education.[1073]	The Labour Law provides some protection for children, but it does not adequately address the protection of children from economic exploitation.	(≤)
31	The right to protect children from the illicit use of narcotic drugs and psychotropic substances (art. 33)	Article 29 of the CPA.	There is a sentence in Article 29 which states that children should be protected from drugs. Prohibited drugs are governed by the Anti-drug Act, and Khat does not include them. The CPA does not provide a legal framework to protect children from the	(×)

[1072] Labour Law: art. 46(4).
[1073] ibid art. 46(3).

			consumption of Khat or the use of narcotic drugs and psychotropic substances. No law exists to define who can consume legal drugs such as Khat. Therefore, children are not protected from it. Article 33 of the CRC is broad. It reads: "States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances."	
32	Right to protect children from sexual exploitation (art. 34)	No specific article in the CPA about the right to protect children from sexual exploitation.		(×)
33	Child trafficking (art. 35)	Article 30(2) of the CPA guarantees the protection of children from trafficking. The Prevention and Suppression of Human Trafficking Act prohibits the trafficking of children.		(√)
34	All forms of exploitation (art. 36)	No article in national laws.		(×)
35	- Prohibition of torture or other cruel, inhumane or degrading treatment or punishment (art. 37(a)). - Right to be protected against unlawful or arbitrary	- Article 29 is titled: Protection from Torture, Inhumane or Degrading Treatment. - Articles 8 and 9 of the Juvenile Justice Law protect children against unlawful or arbitrary	The content of Article 29 does not say anything about torture or inhumane or degrading treatment. However, from the title, one can deduce that the CPA prohibits torture, and inhumane and degrading treatments. The Constitution clearly prohibits torture and other cruel, inhumane	(√)

	deprivation of liberty (art. 37 (b) (c) (d).	deprivation of liberty and provides guarantees.	or degrading treatment or punishment.	
36	Armed conflict (art. 38)	No article in national laws.		(×)
	Assistance to a child victim (art. 39)	No article in national laws.		(×)
37	The rights of an accused child (art. 40)	Every child has free legal aid (Article 32, CPA), The JJL has extensive articles concerning the rights of an accused child.	Although the JJL has expansive provisions, children are arrested and tried under Article 33(3) of the POSL at the request of the parents.	(√)

The analysis of the table above shows that 57% of the articles in the CRC do not have equivalent provisions in national law, or those in the national law are not in conformity with the CRC, which means the formal national law does not protect children's rights. The national law has conformity with only 32% of CRC provisions, meaning that is the level of protection containing in formal national law. The remaining 11% is partially in conformity.



Even the CRC provisions with equivalent clauses in the formal law need further investigation and study. The interplay of the three legal systems impacts children's rights. For example, the table shows that Somaliland has laws that are equivalent to the right to registration, identity and nationality under Articles 7 and 8 of the CRC. However, the case study demonstrates that formal national law does not sufficiently protect children from statelessness because of the status of Somaliland as an unrecognised State – not necessarily the fault of Somaliland – and the gendered Citizenship Law that discriminates against women and the role of *Xeer* (see Chapter 6).

In terms of child sexual abuse, (a) the laws of Somaliland are conflicting and, as a consequence, unable to protect children from sexual abuse, and (b) a special law about the right to protect

children from sexual abuse is missing. For example, child marriage is not illegal in Somaliland.[1074] The laws of Somaliland do not define the age of marriage and do not treat marrying a child as a criminal act. The CPA, a special law for children, does not mention it. A prohibition of child marriage and female genital mutilation, included among other issues in the first draft of the CPA, was later removed.[1075] A proposed amendment to the Rape and Sexual Offences Act (2019 amendment) permits child marriage (see Chapter 7).

The original, now suspended, Sexual Offences Act (2018) was relatively better for protecting children and adults from some sexual offences. Even if the confusion existing in the criminal laws is solved, they are insufficient in addressing issues of child sexual abuse, which require more than criminal law. Civil and administrative measures and the establishment of appropriate institutions that assist children who are survivors of sexual abuse are needed and obligated by the CRC.[1076] Currently, Somaliland lacks them.

There are also other laws that directly violate children's rights. For example, the Public Order and Security Law (POSL) gives parents the authority to ask a district court to apprehend a child for disobeying the parent. With no clear definition of disobedience and the absence of due process of law (as it is based on the request and testimony of a parent), the accused child is more likely to end up in prison.

Moreover, protecting children's rights requires a comprehensive approach that considers all aspects of the law (for example, civil, criminal and administrative laws) to avoid contradictions and loopholes and to establish a complementary legal framework. The JJL stipulates that children under the age of 15 do not have criminal responsibility, and those under 18 have limited criminal responsibility. The absence of birth registration and birth certificates poses a challenge to this article's implementation because it is not straightforward to say an accused person is not 16 but is 14 years' old.

8.4 Answering the main research question: how do international and national laws protect the rights of children living in Somaliland?

The main research question is: how do international and national laws protect the rights of children living in Somaliland? The rigid dichotomy between State and non-State entities, and looking at subjects and objects of international law from the prism of the State make Somaliland an anomaly, and international human rights law is unprepared to provide adequate mechanisms to protect children living in Somaliland. Not a party to human rights treaties and not recognised as a State, Somaliland finds itself under the radar of international human rights law. Treaty- and Charter-based human rights bodies do not receive reports from Somaliland and do not scrutinise it as an international legal person capable of having duties and rights under international law. Somalia, the State with recognition and membership with international bodies, lost effective control three

[1074] Leah Kenny et al., "Adolescent-led marriage in Somaliland and Puntland: A surprising interaction of agency and social norms", Journal of Adolescence, Volume 72, 2019: 102.
[1075] I was part of the group of lawyers who drafted the first version of the Child Rights Protection Act in 2014/2015. Prohibition of FGM and child marriage were included in the first draft. However, that draft was reviewed and drastically changed.
[1076] UN Convention on the Rights of the Child, 1989: art. 19(2).

decades ago and is unable to perform its legal obligation under the CRC, even if it is fully willing to do so.

Customary international human rights law and *jus cogens* rules are less restrictive than treaties in terms of whom they apply to. These laws are applicable in theory to Somaliland, despite the apparent difficulty in ascertaining and identifying their content. Even so, existing international human rights law enforcement mechanisms ignore and fail to establish procedures that offer avenues to scrutinise, review and report about Somaliland in a manner that takes into consideration its status for the benefit of the rights holders. If there is a mismatch between the fact of having a right and the entity that bears the obligation, having the right becomes almost meaningless. That is why the position of treaty- and Charter-based bodies who are fixated on the recognised State that lost effective control and overlooked the authority in control of the territory is not helpful in holding anybody accountable for the rights of children in Somaliland.

Somaliland's national legal system, consisting of various legal orders with sometimes competing concepts, has laws about children's rights. On the one hand, these laws recognise children's rights and incorporate some provisions from international child rights law. On the other hand, there are contradictions, loopholes and ambiguities as well as clear violations of children's rights. Nevertheless, the national law is in a position that can be improved. Domestically, the human rights obligation of the government of Somaliland emanates from the Constitution and parliamentary laws. Therefore, the obligation exists, and justiciable rights are present. The degree of protection these laws can grant depends not only on child-related laws but also on the overall legal framework and independence, effectiveness and impartiality of institutions, including the judiciary, together with how *Xeer* and Sharia interact with the formal national law.

8.5 Recommendations

This section provides recommendations for international human rights bodies, for the government of Somaliland, and for non-governmental organisations (national and international) working on children's rights and human rights in general.

Recommendations for UN human rights bodies (Charter and treaty based bodies)

The status of Somaliland makes necessary the adoption of a special approach to scrutinise the children's rights and to provide inhabitants with procedures to file complaints in international and regional human rights bodies. The current method used by human rights bodies is not human rights-centred. There should be legal and political space to permit the Somaliland government and non-governmental organisations to submit separate reports. This requires preparing and publishing guidelines and procedures specific to unrecognised States. If such reporting is permitted, it will establish a mechanism to examine the children's human rights situation in Somaliland and provide recommendations and concluding observations.

Moreover, it is necessary for the Committee on the Rights of the Child to address Somaliland separately in its review mechanisms, including concluding observations. These measures could be taken without taking a position on the status of Somaliland. It is essential for the existing mechanisms to become inclusive and go beyond the narrowly defined divisions of State and non-State actors. This may include creating a complete procedure for Somaliland (and perhaps other unrecognised States) to accommodate their unique position.

Moreover, Somalia currently reports about the human rights situation of Somaliland in a generic way, without acknowledging that it no longer has effective control. Somalia needs to continue its reporting, particularly within the scope of its positive obligation. However, acting as if it still has effective control over the territory does not reflect reality. Human rights bodies, in particular the Committee on the Rights of the Child, can demand that Somalia report its positive obligation emanating from the *de jure* jurisdiction over the territory and acknowledge the loss of control. Within that framework, the Committee can expand its scrutiny of Somaliland by receiving reports from non-government organisations and noting these reports in its observations.

The UN General Assembly

The status of Somaliland has persisted for three decades, and there is no immediate foreseeable solution to it. Therefore, permitting Somaliland to accede to human rights treaties in a manner similar to the State of Palestine may help to improve the protection of the people in Somaliland. The UN General Assembly granted Palestine the status of a non-member observer State,[1077] which allowed Palestine to ratify human rights treaties.[1078] The extra-Charter status of the non-member observer does not mean recognition of statehood.[1079] Other non-recognition options include accepting Somaliland as a member of a UN specialised agency which would allow, under the 'Vienna Formula,' Somaliland to join human rights treaties. Or the UN General Assembly can invite Somaliland to accede to human rights treaties without necessarily recognising Somaliland. These options are not official recognition of Somaliland's claim of statehood but are mechanisms that can impose a legal obligation on Somaliland in relation to the children and the larger population under its control. It is a way to accept reality when it does not fit the State and non-State division of actors and when existing mechanisms are restricted.

Recommendation for the government of Somaliland

The Constitution of Somaliland makes clear that Somaliland must abide by regional and international human rights treaties. The thesis proposes the following approaches:

8.5.1. Compliance with international child (human) rights treaties in domestic laws

Somaliland should incorporate the UN Convention on the Rights of the Child and other human rights instruments in its domestic law by means of legislation. If this approach is accepted, it means the international human rights treaties would become part of Somaliland's national law and would bypass the predicament posed by the lack of recognition, at least domestically. The proposal is for Somaliland to incorporate human rights treaties in legislation by adopting them as they are written in these treaties.

8.5.2. Somaliland to seek to join international human rights treaties

Article 81 of the Vienna Convention on the Law of Treaties states:

[1077] UN General Assembly, Status of Palestine in the United Nations, Resolution 67/19, UN Doc. A/RES/67/19, 29 November 2012.
[1078] Jure Vidmar, "UN Membership and the State Requirement: Does 'State' Always imply 'Statehood'?" in *Max Planck Yearbook of United Nations Law* (2020) Volume 24, 1, edited by Erika de Wet, Kathrin Maria Scherr and Rüdiger Wolfrum: 212.
[1079] Jure Vidmar, "UN Membership and the State Requirement: Does 'State' Always imply 'Statehood'?" in *Max Planck Yearbook of United Nations Law* (2020) Volume 24, 1, edited by Erika de Wet, Kathrin Maria Scherr and Rüdiger Wolfrum: 212.

> The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialised agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention.

Somaliland should seek to fulfil one of the criteria in Article 81 to be able to accede to human rights treaties. Despite the political difficulties present, genuine attempts to fulfil these requirements in good faith may prove successful or at least manifest that Somaliland is committed to taking human rights seriously. This dissertation recommends that joining a specialised agency of the UN may be less difficult than the other options.

International and national nongovernmental organisations

Several human rights bodies, including the Committee on the Rights of the Child, the Human Rights Committee and the Human Rights Council under the Universal Periodic Review (UPR), receive reports from non-governmental organisations. These are unique processes where international and national non-governmental organisations can cooperate to present reports about the child (human) rights situation in Somaliland in a separate submission and lobby within these bodies to accommodate the reports and provide separate recommendations particularly addressing the situation of Somaliland. Moreover, non-governmental organisations play a role in advocating for Somaliland to incorporate the CRC and to realise children's rights in Somaliland.

Impact paragraphs

The research covers an important area of human rights that does not attract much research attention. Children's rights and human rights in unrecognised States are not subjects that are the focus of research and advocacy. This research attempts to fill the gap. It gives a legal foundation for understanding children's rights in the context of an unrecognised State. Although the focus of the research is on Somaliland and other unrecognised States were not examined, it raises several issues concerning children's rights and unrecognised States. It illustrates the shortcomings of international human rights law in covering children's rights in an inclusive manner and how the narrow categorisation of international legal persons as State and non-State actors limits the universalistic language of human rights treaties.

The research is relevant for the academic community researching children's (human) rights and unrecognised States. It also contributes to understanding the legal obligations of actors involved in the context of unrecognised States. The research findings and recommendations are relevant for UN human rights bodies, treaty-based human rights bodies, nongovernmental organisations, human rights activists, and national authorities. Domestic actors in Somaliland may see this research as relevant in terms of its analysis of international human rights law's obligations and the domestic laws concerning children. In that aspect, international and national laws are analysed to demonstrate children's rights and explore which entities are obligated to protect children's rights and how that works. From a practical perspective, practitioners, including government authorities and activists, may find from the research useful information on international and national laws that would assist them in formulating policies and strategies that further children's rights. The research particularly analyses Domestic laws concerning children, which is essential for all actors working in Somaliland. These include UN specialised agencies that are present in Somaliland and international civil society groups that specialise in children's rights. They will find legal information on Somaliland's legal system and what it says about children's rights.

The research includes information that may help human rights bodies by offering options that would permit unrecognised States to sign human rights treaties. These options would also assist international and national human rights organisations and provide a basis for their advocacy strategies in demanding better protection of children's rights. The practical options offered by the research may contribute to the development of better international human rights mechanisms that respond to the unique characteristics of Somaliland and other unrecognised States with similar features.

This research sets the foundations for further empirical research to collect data to create a complete picture of the socio-legal situation for children in Somaliland and, in particular, to look empirically at how the pluralist legal system of Somaliland consisting of the formal law, Sharia law and Xeer, play out in relation to children's rights.

Summary of the Dissertation

This research studies children's rights in Somaliland, an unrecognised State located in the Horn of Africa. Using a legal doctrinal methodology that is a combination of descriptive and evaluative approaches, it studies the applicability of international child (human) rights laws on the unrecognised State of Somaliland and evaluates how the domestic laws of Somaliland protect or do not protect children's rights. Currently, the prevailing narrative concerning child (human) rights is centred on (recognised) States, the implementation of human rights obligations, and the role of non-State actors. Activists and researchers often examine if a particular State has signed a particular treaty and, if the answer is yes, whether the obligations therein have been fulfilled. This research aims to fill the gap by focusing on an unrecognised State from the perspective of international law, in particular international human rights law, in relation to the unrecognised State and the recognised State as well as from the perspective of national law.

To this purpose, chapters 2 to 4 examine the international human rights law aspect of the dissertation by looking at the legal obligation of the relevant actors: Somaliland and Somalia. Chapters 5 to 7 study the national laws of Somaliland vis-à-vis children's rights, and chapter 8 concludes with findings and recommendations.

More specifically, chapter 2 studies the status of Somaliland in the context of international legal personality, statehood and recognition. It aims to situate Somaliland in the international arena where the dichotomy of State and non-State actors dominates. Somaliland has a population, a territory and a government and its capacity to enter into international relations is contested due to the lack of recognition. Somaliland has the attributes of statehood and acts and looks like a State, but internationally, it is considered part of Somalia. Authors employ different terms such as *de facto* State, contested State, breakaway region, self-declared republic, territorial non-State actor, etc. Chapter 2 defines and adopts the term unrecognised State to refer to Somaliland and explains why this term is used.

Chapter 3 focuses on Somaliland's legal obligations under international human rights law and in relation to children's rights. Treaty law, international customary law and norms of *jus cogens* are studied. The chapter examines Somaliland from different scenarios to investigate if there is a human rights obligation on Somaliland as an entity with effective control of a territory internationally recognised to constitute part of Somalia, a Member State of the African Union and the United Nations.

Chapter 4 examines whether Somalia has a legal obligation under the UN Convention on the Rights of the Child (CRC) and general international human rights law in relation to the children in the territory under the control of the government of Somaliland. Somalia has *de jure* recognition yet lacks effective control. The chapter examines the interrelated notions of jurisdiction (*de facto* and *de jure* jurisdiction), territorial sovereignty, and State obligations. It also investigates Somalia's actions under the implementation obligations required by the CRC to understand if Somalia has assumed obligation over the territory.

Chapter 5 concerns the formal national law of Somaliland regarding children's rights. It examines the interactions between the *Xeer*, Sharia and the formal law and examines how formal laws define children's rights. Formal national laws are identified and analysed. Chapter 6 and Chapter 7 are two case studies that focus on the child's right to nationality (chapter 6) and their right to protection from sexual abuse (chapter 7). The domestic laws concerning these two subjects are identified and legally analysed.

Chapter 8 concludes the findings of the research and provides recommendations to stakeholders and the actors at national and international levels. It is in this chapter that the main research question and sub-questions are answered.

Samenvatting van het proefschrift

Dit onderzoek bestudeert kinderrechten in Somaliland, een niet-erkende staat in de Hoorn van Afrika. Gebruikmakend van een juridisch doctrinaire methodologie die een combinatie vormt van beschrijvende en evaluatieve benaderingen, onderzoekt het de toepasbaarheid van internationale kinder(mensen)rechten wetgeving op de niet-erkende staat Somaliland. Daarnaast wordt geëvalueerd hoe de binnenlandse wetgeving van Somaliland kinderrechten al dan niet beschermt. Momenteel concentreert het overheersende narratief met betrekking tot kinder(mensen)rechten zich op (erkende) staten, de implementatie van mensenrechtelijke verplichtingen, en de rol van niet-statelijke actoren. Activisten en onderzoekers onderzoeken vaak of een bepaalde staat een bepaald verdrag ondertekend heeft en, als dat zo is, of de verplichtingen die daaruit voortvloeien nagekomen zijn. Dit onderzoekt wil de kloof dichten door te focussen op een niet-erkende staat vanuit het perspectief van het internationaal recht, in het bijzonder de internationale mensenrechtenwetgeving, in relatie tot de niet-erkende en de erkende staat, alsmede vanuit het perspectief van nationale wetgeving.

Met dit doel wordt in hoofdstuk 2 t/m 4 het aspect van internationale mensenrechtenwetgeving van de dissertatie onderzocht door te kijken naar de wettelijke verplichtingen van de relevante actoren: Somaliland en Somalië. De hoofdstukken 5 t/m 7 onderzoeken de nationale wetgeving van Somaliland ten opzichte van kinderrechten, en hoofdstuk 8 sluit af met bevindingen en aanbevelingen.

Meer specifiek bestudeert hoofdstuk 2 de status van Somaliland in de context van internationale rechtspersoonlijkheid, staat en erkenning. Het doel is om Somaliland te situeren in het internationale speelveld, waar de dichotomie van statelijke en niet-statelijke actoren domineert. Somaliland heeft een bevolking, een territorium en een regering, en haar bevoegdheid om internationale relaties aan te gaan wordt betwist vanwege het ontbreken van erkenning. Somaliland heeft de eigenschappen van een staat, handelt als een staat en ziet er uit als een staat, maar wordt internationaal gezien als een deel van Somalië. Auteurs gebruiken hiervoor verschillende termen zoals *de facto* staat, betwiste staat, afgescheiden regio, zelfverklaarde republiek, territoriale niet-statelijke actor, enzovoort. Hoofdstuk 2 definieert en gebruikt de term niet-erkende staat om te refereren aan Somaliland en legt uit waarom deze term gebruikt wordt.

Hoofdstuk 3 focust op de wettelijke verplichtingen van Somaliland onder de internationale mensenrechtenwetgeving en met betrekking tot kinderrechten. Verdragsrecht, internationaal gewoonterecht en *jus cogens* normen worden bestudeerd. Dit hoofdstuk beschouwt Somaliland vanuit verschillende perspectieven om te onderzoeken of er een mensenrechtenverplichting geldt voor Somaliland, als een entiteit met effectieve controle over een territorium dat internationaal wordt erkend als deel van Somalië, een lidstaat van de Afrikaanse Unie en de Verenigde Naties.

Hoofdstuk 4 onderzoekt of Somalië een wettelijke verplichting heeft onder het VN-verdrag inzake de rechten van het kind (IVRK) en algemene internationale mensenrechtenwetgeving in relatie tot de kinderen in het gebied dat onder controle staat van de regering van Somaliland. Somalië heeft *de jure* erkenning maar ontbeert effectieve controle. Het hoofdstuk onderzoekt de samenhangende noties van rechtsbevoegdheid (*de facto* en *de jure* rechtsbevoegdheid),

territoriale soevereiniteit en statelijke verplichtingen. Het inventariseert ook de acties van Somalië in het licht van implementatie verplichtingen vereist door het IVRK, om te begrijpen of Somalië verplichtingen op zich heeft genomen over het territorium.

Hoofdstuk 5 heeft betrekking op de formele nationale wetgeving van Somaliland over kinderrechten. Het onderzoekt de interacties tussen de *Xeer,* Shariarecht en formeel recht, en onderzoekt hoe formele wetten kinderrechten definiëren. Formele nationale wetten worden geïdentificeerd en geanalyseerd. Hoofdstuk 6 en hoofdstuk 7 zijn twee case studies die focussen op het recht van het kind op nationaliteit (hoofdstuk 6) en hun recht op bescherming tegen seksueel misbruik (hoofdstuk 7). De binnenlandse wetten over deze twee onderwerpen worden geïdentificeerd en juridisch geanalyseerd.

Hoofdstuk 8 sluit de bevindingen van het onderzoek af en geeft aanbevelingen aan belanghebbenden en de actoren op nationaal en internationaal niveau. In dit hoofdstuk worden de belangrijkste onderzoeksvragen en deelvragen beantwoord.

Curriculum vitae

Guleid Ahmed Jama is a human rights lawyer based in Hargeisa, Somaliland. He finished his schooling in Erigavo, east of Somaliland, and earned an LL.B. and MA from the University of Hargeisa. He was admitted to the legal practice in 2010 and has been practising law since then.

Guleid founded in January 2013 the Human Rights Centre Somaliland, a human rights advocacy group, where he served as its head until February 2019. He co-founded other civil society organisations in Hargeisa and served as an advisory board member in international organisations, including the Knowledge Platform for Security and Rule of Law in the Hague, the Netherlands, and the Strategic Initiative for Women in the Horn of Africa in Kampala, Uganda. Guleid is a 2017 Mandela Washington Fellow at Rutgers University, USA, and a 2019 Fellow of Makwanyane Cornell Law School.

Guleid started this PhD research in August 2020 as an external PhD candidate funded by the Netherlands Organisation for Scientific Research (NWO) in its project on the development rights of children in unrecognised States. Guleid hopes to continue a career that combines activism and academic research.

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