Creating a Legal Framework for Terrorism Defectors and Detainees in Somalia

Since the military offensive against Al-Shabaab by African Union and Somali forces in Somalia in 2011, many terrorists have defected or been detained. To encourage defections, the Somali President has issued multiple amnesty decrees to members of Al-Shabaab. However, Somalia faces the problem of how to manage these former terrorists within the context of a very weak legal system, grappling with twenty-five years of civil conflict. Through multiple interviews with people working in Somalia on the national program for rehabilitating and reintegrating former terrorists, this Note maps out the current legal framework for handling terrorists and evaluates its effectiveness. It concludes that, while the current programs in Somalia are a positive step and likely to be more effective than traditional counter-terrorism models, there is still a need to ensure adequate safeguards for disengaging terrorists. To improve the efficacy of the legal framework, this Note suggests a number of recommendations: the need to create a transparent classification system, codification of best practices into law, slowly shifting away from military tribunals to civilian courts, maintaining freedom of movement, focusing on women, and placing the program within a broader development framework.

INTRODUCTION

After the overthrow of the Siad Barre regime in Somalia in 1991, the country experienced state fragmentation and disintegration.[1] Since then, warlords and militia groups, some of which identify as Islamist, have controlled large swathes of territory.[2] Since 2006, the terrorist group Harakat Al-Shabaab al-Mujahideen (known popularly as Al-Shabaab) has increasingly controlled greater portions of South-Central Somalia and has launched numerous regional terrorist attacks.[3] In 2011, Kenya, alongside the Somali Federal Government, deployed forces to try to curb the threat.[4] They later merged with the African Union Mission in Somalia ("AMISOM") and launched major military offensives against Al-Shabaab.[5]

As AMISOM reclaims more territory, many terrorists have either defected or been arrested.[6] To encourage defections from Al-Shabaab, the President of Somalia has announced multiple condition-

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1. Ioan M. Lewis, Understanding Somalia and Somaliland: Culture, History, Society 72-74 (2008).

2. Mary Harper, Getting Somalia Wrong? Faith, War and Hope in a Shattered State 34–35 (2012).

3. Stig Jarle Hansen, Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group, 2005–2012, at 47, 49–72 (2013).

4. Int'l Crisis Grp., The Kenyan Military Intervention in Somalia, at i (Feb. 15, 2012).

5. Press Release, African Union Mission in Som., AMISOM Assumes Formal Command of Kenyan Forces in Somalia (July 6, 2012), http://amisom-au.org/2012/07/amisom-assumes-formal-command-of-kenyan-forces-in-somalia.

6. *Somlia: Amisom Says Continued Defections from Al Shabaab Will Help Peace in Somalia*, RBC Radio (June 10, 2014), http://www.raxanreeb.com/2014/06/somalia-amisom-says-continued-defections-from-al-shabaab-will-help-peace-in-somalia; *see also* Cedric Barnes & Zakaria Yusuf, *Somalia's Al-Shabaab Down but Far from Out*, Int'l Crisis Group: In Pursuit of Peace (June 27, 2016), http://blog.crisisgroup.org/africa/somalia/2016/06/27/somalias-al-shabaab-down-but-far-from-out; *Somali National Intelligence Agency Backed by AU Troops Arrest Al Shabaab Elements*, AMISOM: African Union Mission in Somalia (Aug. 8, 2015), http://amisom-au.org/2015/08/somali-national-intelligence-agency-backed-by-au-troops-arrest-al-shabaab-elements; *Somalia: Over 300 Al-Shabaab Suspects Nabbed in Mogadishu*, Horseed Media (Aug. 16, 2016), https://horseedmedia.net/2016/08/16/somalia-over-300-al-shabaab-suspects-nabbed-in-mogadishu.

al amnesty programs for people who leave Al-Shabaab and go "through a process of supervised rehabilitation."[7]   There are a number of conditions to qualify for amnesty, including: "Recognition of previous crimes, Rejection of violence and rejecting al-Shabaab, Embracing a peaceful resolution to conflict, [and] A commitment to play an active part re-joining a community and contributing to its welfare."[8]   A key problem Somalia faces is how to manage these detainees and defectors. The Federal Government of Somalia has a very weak formal legal system.[9]   This Note will map out the current legal framework for handling Al-Shabaab detainees and defectors in Somalia, and evaluate the effectiveness of current programs. Currently, Al-Shabaab members are categorized into two groups, high-risk and low-risk.[10]   A rehabilitation program has been established for disarmament, demobilization and reintegration ("DDR"), as well as the de-radicalization of detained and defecting low-risk Al-Shabaab combatants, with assistance from the United Nations and international community.[11]   High-risk terrorists, however, are tried in military courts.[12]   The Note will also provide recommendations for improving Somalia's program, which can be applied to other fragile states attempting to handle large numbers of terrorists, in the context of ongoing conflict.

The research conducted for this Note includes in-person, Skype, and phone interviews with fourteen individuals involved in the administration, design, and oversight of the programs, as well as broader experts on counter-terrorism and deradicalization. I interviewed individuals from the U.N. and NGOs, as well as academics and experts. Further, I have drawn on publicly available information about deradicalization programs in Somalia. Due to the highly secretive nature of some these programs—and the lack of a robust legal and political system in place to ensure legislative and judicial oversight—the extent of Somalia's de-radicalization program cannot be ascertained with certainty.[13]   This Note nonetheless sketches the

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7.   Press Release, Office of the President, Fed. Republic of Som., HE the President of Somalia, Hassan Sheikh Mohamud on Al-Shabaab Defections (Jan. 28, 2015), http://www.villasomalia.gov.so/he-the-president-of-somalia-hassan-sheikh-mohamud-on-al-shabaab-defections.

8.   *Id.*

9.   *See infra* Part III.A.1.

10.   *See* discussion *infra* Part III.C.

11.   *See infra* Part III.

12.   *See infra* Part III.E.1.

13.   The number of foreign governments involved with the implementation of deradicalization in Somalia is also shrouded in secrecy. This Note does not explore in detail

broad framework for management of terrorism in Somalia.

Part I sets out the background in which the counter-terrorism framework in Somalia operates, considering the role of DDR programs and amnesty laws in counter-terrorism policy globally, and the history of terrorism in Somalia. It first evaluates the history of counter-terrorism, before and after the 9/11 terrorist attacks. It then reviews a history of DDR programs globally.

Part II looks at the evolution of Al-Shabaab in the particular context of the Somali terrorism amnesty program.

Part III evaluates the national program in place for rehabilitating and reintegrating former terrorists. It discusses the draft anti-terrorism bill, which will constitute the basis for criminal prosecutions of terrorism cases. It also evaluates the amnesty offer—announced by the President, which is intended to encourage greater defections—and analyzes the state of rule of law in Somalia more broadly. The rest of the Part focuses on the procedures for dealing with defectors and detainees, looking at the rehabilitation program for low-risk combatants and the treatment of high-risk cases through the criminal justice system.

Part IV focuses on recommendations for Somalia's deradicalization program, as well as for other fragile countries handling significant numbers of defecting and detained terrorists in the context of ongoing conflict. Though I conclude that the programs in Somalia are a positive step and likely to be more effective than traditional counter-terrorism models, I provide six recommendations to strengthen current efforts: (1) creating a transparent rights-based and rights-respecting classification system, (2) codifying and writing into law best practices and policies, (3) investing in the criminal justice system, (4) ensuring that all deradicalization centers allow freedom of movement and access to family, (5) putting women at the core of deradicalization programming, and (6) creating a broader development framework.

I. COUNTER-TERRORISM AND DDR

Counter-terrorism, not only in Somalia but around the globe, has evolved and shifted significantly since 9/11. Today, there is

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foreign engagement in Somalia's counter-terrorism or "countering violent extremism" programs, however, there is undoubtedly significant involvement. *See, e.g.*, Thomas Gibbons-Neff, *U.S. Airstrike Kills More Than 150 at Somalia Terrorist Camp, Military Says*, WASH. POST (Mar. 7, 2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/03/07/u-s-drone-strike-kills-more-than-150-in-somalia.

greater focus on "Countering Violent Extremism" ("CVE").[14] As part of this effort—and the attempt to combat terrorism in countries where there is ongoing civil conflict—DDR programs are increasingly being employed in situations that would have been traditionally considered a counter-terrorism operations. In Somalia, this is occurring with respect to the Al-Shabaab terrorist group. This section explains the evolution of counter-terrorism operations around the world, including the history and role of DDR programs in supporting these efforts. It then looks at the history of Al-Shabaab in Somalia.

A. *The Evolution of Counter-Terrorism Policies*

1. Counter-Terrorism Before 9/11

Conventional notions of counter-terrorism are focused on trying to eliminate enemy combatants, with minimal thought given to understanding the structural and ideological causes of extremism. The United States, for example, before 9/11, emphasized the use of intelligence, pursuit of an aggressive strategy to combat terrorism, and preparation to respond to a catastrophic attack.[15] The policy remained virtually the same from the 1980s until 9/11 and consisted of four pillars: "Make no concessions to terrorists and strike no deals; Bring terrorists to justice for their crimes; Isolate and apply pressure on states that sponsor terrorism to force them to change their behavior; and, Bolster the counter-terrorism capabilities of countries that

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14. *See infra* note 31 and accompanying text.

15. Understanding American counter-terrorism policy is useful because the United States has the highest military budget, generally tends to spearhead counter-terrorism policies and initiatives around the world, and has been significantly involved in Somalia (through proxies, drones, and some special forces). Leaked reports revealed U.S. presence in and around Somalia, and, on November 27, 2016, the New York Times reported that the United States had expanded the authorization to use military force against Al-Qaeda to encompass Al-Shabaab in Somalia. Charlie Savage et al., *Obama Expands War with Al Qaeda to Include Shabaab in Somalia*, N.Y. TIMES (Nov. 27, 2016), http://www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-qaeda-to-include-shabab-in-somalia.html; *The Drone Papers*, INTERCEPT, https://theintercept.com/drone-papers/ (last visited Dec. 4, 2016). For U.S. military involvement across Africa and in Somalia, see Nick Turse, *Target Africa: The U.S. Military's Expanding Footprint in East Africa and the Arabian Peninsula,* INTERCEPT (Oct. 15, 2015, 7:59 AM), https://theintercept.com/drone-papers/target-africa; Helene Cooper, *U.S. Strikes in Somalia Kill 150 Shabaab Fighters*, N.Y. TIMES (Mar. 7, 2016), http://www.nytimes.com/2016/03/08/world/africa/us-airstrikes-somalia.html; *see also* Gibbons-Neff, *supra* note 13; Anjli Parrin & Modupe Odele, *The Few Known Knowns About U.S. Drone Policy in Africa*, AFR. ARGUMENTS (Oct. 20, 2016), http://africanarguments.org/2015/10/20/the-few-known-knowns-about-us-drone-policy-in-africa.

work with the United States and require assistance."[16]   However, it must be stressed that counter-terrorism as a whole was not at this time prioritized by the United States or other powerful states.[17]   The 9/11 Commission Report stated that "none of the measures" taken by the administration prevented or delayed the terrorist activities, finding that "across the [U.S.] government, there were failures of imagination, policy, capabilities and management."[18]

2. Counter-Terrorism Post-9/11

The 9/11 attacks changed the United States', and global, approach to counter-terrorism.   In the immediate period post-9/11, the United States, understandably shaken by the attacks that left more than 3000 people dead, reacted strongly.   Professor Martha Crenshaw noted that "the Bush Administration decisively rejected a policy of restraint and declared a war on terror."[19]   The government swiftly passed the USA PATRIOT Act, which gave sweeping surveillance authority to the U.S. government and contained provisions relating to terrorist financing, border protection, and information sharing between agencies.[20]   The Central Intelligence Agency's 2003 National Strategy for Combatting Terrorism detailed a four-pronged approach to counter-terrorism, dubbed the "4D Strategy (Defeat, Deny, Diminish and Defend)."[21]   The 4D Strategy had a strong focus on the use of

16.   THE NAT'L COMM'N ON TERRORISM, COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM 17 (Aug. 2, 2000), https://www.gpo.gov/fdsys/search/pagedetails.action?granuleId=&packageId=GPO-COUNTERINGTERRORISM; *see also* MARTHA CRENSHAW, EXPLAINING TERRORISM: CAUSES, PROCESSES, AND CONSEQUENCES 138 (2011).

17.   *See, e.g.*, Cenap Cakmak, *Evolution of Global Counterterrorism Initiatives*, *in* COUNTERTERRORISM: FROM THE COLD WAR TO THE WAR ON TERROR: VOLUME 1: COMBATING MODERN TERRORISM (1968–2011) 229, 231 (Frank Shanty ed., 2012) ("[P]rior to 9/11 the permanent members [of the U.N. Security Council] never considered terrorism an imminent threat to international peace and security.").

18.   NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., FINAL REPORT: EXECUTIVE SUMMARY 9 (2004), http://govinfo.library.unt.edu/911/report/911Report_Exec.pdf.

19.   CRENSHAW, *supra* note 16, at 175.

20.   Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT of 2001), Pub. L. No. 107-56, 115 Stat. 276 (2001); *see also* Dhruba J. Bora, *United States*, *in* COUNTERTERRORISM: FROM THE COLD WAR TO THE WAR ON TERROR: VOLUME 1: COMBATING MODERN TERRORISM (1968–2011), *supra* note 17, at 185, 187–88.

21.   CENT. INTELLIGENCE AGENCY, NATIONAL STRATEGY FOR COMBATING TERRORISM 15 (Feb. 2003), https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter_

heavy military force and was more "aggressive [and] offensive" than the pre-9/11 strategy.[22] The strategy was designed to "eliminate capabilities that allow terrorists to exist and operate—attacking their sanctuaries; leadership; command, control, and communications; material support; and finances."[23] Some elements, such as the focus on states and military intervention into states accused of harboring or protecting terrorists, were retained from the pre-9/11 strategy. The outcome of this "grand strategy of preponderance and unilateralism" appeared to be, overall, unsuccessful.[24] Terrorism expert and Georgetown School of Foreign Service professor Daniel Byman dubbed the Bush administration's policies as a "garbage-pail approach to counter-terrorism [that] reflects a broader confusion on how to win the war on terrorism."[25] Writing in 2011, Crenshaw notes that "[t]he occupation in Iraq inspired further terrorism from Al Qaeda and its allies and affiliates. Afghanistan remained unstable and volatile after a military victory was declared, and terrorism spread to Pakistan."[26]

Although some U.S. allies took a softer approach to counter-terrorism than the United States, many joined in the war on terror and significantly supported U.S. policies.[27] As a result of the ineffectiveness of some of these policies, countries over the past few years have begun to adopt a broader set of counter-terrorism measures.

3. Shifts in the Counter-Terrorism Approach

The U.N. Global Counter-Terrorism Strategy—contained in General Assembly resolution 60/288 of September 8, 2006—represented a shift in the counter-terrorism approach.[28] It outlines

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Terrorism_Strategy.pdf.

22. *Id.* at 17.

23. *Id.*

24. CRENSHAW, *supra* note 16, at 180.

25. Daniel Byman, *US Counter-Terrorism Options: A Taxonomy*, 49 SURVIVAL, no. 3, 2007, at 121, 121.

26. CRENSHAW, *supra* note 16, at 180.

27. The EU has emphasized that counter-terrorism should include a very strong civilian component and respect for international law. *See* Gilles De Kerchove & Christiane Höhn, *Counter-Terrorism and International Law Since 9/11, Including in the EU-US Context*, 16 Y.B. INT'L HUMANITARIAN L. 267, 268–69 (2013). For a discussion of the difference in post-9/11 approaches to counter-terrorism, *see* KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM (2011).

28. G.A. Res. 60/288 (Sept. 20, 2006).

four methods to counter terrorism: creating measures to (1) "address the conditions conducive to the spread of terrorism," (2) "prevent and combat terrorism," (3) "build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard," and (4) "ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism."[29] This approach incorporated the use of non-military tools, in addition to the traditional military tools, to combat terrorism, and emphasized respect for fundamental human rights in the process.

The United States, too, shifted tactics. In the White House's 2011 National Strategy it listed "core principles" to guide U.S. counter-terrorism strategies: "Adhering to U.S. Core Values; Building Security Partnerships, Applying C[ounter]-T[errorism] Tools and Capabilities Appropriately; [and] Building a Culture of Resilience."[30] In line with this new policy, the government increased efforts at CVE both at home and abroad. In February 2015, the United States hosted a Summit on CVE at the White House.[31] The United States defined CVE as encompassing "preventative aspects of counterterrorism as well as interventions to undermine the attraction of extremist movements and ideologies that seek to promote violence."[32] Such methods include "[b]uilding awareness," "[c]ountering extremist narratives," and "[e]mphasizing [c]ommunity [l]ed [i]nterventions."[33] It "has evolved in response to the understanding that while conventional militarized and repressive counter-terrorism . . . strategies may be necessary, they are insufficient in ending terrorism when employed alone, and indeed, may even have the unintended consequences of fueling grievances and provoking further radicalisation."[34] Therefore, this approach represented the belief that there is a need to tackle the ideology underlying terrorism, and do it in a manner that respects core human rights principles.

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29. *Id.* at 4, 5, 7, 9.

30. THE WHITE HOUSE, NATIONAL STRATEGY FOR COUNTERTERRORISM 4 (June 2011), https://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf.

31. Fact Sheet, The White House Office of the Press Sec'y, The White House Summit on Countering Violent Extremism (Feb. 18, 2015), https://www.whitehouse.gov/the-press-office/2015/02/18/fact-sheet-white-house-summit-countering-violent-extremism.

32. *Id.*

33. *Id.*

34. Naureen Chowdhury Fink, *The Blue Flag in Grey Zones: Exploring the Relationships Between Countering Violent Extremism (CVE) and Disarmament, Demobilization and Reintegration (DDR) in UN Field Operations*, *in* UN DDR IN AN ERA OF VIOLENT EXTREMISM: IS IT FIT FOR PURPOSE? 62, 65 (James Cockayne & Siobhan O'Neil eds., 2015).

The White House Summit highlighted multiple examples of community-based responses to preventing extremism. These included mobilizing and empowering civil society in Mombasa, Kenya to work with police to understand grievances within communities targeted for "large-scale arrests and sweeps" by the Kenyan forces.[35] For example, one part of the program provided small grants for "activities such as livelihood training, cultural events, community debates on sensitive topics, and counseling for post-traumatic stress disorder."[36] These collaborations also help the police get better intelligence and identify potential suspects.[37]

Globally, a broad range of rehabilitation programs have sprung up to deal with already identified radicalized individuals. For example, in Saudi Arabia, the national government created the Prevention, Rehabilitation, and Aftercare ("PRAC") program to deal with individuals already classified as extremist or radicalized, but who, in many cases, have yet to commit an attack.[38] The PRAC program encompasses awareness programs in schools and elsewhere religious counseling, psycho-social counseling, and after-care once deradicalized people have completed the program (such as half-way

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35. Sarah Sewall, Under Sec'y for Civilian Sec., Democracy, & Human Rights, U.S. Dep't of State, Why Counterterrorism Needs Countering Violent Extremism (CVE): How Human Rights and Good Governance Help Prevent Terrorism, Address Before Columbia Law School (Sept. 22, 2015), http://www.state.gov/j/remarks/247214.htm.

36. *See generally* James Khalil & Martin Zeuthen, *A Case Study of Counter Violent Extremism (CVE) Programming: Lessons from OTI's Kenya Transition Initiative*, 3 STABILITY: INT'L J. SECURITY & DEV., no. 1, art. 31, 2014, at 1, http://www.stabilityjournal. org/articles/10.5334/sta.ee.

37. *Id.* However, the counter-terrorism actions of the Kenyan police and armed forces have come under significant criticism. In July 2016, Human Rights Watch released a 137-page report detailing that counter-terrorism operations in the Kenyan capital, Nairobi, and in Northeastern Kenya have led to at least thirty-four enforced disappearances by security agents. HUMAN RIGHTS WATCH, DEATH AND DISAPPEARANCES: ABUSES IN COUNTERTERRORISM OPERATIONS IN NAIROBI AND IN NORTHEASTERN KENYA (July 2016); *see also* Mohammed Yusuf, *How Kenya's Al-Shabaab Amnesty Is a Loaded Gun*, IRIN NEWS (Aug. 31, 2016), https://www.irinnews.org/special-report/2016/08/31/how-kenya%E2%80% 99s-al-shabab-amnesty-loaded-gun. On September 7, 2016, the Kenyan government launched a new national CVE strategy. *See President Uhuru Launches New Strategy to Fight Extremism, Terror*, STANDARD (Nairobi) (Sept. 7, 2016), http://www.standardmedia. co.ke/article/2000215075/president-uhuru-launches-new-strategy-to-fight-extremism-terror.

38. CHRISTOPHER BOUCEK, SAUDI ARABIA'S "SOFT" COUNTERTERRORISM STRATEGY: PREVENTION, REHABILITATION, AND AFTERCARE (Sept. 2008), http://carnegieendowment.org/ files/cp97_boucek_saudi_final.pdf; *see also* Andreas Casptack, *Deradicalization Programs in Saudi Arabia: A Case Study*, MIDDLE E. INST. (June 10, 2015), http://www.mei.edu/ content/deradicalization-programs-saudi-arabia-case-study.

houses and assistance with employment).[39] It also has less traditional methods, such as paying for the wedding of a deradicalized person.[40] Many of these measures can be considered preventative and move away from the use of hard military force to engage with terrorism, but instead are an attempt to deal with root causes of terrorism—the underlying factors and reasons that lead people to become radicalized.[41]

B. *History of DDR*

The increased emphasis on the use of CVE has tied in with a second trend in which non-military tools are being used in the context of counter-terrorism operations, especially within countries grappling with civil conflict and terrorism simultaneously. In these situations, DDR processes, traditionally reserved for more structured armed forces, are being employed to de-radicalize terrorists, and are being used as part of new CVE strategies.

DDR has therefore changed dramatically. Originally, it was seen as a tool to be used for post-conflict rebuilding, "a process introduced following a conflict and directed primarily at ensuring the transition of combatants to civilian life."[42] The first U.N. DDR mechanism was created in 1989 as part of the U.N. peace operation in Central America.[43] Since 1999, DDR has been mandated in almost every U.N. peacekeeping mission and most special political

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39.   BOUCEK, *supra* note 38, at 8–9, 17, 20.

40.   Casptack, *supra* note 38.

41.   However, Saudi Arabia is very selective in what it defines as the "root causes" of terrorism, and does nonetheless continue to take a strong military approach to counterterrorism. It has carried out multiple airstrikes against terrorist targets in neighboring Yemen. *See* Kareen Fahim, *The Saudi-Led Coalition's Airstrikes in Yemen, and the Civilian Toll*, N.Y. TIMES (Sept. 29, 2015), http://www.nytimes.com/2015/09/30/world/middleeast/the-saudi-led-coalitions-airstrikes-in-yemen-and-the-civilian-toll.html.   Further, its interpretation of Wahhabi Islam is considered by many to be a major contributor to the rise of jihadist extremist groups in the region. *See* STEPHEN SCHWARTZ, THE TWO FACES OF ISLAM: THE HOUSE OF SA'UD FROM TRADITION TO TERROR (2002); *cf.* NATANA J. DELONG-BAS, WAHHABI ISLAM: FROM REVIVAL AND REFORM TO GLOBAL JIHAD (2004) (arguing that categorizations of Wahhabi Islam as simply absolute adherence to old principles of Islam is mistaken).

42.   Robert Muggah, *No Magic Bullet: A Critical Perspective on Disarmament, Demobilization and Reintegration (DDR) and Weapons Reduction in Post-Conflict Contexts*, 94 ROUND TABLE 239, 242 (2005).

43.   Lars Waldorf, *Linking DDR and Transitional Justice*, *in* DISARMING THE PAST: TRANSITIONAL JUSTICE AND EX-COMBATANTS 14, 18 (Ana Cutter Patel et al. eds., 2010).

missions.[44]

DDR specialists Robert Muggah and Chris O'Donnell categorizes the evolution of DDR programs into three distinct phases.[45] The first wave, which began in the early 1990s, was aimed at ending civil wars across Latin America and Africa.[46] These programs involved "the organized cantoning and decommissioning of senior military personnel together with rank and file soldiers with the goal of breaking their command and control."[47] The second generation of DDR programs coincided with expanding mandates of U.N. peace operations toward the end of the 1990s and early 2000s.[48] Activities shifted "from a narrow preoccupation with demobilizing and reintegrating ex-combatants—'spoilers' in the vernacular—to the much broader goals of building the conditions for sustainable peace."[49] DDR aimed "to promote reconciliation between erstwhile soldiers and communities, rebuild and reinforce social institutions, and promote economic livelihoods for combatants, their dependents and neighborhoods."[50]

Muggah and O'Donnell argues that a third shift in DDR programs has occurred over the last decade.[51] As interventions by the international community occur in more complex situations and the nature of conflicts continue to become more protracted, DDR is being used in a much broader set of situations. "It is often taking place earlier, even before peace agreements are achieved. . . . [It] target[s] groups that may not be explicit parties to an eventual peace agreement," meaning DDR is no longer necessarily "voluntary."[52]

> DDR is thus being re-imagined as a complex bargaining process connected fundamentally to local conditions on the ground. It is also connected in complex ways to peace negotiations and robust peace operations, justice and security sector reform, and peace-

44. Siobhan O'Neil & James Cockayne, *Introduction*, *in* UN DDR IN AN ERA OF VIOLENT EXTREMISM: IS IT FIT FOR PURPOSE?, *supra* note 34, at 14, 25.

45. Robert Muggah & Chris O'Donnell, *Next Generation Disarmament, Demobilization and Reintegration,* 4 STABILITY: INT'L J. SECURITY & DEV., no. 1, art. 30, 2015, at 1, 2–6, http://www.stabilityjournal.org/articles/10.5334/sta.fs.

46. *Id.* at 2–3.

47. *Id.* at 2.

48. *Id.* at 3–4.

49. *Id.* at 3.

50. *Id.*

51. *Id.* at 4–6.

52. *Id.* at 5.

and state-building. Indeed, in all these settings DDR
is acknowledged as a central plank of the peace nego-
tiations with practitioners included as key members of
UN Mediation Teams, most recently in Mali.[53]

Muggah and O'Donell call this "next generation DDR."[54] In prac-
tice, it results in more DDR programs commencing in situations
where states may be likely simultaneously conducting counter-
terrorism and CVE programs.[55]

1. DDR and CVE

In the context of counter-terrorism and CVE operations, dis-
arming and de-radicalizing terrorists, "next generation DDR," has
become more important. Vanda Felbab-Brown, senior fellow in for-
eign policy at the Brookings Institute, identifies three trends in con-
ducting DDR in the context of offensive military operations, counter-
terrorism, and non-permissive environments. First, as has been noted
above, these "processes are increasingly being undertaken in the con-
text of on-going military operations and counterterrorism [and CVE]
campaigns,"[56] situations that fall squarely within Muggah and
O'Donnell's third generation DDR paradigm. Second, these ef-
forts—conducted under the framework of the Integrated DDR Stand-
ards[57]—are more often being implemented in very weak recipient

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53. *Id.* at 6.

54. *Id.* at 4; s*ee also* Georgina Reyes, *The Three Generations of DDR and the
Evolution of Global Goal Setting Models for Peacebuilding*, PRSG: PEACEBUILDING,
REINTEGRATION & STABILIZATION GROUP BLOG (Oct 16, 2016), https://cve-initiative.org/
2016/10/16/the-three-generations-of-ddr-and-the-evolution-of-global-goal-setting-models-
for-peacebuilding/.

55. Vanda Felbab-Brown, *DDR in the Context of Offensive Military Operations,
Counterterrorism, CVE and Non-Permissive Environments: Key Questions, Challenges,
and Considerations*, *in* UN DDR IN AN ERA OF VIOLENT EXTREMISM: IS IT FIT FOR PURPOSE?,
supra note 34, at 36, 41

56. *Id.*

57. The U.N. Integrated DDR Standards (IDDRS) were developed in 2006 to "provide
the UN system with a set of policies, guidelines and procedures for the planning,
implementation and monitoring of DDR programmes in a peacekeeping context." *Module
1.10: Introduction to the IDDRS*, U.N. INTEGRATED DDR STANDARDS FRAMEWORK 2–3
(May 9, 2014) [hereinafter *Module 1.10*], http://unddr.org/uploads/documents/IDDRS_
1_10_Rev_2014.pdf. They aim to allow

> DDR practitioners . . . to make informed decisions based on a clear, flexible
> and in-depth body of guidance across the range of DDR activities; to serve as a
> common foundation for the commencement of integrated operational planning
> in Headquarters and at the country level; [and] to function as a resource for the
> training of DDR specialists.

states with limited capacity and sometimes questionable governance records.[58] Third, with the explosion of violent conflicts around the world, Felbab-Brown predicts that "there will be a growing need for DDR and for such programmes to accommodate large numbers of ex-combatants, their families, and supporters."[59] Today among other states, DDR programs in Libya, Mali, and Somalia deal with counter-terrorism and CVE when trying to disarm ex-combatants or defectors from terrorist groups.

2. Amnesties and DDR

However DDR programs, both globally and in Somalia, have been traditionally paired with some form of amnesty scheme that allows those returning to civilian life to avoid criminal liability, and "are usually seen as one of the key incentives or preconditions for a successful DDR program."[60] This has, however, historically been an area of contention between international lawyers, who frequently equate amnesties with impunity and aim to limit and constrain the use of amnesties, and, DDR practitioners and transitional justice practitioners, who encourage amnesties when they further peace objectives.[61] Under international treaty law, amnesties are neither prohibited nor expressly required.[62] The 2004 U.N. Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies explicitly "reject[s] any amnesty for genocide, war crimes, or crimes against humanity."[63] This was later ex-

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Id. at 3. Since it was created, the Framework has been widely used across DDR operations. *See id.* at 1.

58. Muggah & O'Donnell*, supra* note 45, at 4–5 (discussing DDR in Democratic Republic of the Congo, Somalia, and Libya).

59. Felbab-Brown*, supra* note 55, at 43–44.

60. Mark Freeman, *Amnesties and DDR Programs*, *in* DISARMING THE PAST: TRANSITIONAL JUSTICE AND EX-COMBATANTS, *supra* note 43, at 36, 37.

61. *Id.*

62. In non-international armed conflicts, the Additional Protocol II to the Geneva Conventions provides that "[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict." Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), at art. 6(5), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. There is no other explicit reference to amnesties within the Geneva Conventions. *See Module 1.10, supra* note 57, at 40.

63. U.N. Secretary-General, *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 64(c), U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *Rule of Law*].

panded to include gross human rights violations.[64]   However, paragraph thirty-two of the report states that "[c]arefully crafted amnesties" in DDR circumstances can be useful.[65]

Louise Mallinder, professor at Ulster University in Northern Ireland, states that the process through which an amnesty is created within a transitional process "can affect the role of amnesty in promoting reconciliation."[66]   She identifies four methods of introducing a formal amnesty process: "(1) exercises of executive discretion; (2) negotiated peace agreements; (3) promulgated amnesty laws; and (4) referendums."[67]   Andreas O'Shea, argues that executive amnesty decrees risk being "arbitrary exercises of presidential discretion" and prefers promulgated amnesty laws, as the legislative process allows for debate and negotiation.[68]   In practice, many executive amnesty "decrees emanate from undemocratic rulers."[69]   In Somalia, as discussed below, the amnesty program has not been legislated, but is instead the result of executive action.[70]

Ultimately, the question of when and how to use amnesties must be considered on a case-by-case basis.[71]   As Mark Freeman, Executive-Director for the Institute for Integration Transitions notes, "The debate is not between peace and justice," but instead "a debate between those who privilege the human dignity and interests of [past] victims" and "those who privilege the human dignity . . . of victims of verifiable current abuse and inevitable future abuse."[72]

II. AL-SHABAAB IN SOMALIA

There is some controversy about the precise origins and ideology of Al-Shabaab. Al-Shabaab can be described as a Sunni jihadi

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64. Ana Cutter Patel, *Transitional Justice and DDR*, *in* SECURITY AND POST-CONFLICT RECONSTRUCTION: DEALING WITH FIGHTERS IN THE AFTERMATH OF WAR 248, 249 (Robert Muggah ed., 2009).

65. *Rule of Law, supra* note 63, at ¶ 32.

66. Louise Mallinder, *Exploring the Practice of States in Introducing Amnesties*, *in* BUILDING A FUTURE ON PEACE AND JUSTICE 127, 139 (Kai Ambos et al. eds., 2009).

67. *Id.*

68. ANDREAS O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 22 (2002).

69. Mallinder, *supra* note 66, at 139.

70. *See Infra* Part III.A.3.

71. Freeman, *supra* note 60, at 63.

72. *Id.*

Islamist terrorist or extremist group. This section describes Sunni Islamist groups; the religious and ethnic make-up of Somalia; and the history, evolution, and goals of Al-Shabaab.

Sunni variants of Islamic groups can be categorized into three forms: political, missionary, and jihadi.[73] Political Islamic groups such as the Muslim Brotherhood in Egypt seek to attain national political power.[74] Missionary groups seek to preserve "the Muslim identity and the Islamic faith and moral order against the forces of unbelief."[75] Finally, jihadi groups all use Islamic armed struggle as an operational tactic.[76]

Among Sunni jihadi movements, the International Crisis Group classifies groups around one of three broad visions: those with (1) an *internal* fight against a perceived impious Muslim regime; (2) an *irredentist* objective to claim land considered to be Muslim land from non-Muslim rule or occupation; or (3) a *global jihad*, against the West.[77] However, these distinctive visions often overlap. For example, in the case of the Islamic State of Iraq and el-Sham ("ISIS"), there is a desire for global jihad as well as a call for supporters around the world to carry out attacks against Western targets, but the group "requires territory to remain legitimate" and has been attempting to take over vast swathes of land.[78] Al-Shabaab also has elements of (1) an internal fight, as it originally developed in response to the Ethiopian invasion of the country to support the Somali Transitional Federal Government ("TFG"), (2) seeks to reclaim land from AMISOM control, and (3) openly claimed to align themselves with a global jihad against the West and its perceived allies, such as Kenya and Ethiopia.[79]

Somalia is fairly unique because, unlike its neighbors, who are composed of multiple tribes, the country is largely ethnically homogeneous.[80] The overwhelming majority of the population speaks

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73. INT'L CRISIS GRP., MIDDLE EAST/NORTH AFRICA REPORT NO. 37: UNDERSTANDING ISLAMISM 6–18 (Mar. 2, 2005), https://www.crisisgroup.org/middle-east-north-africa/understanding-islamism.

74. *Id.* at 6.

75. *Id.* at i.

76. *Id.* at 14–18.

77. *Id.* at i.

78. Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980.

79. *See infra* Part II.B; *supra* note 77 and accompanying text.

80. HARPER, *supra* note 2, at 15.

the same language and shares the same culture and religion.[81] Somalis ethnically are part of "the Cushitic-speaking family."[82] However, the Somali people span more than just Somalia—they spread across the Horn of Africa and there is a large diaspora in the Middle East, Europe, and North America, most of whom left as refugees.[83] Somalis are "firmly attached to Islam" and traditionally come from three main Sufi denominations.[84] For the most part, they have practiced a "fairly tolerant and moderate type of Sunni Islam, respecting different forms of religious observance."[85] However, after the fall of the Siad Barre regime in the 1990s, some contemporary fundamentalists turned to a different movement of Sunni Islam, *Wahhabi al-Ittihad al-Islam* (Salafists), based on the influence of Saudi Arabian scholars.[86]

The country is divided along a complex clan structure, which has "served as a formidable obstacle to the formation of a stable, modern nation-state in Somalia."[87] Despite these divisions, actual clan make-up is "fluid and ambiguous . . . . Alliances between these almost infinitely divisible groups shift frequently, making it very difficult for outsiders to understand what is going on."[88] The rise of Islamist groups, with their organization around religious affiliation rather than clan-ties has, to some extent, diminished the importance of clans, although they too have partly also become associated with individual clans and subclans.[89]

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81. *Id.*

82. Lewis, *supra* note 1, at 9.

83. *Id.*

84. *Id.* at 16.

85. Harper, *supra* note 2, at 74.

86. *Id.* at 76–77; *see also* Roland Marchal, *A Tentative Assessment of the Somali Harakat Al-Shabaab*, 3 J.E. African Stud. 381, 382 (2010). Many Somali students received scholarships from Saudi Arabian Islamic institutions preaching Wahhabism. Michael Farquhar, Circuits of Faith: Migration, Education, and the Wahhabi Mission 81 (2016).

87. Harper, *supra* note 2, at 36. Mary Harper explains, "The clan has an almost endlessly splitting structure and poses serious obstacles to attempts to impose central authority. . . . Clans divide into sub-clans, which divide again and again, sometimes ending up as a group of just a few families, which identifies itself as a separate clan with its own distinct name." *Id.* at 11.

88. *Id.* at 36.

89. *Id.* at 40–41. For example, "[t]he Union of Islamic Courts . . . lost support when it started to become too closely associated with the interests of one clan, or, in this case, subclan. Even though the origins of the UIC lay in a loose affiliation of sharia courts, representing a number of different clans and sub-clans, it was increasingly perceived as a vehicle to further the ambitions of the Ayr sub-clan of the Hawiye." *Id.* at 41–42.

Al-Shabaab and predecessor groups in Somalia need to be analyzed alongside the history of the country. Writing about *Al-Itihaad* in 2002, Professor of History Medhane Tadesse noted that "Islam and fundamentalism in Somalia can be better understood in the context of contemporary Somali political history, state dysfunction, international intervention, the civil war, and the efforts made at new political reconstruction by the Somali themselves."[90] Islamism became, at times, as in the case of Al-Shabaab, a form of government and a force of stability within a highly fractured Somalia.[91]

A. *History of Al-Shabaab in Somalia*

The precise origins of Al-Shabaab are disputed. One common understanding is that the group developed out of the Union of Islamic Courts ("UIC"), which began developing in 2004, took over Mogadishu in 2006, but was driven out of power by Ethiopian troops supported by the United States six months later.[92] By late 2006, references to the group began appearing in Mogadishu,[93] and it had started to control large swathes of territory in South-Central Somalia.[94]

However, jihadi Islamic groups have a much longer history in the country, and provide the precursors for modern day Al-Shabaab.[95] Scholar Stig Jarle Hansen traces the formation of Al-Shabaab to the Soviet intervention in Afghanistan in 1979–1989 and points to many Somali jihadists who travelled to fight in Afghanistan driven "by a belief in a form of defensive jihad, a form of defense of Muslim brothers in another country."[96] Years later, many of these

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90. MEDHANE TADESSE, AL-ITTIHAD POLITICAL ISLAM AND BLACK ECONOMY IN SOMALIA: RELIGION, MONEY, CLAN AND THE STRUGGLE FOR SUPREMACY OVER SOMALIA 1 (2002).

91. *See generally* CEDRIC BARNES & HARUN HASSAN, THE RISE AND FALL OF MOGADISHU'S ISLAMIC COURTS (Apr. 2007), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/bpsomalia0407.pdf.

92. HARPER, *supra* note 2, at 66. Other scholars suggested it originated at a different date. *See, e.g.*, Marchal, *supra* note 86, at 390.

93. HANSEN, *supra* note 3, at 1.

94. HANSEN, *supra* note 3, at 39.

95. One of the most famous early-known examples is that of Seyyid Mohamed Abdulle Hassan, who waged jihad against the colonial powers in the early 1900s in an attempt to create a "greater Somalia" and remove foreigners. Although he ultimately failed, his ideology and vision has inspired many, and poems about his conquests are still told in Somalia. *See* LEWIS, *supra* note 1, at 16; HARPER, *supra* note 2, at 75.

96. HANSEN, *supra* note 3, at 20.

Somali Afghanistan veterans became Al-Shabaab leaders.[97] Tadesse argues that the origins occurred even earlier, stating that the modern Islamic movement can be "directly related to . . . the introduction of Egypt's al-Azhar University's Arabic language curriculum" to Somalia through the creation of the Institute of Islamic Studies in Mogadishu in 1953.[98] Whatever the precise beginnings, most scholars acknowledge the importance of the formation of *Al-Itihaad al-Islamiya* and its influence in the 1990s in Somalia.[99] Many of al-Itihaad's members later became senior officials of both the Union of Islamic Courts and Al-Shabaab, including Ahmed Abdi Godane, leader of Al-Shabaab from 2008 until his death in September 2014.[100]

1. Union of Islamic Courts

The Union of the Islamic Court (*Mu'askar Mahkamat*) played a significant role in the early development of Al-Shabaab. Members who had been frustrated with the lack of success of initial Islamic Courts (which were seen as struggling to break from clan loyalties) created training camp to train militias and diminish their loyalties to their clan.[101] The Union of Islamic Courts took control of Mogadishu in 2006 and in its short time in power brought order to Somalia for the first time in many years.[102] This gave it significant legitimacy. Speaking about the camps, Somalis in 2010 stated:

> When the ICU came into the country they made safety and peace for the citizens a priority. They made sure that every robber gave up his gun, all the video spots were closed, every khat (sic) seller stopped selling poison to people, everything was calm and quiet. And it was really what the people wanted, after living in war for 17 years. It was like Allah answered all our

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97. *Id.*

98. TADESSE, *supra* note 90, at 13.

99. *See, e.g.*, *id.* at 48–72

100. HARPER*, supra* note 2, at 77; Farouk Chothia*, Ahmed Abdi Godane: Somalia's Killed Al-Shabab Leader,* BBC (Sept. 9, 2014), http://www.bbc.com/news/world-africa-29034409.

101. Marchal, *supra* note 86, at 388. Marchal identifies three different attempts to build Islamic Courts in Mogadishu (1994–1997; 1997–2000; and 2004–2006). *Id.* at 385. The most successful of these attempts occurred from 2004–2006 in the context of frustration with the Ethiopian- and American-supported Transitional Federal Government, which had been installed in the country. The courts were able to exploit anti-foreign sentiment and had significant influence in Mogadishu. *Id.* at 390.

102. BARNES & HASSAN, *supra* note 91, at 4.

prayers.[103]

Therefore, in this way, they were able to gain early support from the Somali population.

2. Ethiopian Invasion into Somalia

The December 2006 invasion by Ethiopian troops to push back the influence of the Union of Islamic Courts into Mogadishu (they had issued a jihad against Ethiopia days earlier) and reinstall the authority of the TFG had a major influence on shaping the ideology of Al-Shabaab.[104]   Many Somalis had preferred life under the Union of Islamic Courts.[105]   Roland Marchal, Professor at Sciences Po, suggests, of the Ethiopian involvement:

> [I]ts most striking consequence was to revive a vibrant Somali nationalism fed by xenophobic discourses against its neighbour.   The Ethiopian rank and file were actually Oromo and Somali, therefore mainly Muslims: nonetheless, they were described as Christians by the TFG opposition, a purely political label.[106]

The anti-foreigner sentiment is echoed in the views of Al-Shabaab. In an interview with Sheikh Hassan Dahir Aweys, a senior leader of Al-Shabaab in 2011, he said, "We are fighting for three reasons. Firstly, our country has been invaded. Secondly, we are being prevented from practicing our religious beliefs. Thirdly, we are fighting against those who are blocking the interests of our people by preventing them from establishing an Islamic government."[107]

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103.   Anna Lindley, *Leaving Mogadishu: Towards a Sociology of Conflict-Related Mobility,* 23 J. REFUGEE STUD. 2, 8 (2010). For more information on the influence of the UIC, see BARNES & HASSAN, *supra* note 91. Qat (also spelled 'Khat') is a plant native to the Horn of Africa and is cultivated and widely chewed in Somalia as a stimulant. A. S. Elmi, *The Chewing of Khat in Somalia*, 8 J. ETHNOPHARMACOLOGY 163 (1983).

104.   Marchal, *supra* note 86, at 391–92.

105.   *Id.*

106.   *Id.*

107.   HARPER, *supra* note 2, at 88. Aweys has been described as the "spiritual leader" of Al-Shabaab. Peter Leftie & Lucas Barasa, *Missile Raid Targeted Top Shabaab Leaders*, DAILY NATION (Nairobi) (Nov. 15, 2011), http://www.nation.co.ke/News/Missile+raid+ targeted+top+Shabaab+leaders/-/1056/1273780/-/115sv0p/-/index.html. However, in 2012, a split within the group formed and Aweys attacked the Al-Shabaab leadership publicly, distancing himself from Emir Ahmed Abdi Godane. Abdi Aynte, *Somalia: Sheikh Hassan Dahir Aweys and the Politics of the Al-Shabaab Split*, AFRICAN ARGUMENTS (Apr. 4, 2012), http://africanarguments.org/2012/04/04/somalia-sheikh-hassan-dahir-aweys-and-the-politics- of-the-al-shabaab-split-by-abdi-aynte. Aweys later became one of the early prominent

Although the UIC ultimately lost heavily against the Ethiopi-an troops, it established the roots for Al-Shabaab, which came to-gether as a coalition of Islamist groups.[108] Since 2006, Al-Shabaab has evolved dramatically but still retains some core characteristics, which are relevant to creating de-radicalization policies for its members.

B. Al-Shabaab Today

Al-Shabaab grew from a small youth militia—out of one of the radical group of Sharia courts—into Somalia's most powerful and effective Islamist movement.[109] There is duality of Al-Shabaab to-day, in that it is both local and global. Stig Harle Hansen dubs these qualities Al-Shabaab's "two faces . . . [which] can contribute to sta-bility through justice, but at the same time be feared and promote a sense of cosmic war between Islam and the West; a 'Clash of Civili-zations', so to speak. The two faces should not be forgotten, and Al-Shabaab today has both."[110]

The local face is built in large part on Al-Shabaab's ability to be highly organized and bring order to areas that it controls, a charac-teristic that has been sorely missed in Somalia over the last twenty-five years. It is fairly bureaucratic, and pays members a decent salary (by some estimates, between $60–200 for a rank-and-file soldier, paid every month).[111]

> People who join should provide CVs, IDs, and tele-phone numbers of their relatives. There are plenty of internal regulations that touch all aspects of life, salary scale, marriage and leaves . . . . [S]alaries are paid every 28th of the month and . . . no money can be di-verted for long from the organisation without lethal punishment. This may sound too mundane but a quick glance at the TFG achievements or the inability of the warlords in 2005 to reach half of that standard while

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defectors. Andrew Harding, *Somali Defector: Why I Left Al-Shabab*, BBC (May 20, 2015), http://www.bbc.com/news/world-africa-32791713 ("An earlier defection—of former leader Sheikh Hassan Dahir Aweys—was widely considered to have been badly handled . . . .").

108. HARPER, *supra* note 2, at 85.

109. *Id.* at 86.

110. HANSEN, s*upra* note 3, at 1.

111. ROLAND MARCHAL, THE RISE OF A JIHADI MOVEMENT IN A COUNTRY AT WAR: HARAKAT AL-SHABAAB AL MUJAHEDDIN IN SOMALIA 42 (March 2011), http://www.sciencespo.fr/ceri/sites/sciencespo.fr.ceri/files/art_RM2.pdf.

> they were entrenched for years in Mogadishu shows
> that we are dealing with something different.[112]

However, not everyone in Somalia willingly joins the group. There have been allegations of forced recruitment, particularly of children.[113] The group's very strict interpretation of Sharia, including a ban on soccer and music, as well as alienation of certain clans, has proved unpopular.[114] Further, the group's failure to provide basic necessities to the population during the 2011 famine lost it some legitimacy among the local population.[115]

Alongside the local governance element of Al-Shabaab is its global face. In 2012, then Al-Shabaab leader Ahmed Abdi Godane pledged "obedience" to Al-Qaeda leader Ayman Al-Zawahiri in a joint video released by both groups.[116] Al-Shabaab has also received numerous foreign fighters, from the United States, Europe, and the Middle East.[117] Godane, until his death, had international ambitions[118] and his followers have continued this approach. The group conducted numerous high profile regional terrorist attacks over the last few years—the most prominent in September 2013 at the Westgate Mall in Nairobi, Kenya, killing sixty-seven, and then in April 2015 at Garissa University in North-Eastern Kenya, killing 148.[119] As part of this shift to a more global approach, Godane eliminated those opposed to his philosophy. In June 2013, a few months prior to the Westgate Mall attack, "a bloody internal battle broke out within al-Shabab, culminating in a major purge."[120] Godane is reported to

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112. *Id.* at 18.

113. HARPER, *supra* note 2, at 96; *see also* Kevin Sieff, *Exclusive: U.S.-Funded Somali Intelligence Agency Has Been Using Kids as Spies,* WASH. POST (May 7, 2016), https://www.washingtonpost.com/world/africa/exclusive-us-funded-somali-intelligence-agency-has-been-using-kids-as-spies/2016/05/06/974c9144-0ce3-11e6-a6b6-2e6de3695b0e_story.html.

114. Marchal, *supra* note 86.

115. Ken Menkhaus, *Al Shabaab's Capabilities Post-Westgate*, CTC SENTINEL, Feb. 2014, at 4, 5.

116. *Who Are Somalia's Al-Shabab?,* BBC (Apr. 3, 2015), http://www.bbc.com/news/world-africa-15336689.

117. HANSEN, *supra* note 3, at 96.

118. *See supra* note 116 and accompanying text.

119. Tristan McConnell, *Close Your Eyes and Pretend to be Dead*, FOREIGN POL'Y (Sept. 20, 2015) http://foreignpolicy.com/2015/09/20/nairobi-kenya-westgate-mall-attack-al-shabab; *Kenya Attack: 147 Dead in Garissa University Assault*, BBC (Apr. 3, 2015), http://www.bbc.com/news/world-africa-32169080.

120. Ken Menkhaus, *supra* note 115, at 5; *see also What the Deadly Attack on a Kenya Mall Was Really About*, THINK PROGRESS (Sept. 22, 2013), http://thinkprogress.org/security/2013/09/22/2662191/deadly-attack-kenya-mall-sign-desperation.

have killed around 200 members of the group's "secret service" and various senior leaders in an attempt to consolidate his own power.[121]

Recently, Al-Shabaab appears to have split once more. In October 2015, reports surfaced that one senior Al-Shabaab leader had pledged allegiance to ISIS (the core group is still affiliated with Al-Qaeda).[122] The split was officially confirmed by a Kenyan security official in December 2015.[123]

In 2011, Kenyan troops entered Somalia on a mission called "Operation Linda Nchi" (in Swahili: Protect the Country)[124] against Al-Shabaab.[125] The Kenyan troops were later absorbed into the African Union Mission, AMISOM.[126] While terrorist attacks in Kenya have increased,[127] military operations have been successful in attacking members of the group and pushing them out of key towns and cities in South-Central Somalia.[128] This has led to large numbers of defectors from Al-Shabaab. In one region alone (Lower Shabelle) the government reported in September 2014 that it had received 300 defectors.[129]

What to do with these large-scale defections is a key challenge for the Somali government, AMISOM, and the international community. The government has issued a number of conditional

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121. Menkhaus, *supra* note 115, at 5.

122*. Al Shabaab Divided Over ISIL Allegiance,* Radio Dalsan (Oct. 23, 2015), http://www.radiodalsan.com/2015/10/23/al-shabaab-divided-over-isil-allegiance.

123. Laban Robert, *AMISOM's Persistent Onslaught on Shabaab Bearing Fruit, Says CS Nkaissery,* Daily Nation (Nairobi) (Dec. 26, 2015), http://www.nation.co.ke/counties/mombasa/Amisom-onslaught-on-Shabaab-bearing-fruit/-/1954178/3009934/-/r0uvx0z/-/index.html.

124. The author of the piece is a native Swahili speaker and provided the translation.

125. Int'l Crisis Group, *supra* note 4, at i.

126. Press Release, African Union Mission in Som*., supra* note 5.

127. Dorothy Otieno, *How KDF's Somalia Incursion Changed Kenya,* Daily Nation (Nairobi) (Oct. 16, 2015), http://www.nation.co.ke/newsplex/newsplex-Linda-Nchi-Terrorism/2718262-2917062-9fm054/index.html.

128. Amnesty Int'l, Amnesty International Report 2015/16: The State of the World's Human Rights 325 (2016).

129*. Somalia: Number of Al-Shabaab Defectors Continue to Increase*, RBC Radio (Sept. 23, 2014), http://www.raxanreeb.com/2014/09/somalia-number-of-al-shabab-defectors-continue-to-increase. Estimates of the overall size of Al-Shabaab vary greatly. One estimate places the group as having between 7000–9000 fighters. *Who Are Somalia's Al-Shabab?, supra* note 116. However, in 2011, an unnamed U.S. official stated that the group had approximately 1000 fighters. Holly Yan, *What Is Al-Shabaab, and What Does It Want?*, CNN (Feb. 22, 2015), http://www.cnn.com/2014/12/02/world/africa/al-shabaab-explainer.

amnesties, and there are multiple deradicalization camps set up, with international and United Nations support, to take in defecting and detained Al-Shabaab ex-combatants.[130] The next section describes and evaluates the response to captured and surrendering Al-Shabaab members.

III. DEALING WITH AL-SHABAAB DEFECTORS AND DETAINEES

The legal framework for managing Al-Shabaab defectors and detainees in Somalia is still in its infancy. This section seeks to map out the existing legal framework. Section A discusses anti-terrorism procedures, created as part of rule-of-law efforts within Somalia, including the proposed anti-terrorism bill. It also looks at the amnesty framework in place, intended to encourage greater defections, and analyzes rule of law in Somalia more broadly. Section B focuses on the procedures for dealing with defectors and detainees, looking at the rehabilitation program for low-risk combatants and the treatment of high-risk cases through the criminal justice system.

A. Anti-Terrorism Procedures in Somalia

1. Rule of Law in Somalia

The entire justice chain—from initial reporting to the police, police investigations, trial, and incarceration—is incredibly weak in South-Central Somalia.[131] Further, there is little formal presence of justice or police personnel or institutions outside of urban centers.[132]

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130. *See infra* Part III.

131. Efforts have been made in other parts of Somalia, however. In Puntland, for example, 2,500 police officers have been biometrically registered and trained. Telephone Interview with U.N. Project Officer in Puntland, Project Officer, United Nations (Jan. 6, 2016) (on file with author).

132. Much of the territory in South-Central Somalia is only now being reclaimed from Al-Shabaab by AMISOM forces and rural areas are much harder for them to reach and control. FED. REPUBLIC OF SOM., NATIONAL STRATEGY AND ACTION PLAN FOR PREVENTING AND COUNTERING VIOLENT EXTREMISM 4, 8 (June 27, 2016), http://www.radiomuqdisho.net/wp-content/uploads/2016/08/CVE-Strategy-26-August-English.pdf (first draft) (stating that "important gains [have been made] in . . . displacing the terrorists from most of the regions in South & Central of Somalia. . . . [However, Al-Shabaab] continues to operate in swaths of the rural areas of southern and central Somalia"). A U.N. public perception survey to gauge the presence of rule-of-law institutions across Somalia commenced in mid-2016 and aims to provide more data on services provided and gaps within the system. *See* UN-MPTF

Outside of Mogadishu, there are very few formal, registered, and trained police.[133]   In the Interim South West Administration ("ISWA") there are currently 200 registered and trained state police, and another 200 will commence registration and training soon.[134]   In Jubaland, 200 state police officers will commence training in the port city of Kismayo in 2016.[135]   However, many of these police force members are composed of former militia members, and those not yet registered have not received any formal training.[136]   This has important implications for their ability to conduct proper investigations and ensure that they are actually detaining Al-Shabaab members. As a result of a weak policing-system, in many of these cases there is exclusive reliance on witness testimony,[137] which is often unreliable.[138]

The justice system is also weak. A pilot mobile courts system, to ensure that people have access to justice outside of urban areas, commenced in early 2016 in South-Central Somalia.[139]   Formal courts, with trained and qualified judges, prosecutors, legal aid providers, functioning case management systems, and other necessary provisions are also lacking—although some of these have been established in key cities in South-Central Somalia.[140]

Finally, the prison system is still in the process of rebuilding.

JOINT PROGRAMME ON THE RULE OF LAW, QUARTER 2 REPORT 31 (2016) [hereinafter UNITED NATIONS DEVELOPMENT PROGRAMME], http://www.so.undp.org/content/dam/somalia/ Reports/Q2-2016/UNMPTF-Q2%202016%20ROL%20VERISON-final.pdf.

133.   Telephone Interview with Senior U.N. Rule of Law Project Official, Rule of Law Project Official, United Nations (Feb. 6, 2016) (on file with author).

134.   Telephone Interview with U.N. Rule of Law Police Specialist, Rule of Law Police Specialist, United Nations (Feb. 7, 2016) (on file with journal). The city of Baidoa is located in the Interim South West Administration, in South-Central Somalia, and a large number of ex-combatants are housed there, within the low-risk Rehabilitation camp for disengaging fighters and within Baidoa Prison, for high-risk cases. *Id.*

135.   Telephone Interview with Senior U.N. Rule of Law Project Official, *supra* note 133.

136.   *Id.*

137.   *Id.*

138.   For a discussion of unreliable eyewitness testimony, see Marco Y. Wong, Note, *Convicting with Our Eyes Open: Regulation of Eyewitness Identification in the United States and England and Wales*, 54 COLUM. J. TRANSNAT'L L. 248 (2015).

139.   UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 132, at 37 (noting that "challenges were faced" in rolling out the Mobile Courts system in South-Central Somalia, but that it is anticipated that the system will be fully functioning soon).

140.   Interview with U.N. Rule of Law Project Officer, U.N. Rule of Law Project Officer, United Nations, in Nairobi, Kenya (Jan. 21, 2016) (on file with author).

In Baidoa, where many convicted Al-Shabaab members are being held,[141] a senior U.N. Rule of Law Project official categorized the prison as "in a very poor state . . . almost kind of falling apart."[142] There is also limited prison capacity and a shortage of trained custodial staff.[143] This makes detaining large numbers of people unfeasible.

2. Draft Anti-Terrorism Bill

Officially, "the Somalia penal law/code does not contain issues around armed terrorism."[144] As of February 2016, a draft antiterrorism bill was at the special committee consideration stage within the federal parliament after having passed through the second reading.[145] This bill, although still subject to change, if approved, will become the governing legal framework for prosecuting terrorism cases.

Under Article 4 of the Draft Act, any person who commits an act of terrorism that causes death is liable to receive the death penalty, according to Islam and the country's penal code.[146] Other acts, such as providing support for, intelligence or information to a terrorist group, as well as being a member of a terrorist group, are offenses subject to lower criminal sentences.[147]

The bill contains provisions for judicial guarantees, although it does allow authorities to detain a person for sixty-two days without

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141.   Telephone Interview with U.N. Official Involved with the Pilot Project, Official, United Nations (Feb. 5, 2016) (on file with author) (explaining that many Al-Shabaab members received multi-year sentences).

142.   Telephone Interview with Senior U.N. Rule of Law Project Official, *supra* note 133.

143.   *Id.*

144.   THE INTER-MINISTERIAL TASKFORCE ON DISENGAGING COMBATANTS, NATIONAL PROGRAMME FOR THE TREATMENT AND HANDLING OF DISENGAGED COMBATANTS AND YOUTH AT RISK IN SOMALIA 15 (Apr. 30, 2013) (on file with author).

145.   E-mail from Mohamed Hadi, Somalia Parliamentary Support Official, United Nations Development Programme, to author (Jan. 3, 2016 05:50 AM) (on file with author).

146.   Xerrka La Dagaalanka Argagixisada [Draft Anti-Terrorism Bill], art. 4 (version as of 14 May 2015, as prepared by the Ministry of Interior Security and submitted to Parliament) (on file with author) (this language is a direct translation of the language used in the statute, written in Somali). Under Somalia's 2012 Provisional Constitution, Sharia law is supreme, followed by the Constitution. SOM. PROVISIONAL CONST. art. 4. Therefore, a person can be convicted and sentenced to the death penalty for committing and an act of terrorism that causes death, if this is in accordance with Sharia principles.

147.   Draft Anti-Terrorism Bill, *supra* note 146, art. 4.

being charged, subject to a court approval.[148] A terrorism suspect detained on suspicion of one of the crimes laid out in the bill (but not yet charged) by a member of the security apparatus must be brought to a court of law within forty-eight hours of being held.[149] Within these forty-eight hours, the sheriff's officials must provide information to the court, including information about the facts of the case and the reason that they were detained, general evidence pertaining to the case, and why it was necessary to detain them (if applicable).[150] A person can, with permission of a court of law, be held without being charged for further investigations for up to sixty days if necessary.[151] The court can, however, request information from the security officials to show that this is necessary to detain the individual while investigations continue, and the investigations must be conducted quickly.[152] The draft anti-terrorism bill does not however contain any provisions for terrorism amnesty.

3. The Terrorism Amnesty Offers

In recent years, the President and the federal government have provided multiple offers for amnesty to Al-Shabaab members who renounce from the group.[153] A number of senior Al-Shabaab members have defected, taking advantage of the amnesty program.[154] Officially, amnesty from defection comes with the following conditions: "Recognition of previous crimes, Rejection of violence and

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148. *Id.*

149. *Id.* art. 22.

150. *Id.*

151. *Id.* art. 23.

152. *Id.*

153. The government first offered conditional amnesty to Al-Shabaab members in September 2014 following the death of then-leader Ahmed Abdi Godane. This offer was renewed once more in early 2015. Abdulaziz Billow & Dan Joseph, *Somali President Renews Amnesty Offer for Al- Shabab Members,* VOA (Jan. 28, 2015), http://www.voanews.com/a/former-al-shabab-commander-urges-others-to-surrender/2616855.html. In September 2015, during the High Level Meeting on Somalia in New York, the offer for amnesty was further reiterated for "al-Shabaab members who are willing to reconcile with the Government, respect the State's authority and renounce global ambitions." Communiqué, Office of the President, Fed. Republic of Som., High Level Meeting on Somalia (Sept. 28, 2015), http://www.villasomalia.gov.so/communique-high-level-meeting-on-somalia-new-york-28-september-2015.

154. In January 2015 the government reported that Zakariya Ismail Hersi (Zaki) and Hussein Dhubi had defected. Press Release, Office of the President, Fed. Republic of Som., *supra* note 7.

rejecting Al-Shabaab, Embracing a peaceful resolution to conflict, [and] A commitment to play an active part in re-joining a community and contributing to its welfare."[155] The President has stated that some crimes "such as murder and rape" will be subject to prosecution and therefore not eligible for amnesty.[156] However, in these instances, former Al-Shabaab members are free to join the "peace process," but only after they have completed their sentences.[157]

But in reality, "there is no formal amnesty. It's just a whole lot of public broadcasts but nothing is detailed."[158] The amnesty requirements have not been administered universally and are at times completely ignored.[159] There is no specific process in place for applying for amnesty, as it stands, and often it is conducted on an ad-hoc basis. Self-confessed senior leaders of Al-Shabaab have been granted amnesty. For example, Zakariya Ismail Hersi (Zaki) was suspected to be the leader of the Amniyat, the intelligence wing of Al-Shabaab responsible for, among other things, planning the Westgate attack in Nairobi (although he officially denies involvement with the Amniyat).[160] Nonetheless, despite his official assertions, many are skeptical that a leader of his seniority had no involvement at all in ordering or planning any terror attacks, and if his involvement with the Amniyat were proven, he would be ineligible for amnesty.[161] Similarly, former spiritual leader Sheikh Hassan Dahir Aweys, who defected prior to Hersi, should also arguably not have been provided amnesty, as he likely committed, or ordered others to commit, murders or rapes.[162]

It is also unclear what happens to all of the defectors who agree to leave Al-Shabaab and take up the offer of amnesty and whether that is in fact what they receive. In the case of Aweys, there is little information on his legal status, and it appears that "he's under

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155. *Id.*

156. *Id.*

157. *Id.*

158. Telephone Interview with Carl Jenkins, Former Consultant, International Office for Migration, (Feb. 2, 2016) (on file with author).

159. *Id.*

160. Harding, *supra* note 107.

161. His involvement was suspected to be so significant that the United States, until March 2015, held a $3 million bounty for his capture. They withdrew the bounty offer after he had officially defected and was under the custody of the Somali government, providing no reason for the defection. *U.S. Withdraws $3 Million Bounty for Somali Islamist who Defected*, REUTERS, Mar. 9, 2015, http://af.reuters.com/article/topNews/idAFKBN0M51 L820150309.

162. Harding, *supra* note 107.

some sort of house arrest but hasn't been in front of a court."[163] Hersi is "technically a free man" although he resides in a safe house highly guarded by Somalia Armed Forces out of fear of retribution by current Al-Shabaab members.[164]

The National Programme for the Treatment and Handling of Disengaged Combatants in Somalia, prepared by the inter-ministerial task force on disengaging combatants, notes that "[t]he enactment of an Amnesty Law would provide the legal framework for lawfully dealing with both transitional and criminal responsibility for acts committed in the context of armed terrorism and conflict."[165] As it stands, however, no plans are currently in place to enact an amnesty law.

B. Somalia's Rehabilitation Programs

The government acknowledges that "conditions for a DDR programme do not exist in Somalia" and that this "is one of the major obstacles hampering international assistance [for the Programme]."[166] However, officially under law, the deradicalization programs take place within the framework of the National Programme for the Treatment and Handling of Disengaged Combatants in Somalia, which was developed in 2012, and is considered to be a DDR program.[167] Despite the fact that Al-Shabaab members could also be categorized as terrorists, the government considers them to be "combatants" and processes their reintegration into civilian life as part of the DDR program.[168]

The national program aims to: (1) handle the current caseload of disengaged combatants within the federal government's custody; (2) create an outreach campaign to inform target groups of the procedures for disengaging as well as the benefits of doing so; (3) "receive, rehabilitate and reintegrate up to 4500 [Al-Shabaab] . . . combatants"; (4) build ministerial institutional capacity; (5) establish a

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163. Telephone Interview with Carl Jenkins, *supra* note 158.

164. Harding, *supra* note 107.

165. THE INTER-MINISTERIAL TASK FORCE ON DISENGAGING COMBATANTS, *supra* note 144, at 15.

166*. Id.* at 11.

167. Paul D. Williams, *Dealing with Disengaged Fighters: The Case of Al-Shabaab*, IPI: GLOBAL OBSERVATORY (Jan. 29, 2013), https://theglobalobservatory.org/2013/01/dealing-with-disengaging-fighters-the-case-of-al-shabaab.

168. THE INTER-MINISTERIAL TASK FORCE ON DISENGAGING COMBATANTS, *supra* note 144, at 8.

coherent policy and legal framework for the disengaged combatants; and (6) "establish a National Technical Coordination Secretariat."[169] The plan stresses that these stated objectives are to be carried out in compliance with international law, particularly principles of international humanitarian and human rights law.[170]

There is also a deliberate attempt to avoid the use of the word "deradicalized"—as there is a fear that this will lead to stigma.[171] Further, the national program, for the purposes of disengagement, does not technically distinguish between defecting and detained members of Al-Shabaab (although for the purposes of classification within the program it could be important, in gauging if the individual is high-risk or low-risk).[172]

In theory the program states that when a disengaged combatant is captured or defects, he initially goes through a forty-eight hour reception phase, in which he is "screened, disarmed and [has his] basic details [taken]."[173] This is coordinated by the Ministry of Defense and the Somali National Army, as well as AMISOM.[174] The combatant is then transferred to the National Intelligence and Security Agency ("NISA"), who conduct a screening process to categorize them as high-risk or low-risk.[175] Low-risk combatants have the option of being transferred to one of three rehabilitation camps,[176] while high-risk cases must face trial (currently only conducted by military courts).[177] Combatants who complete the rehabilitation phase are released, supported through a reinsertion program and reintegrated back into the community.[178] The U.N. Assistance Mission in Soma-

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169.   *Id.* at 7–8.

170.   *Id.* at 4.

171.   Telephone Interview with Patrick Loots, Chief DDR Officer, U.N. Assistance Mission in Somalia (Jan. 24, 2016) (on file with author).

172.   Obi Anyadike, *One Man's Terrorist is Another Man's Carpenter: How DDR Can Shrink Support for Al-Shabab in Somalia*, IRIN (July 21, 2016), https://www.irinnews.org/feature/2016/07/21/one-man%E2%80%99s-terrorist-another-man%E2%80%99s-carpenter; *see also* THE INTER-MINISTERIAL TASK FORCE ON DISENGAGING COMBATANTS, *supra* note 144, at 8 (noting that the program aims "[t]o receive, rehabilitate and reintegrate 4,500 fighters/combatants who *renounce violence, voluntarily surrender or are captured* from Al-Shabaab/other armed groups") (emphasis added).

173.   *Id.* at 10.

174.   Telephone Interview with Patrick Loots, *supra* note 171.

175.   THE INTER-MINISTERIAL TASK FORCE ON DISENGAGING COMBATANTS, *supra* note 144, at 14.

176.   Telephone Interview with Patrick Loots, *supra* note 171.

177.   *See infra* Part III.E.

178.   THE INTER-MINISTERIAL TASK FORCE ON DISENGAGING COMBATANTS, *supra* note

lia ("UNSOM") supports this DDR program, although it does not actually implement it.[179]

C. Screening Phase—Classification of Al-Shabaab Members

Before entering the program, suspected Al-Shabaab members have to be screened and classified as either high-risk or low-risk. However, one of the most significant problems with the program is with the classification process. The UNSOM DDR Chief stated that there is currently "not a clear screening criteria in place for determining high and low risk."[180] It is completely controlled by NISA, with no transparency or oversight mechanisms, and no set procedures in place for understanding how they categorize.[181]

Carl Jenkins, an official involved in the design and implementation of one of the low-risk camps, said, "It is a black hole. People go into it——people come out of it. Some of them never came out."[182] The duration of the screening is also largely unknown. An unnamed NISA official told a news service in June 2014 that the longest screening he had taken part in personally lasted one month, although many had been much shorter.[183] The government is, however, aware of the problem and UNSOM stated that negotiations are currently ongoing to create a uniform classification policy to be used for disengaging combatants going to any of the three centers.[184] However, a robust system has yet to be implemented, despite negotiations.[185] Therefore to an outsider, the reason why someone is screened as high- versus low-risk often appears to be arbitrary.[186]

144, at 15 (stating that participants are "offer[ed] rehabilitation and reintegration options back as constructive members of society").

179. Telephone Interview with Patrick Loots, *supra* note 171.

180. *Id.*

181. Telephone Interview with Carl Jenkins*, supra* note 158.

182. *Id.*

183. *No Easy Way Forward for Al-Shabab Defectors,* IRIN (June 12, 2014), http://wwiw.irinnews.org/report/100197/no-easy-way-forward-for-al-shabab-defectors.

184. Telephone Interview with Patrick Loots, *supra* note 171.

185. *Id.* (stating that the U.N. hopes to get screening criteria defined soon).

186. This view was confirmed through numerous interviews with individuals involved in deradicalization programming in Somalia. It was also noted that it was unclear if the government or NISA even had the capacity to correctly screen, even if a framework were to be developed. The ability of the police forces and army, especially in South-Central Somalia, to conduct investigations, is virtually non-existent. *See, e.g.*, Telephone Interview with Senior U.N. Rule of Law Project Official, *supra* note 133; Telephone Interview with

A CVE expert stated that an evidence-based matrix through which the motivations, level of radicalization, and crimes committed are evaluated is needed to ensure robust classification.[187] Especially considering the implications of the classification process (high-risk combatants face the potential of the death penalty and are tried by military courts), strong oversight is crucial to ensuring that the process is fair. As explained in my recommendations below, this enhances the legitimacy of the program in addition to respecting fundamental human rights.

D. Rehabilitation of Low-Risk Combatants

Officially, there are currently three operational rehabilitation camps in Somalia for low-risk combatants: the Serendi Rehabilitation Facility in Mogadishu, the Hiil Walaal Rehabilitation Facility in Beletweyne, and the Baidoa Rehabilitation Facility, which includes an additional safe house for female combatants and their dependents.[188] It is unclear, however, if there are other centers for the detention of Al-Shabaab members and allegations have surfaced of other "shadowy" camps.[189] As of January 2016, there were approximately 350–400 people at the Mogadishu center, sixty in Beletweyne and approximately ninety-five in Baidoa.[190] Under law, these are considered to be disengagement camps and are managed by the Ministry of Interior Security.[191] This section describes the formation of these camps and how they function.

In 2015, administration of the Mogadishu and Beletweyne facilities was taken over by Adam Smith International, a British con-

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Carl Jenkins, *supra* note 158.

187. Interview with Anneli Botha, Scholar, Institute of Security Studies, in Nairobi, Kenya (Jan. 16, 2016) (on file with author).

188. Telephone Interview with Patrick Loots, *supra* note 171. A fourth camp, in Kismayo, was slated to be opened by mid-2016. *See* U.N. Assistance Mission in Som., *Call for Proposals: Reinsertion Projects for Disengaged Al Shabab Combatants in Dedicated Transition Facilities in Mogadishu, Beletweyne, Baidoa, Kismayo—Somalia*, U.N. SUPPORT OFF. SOM., https://unsos.unmissions.org/sites/default/files/16-05-18_call_for_proposals.pdf (last visited Dec. 2, 2016).

189. Sieff, *supra* note 113.

190. Telephone Interview with Patrick Loots, *supra* note 171. The number of persons in the facilities is frequently changing, however, as combatants successfully complete the program and new combatants enter into the facility. However, these statistics are fairly typical of average numbers, according to the UNSOM DDR Chief. *Id.*

191. THE INTER-MINISTERIAL TASK FORCE ON DISENGAGING COMBATANTS*, supra* note 144, at 4.

tractor that conducts significant work across Somalia.[192] Previously, a Danish contractor ran the facility—however, there were significant complaints and accusations of improper management.[193] The International Organization of Migration ("IOM") manages the Baidoa facility.[194] Due to the changes in administration at the other two camps, as well as the fact that the Baidoa facility falls under the oversight of an inter-governmental organization (and therefore is more accountable than a corporation), I focus my analysis on the rehabilitation procedures in Baidoa, which became operational in 2014.

1. Baidoa Rehabilitation Center

At Baidoa, the rehabilitation program consists of family reunification, religious education, vocational and literacy training, civic education, and social reintegration. Upon entry to the Baidoa facility, for the first two weeks, the individual is required to remain within the center and may not leave.[195] According to an official involved in the design of the program, this is done "as a security provision, just to make sure that the individual is safe and not an infiltrator."[196] However, family reunification, usually at the entrance of the facility, occurs as soon as possible and often within twenty-four hours, where possible.[197] Beyond the two-week period, these low-risk cases were free to come and go as they pleased and did not have to reside within the facility.[198]

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192.   Telephone Interview with Patrick Loots, *supra* note 171.

193.   For example, in August 2014, the Special Representative of the U.N. Secretary-General for Children and Armed Conflict expressed concern that there were fifty-five children at the Serendi camp and that "the process and criteria under which children end up in this center are not transparent and the decision that deprives them from their liberty for months and sometimes years cannot be challenged." Press Release, Office of the Special Representative of the Sec'y-Gen. for Children & Armed Conflict, U.N. Special Representative for Children and Armed Conflict Calls for Full Implementation of Action Plans by Federal Government of Somalia (Aug. 22, 2014), https://childrenandarmedconflict. un.org/press-release/special-representative-calls-for-full-implementation-action-plans- somalia. This was later remedied, and under the current national program, as soon as children associated with armed groups are identified, it is mandatory to call UNICEF. There are no longer any children at Serendi. Rep. of the Independent Expert on the Situation of Human Rights in Somalia, Human Rights Council, 30th Sess., at 7, U.N. Doc. A/HRC/30/57 (Oct. 28, 2015) [hereinafter Rep. of the Independent Expert].

194.   Telephone Interview with Patrick Loots, *supra* note 171.

195.   Telephone Interview with Carl Jenkins, *supra* note 158.

196.   *Id.*

197.   *Id.*

198.   *Id.*

During Ramadan, however, when terror threat levels are elevated, movement is generally restricted.[199] Providing protection, and a safe place to stay, is "the first thing the center provide[s]."[200] Most of the combatants, especially those who had defected, face significant threats from Al-Shabaab.[201] Further, others are subject to be targeted by their former communities, especially if they had committed crimes there.[202]

In terms of programming, the center provides religious debate, economic reintegration mechanisms, literacy and numeracy skills, vocational training, civic education, and social reintegration through traditional dispute resolution and community "trauma healing."[203]

Religious debate, a form of religious re-education in which the former terrorist discusses their views of Islam with a religious leader, is currently conducted by two imams, one who serves as a sort of youth leader (he is very young) and the other who is significantly older.[204] Economic reintegration consists of ensuring that the combatants will be able to support themselves financially once they leave.[205] In many cases, the combatants had prior debt, which needs to be repaid before they are able to feel safe and reintegrate into society. Literacy and numeracy skills are offered in English, Arabic, and Somali, although it is compulsory to take Somali.[206]

Civic education is not conducted through classroom learning, but instead the combatants form their own councils responsible for decision-making alongside the facility team. According to a former international administrator at Baidoa, "You can then be part of the decision-making process, and by default you learn that you don't

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199. The security risk during Ramadan should not be underestimated. During the holy month in 2016, there were multiple terrorist attacks in Somalia, including on a hotel in Mogadishu that killed fifteen people. Abdi Sheikh & Feisal Omar, *Somali Islamist Militants Attack Hotel in Mogadishu*, REUTERS, June 26, 2016, http://www.reuters.com/article/us-somalia-blast-idUSKCN0ZB0KC. An elevated security threat level during Ramadan has been commonplace in Somalia for some years. *See A Deadly Ramadan in Somalia*, IRIN (July 15, 2014), http://www.irinnews.org/report/100353/deadly-ramadan-somalia.

200. Telephone Interview with Carl Jenkins, *supra* note 158.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

have to follow orders—you can actually be part of society."[207]

a. Community Trauma Healing and Traditional Dispute Resolution

Social reintegration occurs through two mechanisms popularly used within transitional justice—community-based trauma healing and traditional dispute resolution.[208] Trauma healing for the community is being implemented at a very local level by a Somali-based NGO, but uses techniques common to reconciliation within post-conflict situations globally.[209]

> [T]hrough voicing the experience of trauma . . . the victims, and the perpetrators would stand up, [and] spend the time using various techniques to share their experience. And quite often . . . what happens is that the victims and the perpetrators find that their shared experience is one and the same, and that they can get through it . . . .[210]

By addressing community concerns, the program attempts to mitigate the concerns of victims, who will have to accept the combatant back into the community.[211] In situations where the combatant committed crimes against members of the community in which they will return,

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207. *Id.*

208. For an overview of common community-based reconciliation methods and techniques used by transitional justice practitioners, *see generally* RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK (David Bloomfield et al. eds., 2003) [hereinafter RECONCILIATION HANDBOOK], http://www.un.org/en/peacebuilding/pbso/pdf/Reconciliation-After-Violent-Conflict-A-Handbook-Full-English-PDF.pdf.

209. The Reconciliation Handbook defines healing as "any strategy, process or activity that improves the psychological health of individuals following extensive violent conflict. Strategies, processes or activities aimed at rehabilitating and reconstructing local and national communities more broadly are also integrally linked to this process. As such, healing is not only about assisting individuals to address their psychological health needs in an isolated way, but is dependent upon and integrally linked to repairing and rebuilding communities and the social context. This implies restoring a normalized everyday life that can recreate and confirm people's sense of being and belonging." *Id.* at 77.

210. Telephone Interview with Carl Jenkins, *supra* note 158.

211. There are many examples of communities where perpetrators and victims must live side-by-side using these techniques. For example, in Sierra Leone, following the end of the civil conflict, a national NGO, frustrated by the national truth and reconciliation process, designed a community-level reconciliation process taking from traditional practices, known as Fambul Tok. John Caulker, *Fambul Tok: Reconciling Communities in Sierra Leone,* ACCORD, Mar. 2012, at 52, 52–54, http://www.c-r.org/downloads/CON1222_Accord_23_11.pdf.

this is especially important.[212]

Trauma healing is complemented with traditional dispute resolution, using Somali customary law administered by clan elders, called xeer.[213] Before being re-admitted to the community the combatants must appear before a xeer-council, composed of clan elders, who decide in accordance with customary law what the appropriate punishment for their crimes will be.[214] Xeer includes "blood compensation,"—called diya—in which the opposing clan is entitled to exact revenge for a crime committed (for example, the crime of murder), although there are currently attempts to prevent clan elders from deciding severe crimes, because of the comparably low judgments given out for these offenses.[215] Generally for the combatants in Baidoa, punishments include a requirement to complete community service.[216] The xeer-councils are assisted through a trauma dispute resolution unit within the Ministry of Justice, which is supported with significant assistance from the International Development Law Organization.[217]

b. Female Disengaging Combatants

Female disengaging combatants, who also undergo the deradicalization program in Baidoa, face significant unique challenges, many of which the program has yet to adequately respond to. These

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212. The program is heavily focused on ensuring community acceptance for the deradicalizing individuals. Some of those who return from the program later obtain jobs within the community. *See* Anyadike, *supra* note 172.

213. Xeer, Somali customary law, is used widely across Somalia. HARPER, *supra* note 2, at 40; M.J. FOX, THE ROOTS OF SOMALI POLITICAL CULTURE 6–7 (2015).

214. Telephone Interview with Carl Jenkins, *supra* note 158.

215. In many parts of South-Central Somalia, where formal governance is very weak, clan elders still make decisions on murder, rape, and sexual and gender based violence. Human Rights Watch, "Here Rape is Normal": A Five-Point Plan to Curtail Sexual Violence in Somalia 27–28 (2014), https://www.hrw.org/sites/default/files/reports/somalia0214_ForUpload.pdf (describing the role of clan elders in adjudicating sexual violence claims). In Baidoa, the dominant sub-clans, the Digil and Mirifle, had an agreement within their judgment code that the civil conflict, which began in 1991, would be considered to be essentially *force majeure*, akin to a major flood or famine. As a result, blood compensation or revenge could not be obtained for crimes related to the civil conflict. This has increased the efficiency of the xeer-council system, as it prevents members of these sub-clans from seeking multiple cycles of compensation and revenge for a long litany of violations committed by both sub-clans. Telephone Interview with Carl Jenkins, *supra* note 158.

216. Telephone Interview with Carl Jenkins, *supra* note 158.

217. Telephone Interview with Patrick Loots, *supra* note 171.

include difficulties ensuring adequate protection (both during the program and after they leave), economic reintegration, and social reintegration. Additionally, most of them arrive at the camps with dependents, which raises complex human rights concerns for the rights and welfare of their children.

At Baidoa, female disengaging combatants are housed at a separate safe house, although they enter the male facility to participate in the program activities (religious debate, vocational training, literacy and numeracy training, etc.).[218] This is in part for protection reasons, but also mainly to ensure that their dependents are unable to enter the male facility.[219] However, as of December 2015, the state of the facilities within the female safe house lacked some basic provisions, which were mostly unable to be provided due to funding shortages.[220] Although the number changed greatly as new entrants arrived and current members completed the program (a large number of female combatants returned home in December 2015), as of January 2016 there were sixteen females at Baidoa and twenty dependents.[221]

Protection issues for female fighters are heightened, in part as a result of the kinds of roles that they play within Al-Shabaab's command structure. "They were often Amniyat [Al-Shabaab's intelligence wing], spies, assassins . . . . They were doing a lot of dirty work because they do it in the background. And that raised their risk profile compared to the males."[222] As a result, some of the females who arrived at the facility were technically likely to have been high-risk under the government-stipulated guidelines but have nonetheless been categorized as low-risk.[223] This creates challenges because some individuals should, under the guidelines, be punished under the

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218. *Id.*

219. The presence of children within the Mogadishu facility was seen as causing significant human rights concerns. *See* Telephone Interview with Carl Jenkins, *supra* note 158. Under international humanitarian law, children deprived of their liberty are to be given special treatment. *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME II: PRACTICE 2795–801 (2005) (stating and contextualizing the International Committee of the Red Cross's IHL Rule 120: Accommodation for Children Deprived of Their Liberty).

220. Telephone Interview with Carl Jenkins, *supra* note 158.

221. Telephone Interview with Patrick Loots, *supra* note 171.

222. Telephone Interview with Carl Jenkins, *supra* note 158.

223. For example, the first female defector to arrive at the Baidoa camp was confirmed as being a member of the Amniyat (a categorization that should have automatically disqualified her from entering the low-risk program). She, however, successfully completed the program. *Id.*

criminal justice system. It is also problematic because, while women appear to be provided roles that under the guidelines would categorize them as high-risk, it is not clear that they have senior authority or control within Al-Shabaab that might be expected of an individual classified as high-risk. Therefore, women face the risk of getting disproportionately harsher sentences than men, relative to the authority, control, and power that they have within Al-Shabaab.

In terms of the traditional dispute resolution mechanisms, a vital drawback is that women are forbidden from representing themselves in front of the xeer-councils.[224] This has significant implications for the viability of this form of alternative justice for female fighters, raising fair trial concerns.[225]

Further, females who are unable to get protection from their clans or communities struggle to be reinserted back into society, making it hard for them to exit.[226] "Unlike the males—who we can send back to an urban center and they can get on with life—[by] sending a female halfway without clan protection, we're probably increasing her vulnerability and protection concerns, particularly sexual and gender [based] violence."[227]

2. Exit From the Rehabilitation Program

To formally leave the program, combatants must secure approval of an exit board.[228] The exit board is composed of representa-

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224. *Id.*

225. Note, these same concerns are raised with regard to clan minorities. A significant drawback of the xeer system is that it generally tends to favor the most dominant clans, elders, and men. *See* Margherita Zuin, *A Model of Transitional Justice for Somalia*, 23 PRAXIS: FLETCHER J. HUM. SECURITY 89, 97 (2008); *see also* HARPER, *supra* note 2, at 15–16, 24–25; .

226. Somalia is still a deeply patriarchal society. For example, women may not serve as judges or as elders within the community (although in certain parts of the country, there are now female prosecutors). *Debating Reforms of Somaliland's House of Elders*, IRIN (July 18, 2013), http://www.irinnews.org/news/2013/07/18/debating-reform-somaliland%E2%80%99s-house-elders ("Traditionally, women are not appointed clan elders, and the first House of Elders after Borama was an all-male body: Since then, a few women have inherited seats from their husbands, but they still represent a very small minority."); *Somaliland's First Female Deputy Prosecutor*, U.N. DEV. PROGRAMME, http://www.undp.org/content/undp/en/home/ourwork/ourstories/somaliland_s-first-female-deputy-prosecutor.html (last visited Nov. 28, 2016) (noting the first female prosecutor was not appointed until 2013).

227. Telephone Interview with Carl Jenkins, *supra* note 158.

228. Telephone Interview with Patrick Loots, *supra* note 171.

tives from NISA, the center's religious counselors, elders, and the community.[229] Center staff also provides an assessment.[230] The exit board ensures that the criteria for leaving are holistic—looking at the individual's risk profile from security, religious understanding, and civic engagement perspectives, and analyzing the ability of the individual to be resilient, both economically and psychologically.[231]

To manage exit procedures, each of the three centers follows its own system, and the compilation of the exit board in Baidoa is not yet harmonized with the criteria for the board composition at the other two camps in Mogadishu and Beletweyne.[232] The exact requirements to successfully pass through the program are not yet set or written down. The UNSOM Chief of DDR stated that alongside IOM and Adam Smith International (the implementing partners at the three camps), they were trying to align to agree on criteria and conditions required for exit.[233] This has crucial ramifications for due process rights, including the right to a fair trial.

However, despite concerns over lack of transparency in the entry process and allegations that NISA had too much control over both the entry and exit procedures (raising questions of due process and fairness), the UNSOM Chief of DDR stressed the importance of NISA involvement with determinations of the composition of the exit board. "It is their responsibility to take care so that they don't relapse," he stated. "You can never cut NISA out of this process."[234] Not including the intelligence services might undermine their ability to secure the country and monitor suspected terrorists who may have passed through the program but return to Al-Shabaab.

E. Treatment of Terrorists Through the Criminal Justice System

All individuals classified as "high risk" are ineligible to enter the centers, and instead must face trial under the criminal justice system.[235] Although there are in general strict requirements limiting which non-state actors can be tried within the jurisdiction of a mili-

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229. *Id.*

230. Telephone Interview with Carl Jenkins, *supra* note 158.

231. *Id.*

232. Telephone Interview with Patrick Loots*, supra* note 171.

233. *Id.*

234. *Id.*

235. THE INTER-MINISTERIAL TASKFORCE ON DISENGAGING COMBATANTS, *supra* note 144, at 14.

tary court,[236] all Al-Shabaab cases in Somalia are currently tried exclusively by military courts.[237]

1. Military Courts

In general, military courts are inappropriate for trying civilians and may only be used to try civilians in exceptional circumstances.[238] Under the African regional human rights system, military courts may not try civilians.[239] In this case, Al-Shabaab members may be properly deemed to be combatants as the group meets the threshold of an armed group under international humanitarian law.[240] However, the military proceedings must still meet Geneva Conventions Common Article 3 provisions, which require that judgments be pronounced by a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[241] Further, the International Covenant on Civil and Political Rights ("ICCPR")[242] provides for the entitlement to "a fair and

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236. Human Rights Committee, General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, ¶ 22, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) ("Trials of civilians by military or special courts should be exceptional.")

237. Telephone Interview with Patrick Loots, *supra* note 171.

238. *See supra* note 236 and accompanying text.

239. AFRICAN COMM'N ON HUMAN AND PEOPLES' RIGHTS, PRINCIPLES AND GUIDELINES ON HUMAN AND PEOPLES' RIGHTS WHILE COUNTERING TERRORISM IN AFRICA, at 24 (2015), http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf.

240. Al-Shabaab has been classified as an "armed group" by the International Committee of the Red Cross. *See Emergency Appeals 2015: Somalia*, INT'L COMMITTEE RED CROSS (2015), https://app.icrc.org/files/2015-emergency-appeals/files/2015_ea_somalia.pdf.

241. This provision is found in Common Article 3 of the Geneva Conventions. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

242. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. REP. 102-23, 999 U.N.T.S. 171 [hereinafter ICCPR]. The ICCPR provisions on the right to a fair trial are largely considered to reflect customary international law and therefore is applicable to Somalia. *See* COUNTER-TERRORISM IMPLEMENTATION TASK FORCE, BASIC HUMAN RIGHTS REFERENCE GUIDE: RIGHT TO A FAIR TRIAL AND DUE PROCESS IN THE CONTEXT OF COUNTERING TERRORISM 7 (Oct. 2014), http://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf.

public hearing by a competent, independent and impartial tribunal established by law."[243] Minimum requirements to ensure that there is a fair trial include the right to communicate with counsel, the right to legal assistance, and the right to a trial without undue delay.[244]

The military courts appear not to meet the basic guarantees of a fair trial. Access to military courts, even for U.N. and other international organization personnel, is very limited.[245] Defendants are not provided access to a lawyer, and the proceedings are generally not recorded by video camera or made available for review.[246] A senior United Nations official who visited the military detention facility in Mogadishu (where some military trials take place), stated:

> [T]he military court . . . where the high-risk cases are taking place, it's in a tiny little room and it is just a summary trial . . . . When I went into that room, to be very honest, I said, oh my God. . . . [E]ven for a lawyer to sit there, I don't think there is enough space . . . to even put in a table.[247]

The U.N. Human Rights Council Independent Expert on the Situation of Human Rights in Somalia noted that "the question of how ex-Al-Shabaab combatants are handled was raised, with some noting that failure to handle such cases through properly established legal and judicial structures might have serious implications on impunity, accountability and future transitional justice processes."[248]

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243. ICCPR, *supra* note 242, art. 14(1) U.N. human rights bodies and experts have objected to the practice of civilians being tried in military courts on the grounds that this violates fundamental due process rights. The U.N. Human Rights Committee, in its General Comment No. 13, concluded that while military courts are not *per se* prohibited under the International Covenant on Civil and Political Rights (ICCPR), it must nonetheless be an exceptional measure and must ensure all due process rights guaranteed under Article 14 of the Convention. U.N. Human Rights Committee, General Comment No. 13: Article 14, Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, (April 13, 1984), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/INT_CCPR_GEC_4721_E.doc. For a general discussion of the trial of civilians in military courts in terrorism cases, see Claudia Martin, *The Role of Military Courts in a Counter-Terrorism Framework: Trends in International Human Rights Jurisprudence and Practice*, *in* COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE 689 (Ana Maria Salinas De Frias et al. eds., 2012).

244. ICCPR, *supra* note 242, art. 14(3)(b)(d).

245. Telephone Interview with Patrick Loots*, supra* note 171.

246. Telephone Interview with Senior U.N. Rule of Law Project Official*, supra* note 133.

247. *Id.*

248. Human Rights Council, Rep. of the Independent Expert on the Situation of Human Rights in Somalia, 27th sess., U.N. Doc A/HRC/27/71, at ¶ 9 (Sept. 4, 2014).

The rationale given for using military courts in South-Central Somalia is that only they have the capacity to try highly sensitive terrorism cases safely.[249] Security concerns for individuals within the civilian justice system are considerable. In 2013, the Benadir Court Complex, which housed the Supreme Court,[250] was attacked by Al-Shabaab members and at least thirty people were killed, including a significant number of court personnel.[251] Assassination attempts against judges and judicial personnel are also common across South-Central Somalia.[252] Considering the fragility of the entire justice system in South-Central, the validity of this justification should not be underestimated.[253]

2. Pilot Program for High-Risk Individuals

For high-risk cases that are given prison sentences and not eligible for the above program, there are attempts to create rehabilitation programs to deradicalize and work with these individuals. A Rehabilitation Pilot Project for High Risk Prisoners in the Baidoa Prison is due to commence soon and is funded by the U.N. Peacebuilding Fund.[254] The first phase of the pilot project will consist of an assessment phase, which will try to assess key features of the target group—such as who they are, how many there are, demographics, and their motivations.[255] Additionally, a community assessment will also be undertaken to understand how Al-Shabaab operates in certain

249. Telephone Interview with Patrick Loots, *supra* note 171 (stating that "the military justice system is the only one that can safely handle these cases.") Multiple other U.N. and intergovernmental organization officials interviewed agreed with this assessment. *See, e.g.*, Telephone Interview with Senior U.N. Rule of Law Project Official, *supra* note 133.

250. Mohamed Amiin Adow, *Dozens Dead in Somali Courthouse Attack*, CNN (Apr. 15, 2013), http://www.cnn.com/2013/04/14/world/africa/somalia-violence/.

251. Press Release, UN in Somalia, Benadir Court Complex Opens in Mogadishu (Sept. 10, 2015), http://www.undp.org/content/unct/somalia/en/home/presscenter/press-releases/benadir-court-complex-opens-in-mogadishu.html; *Al-Shabaab Takes Responsibility for Deadly Mogadishu Attack*, HIIRAAN ONLINE (Apr. 15, 2013), http://hiiraan.com/news4/2013/Apr/28904/al_shabaab_takes_responsibility_for_deadly_mogadishu_attacks.aspx.

252. For example, in January 2016, the Bardere Court Chief survived an assassination attempt. *Somalia: Bardere Court Chief Survives Assassination Bid,* ALLAFRICA (Jan. 29, 2016), http://allafrica.com/stories/201601300013.html; *see also Somalia: Court Judge Assassinated in Mogadishu*, RBC RADIO (Nov. 23, 2013), http://www.raxanreeb.com/2013/11/somalia-court-judge-assassinated-in-mogadishu/.

253. For an analysis of the justice system in Somalia, *see supra* Part III.A.1.

254. Telephone Interview with U.N. Official Involved with the Pilot Project, *supra* note 141.

255. *Id.*

regions and how they are perceived.[256] In part, this is necessary to ensure that there is adequate contextual knowledge of the motivations, characteristics, and objectives of radicalized individuals in Somalia.

Thereafter, the second phase will consist of implementing the actual rehabilitation project. Currently, there is no follow-up plan to continue to work with or check up on the prisoners who will have gone through the program and are released, although this is something that is being considered.[257]

The pilot project will commence with around forty people, who are hopefully nearing the end of their prison sentences and getting ready to be released.[258] "You need a quite motivated group at first. If you have people who are not interested, that can destroy it."[259] Thereafter, there will be continuous reassessment to ensure that the methods used to rehabilitate are meeting the goals. "The project document will be more of a living document."[260] A difficulty in conducting counter-terrorism and CVE projects is that while the tactics, organization, and objectives of terrorist organizations frequently morph rapidly, large bureaucracies and institutions are much slower to respond.[261] Therefore, without continuous reassessment and review of rehabilitation techniques, a CVE program will likely be less effective than it could be.

IV. RECOMMENDATIONS

Somalia's national program for the treatment and handling of disengaging fighters is still in its infancy, and only the low-risk program is fully established. In the last year, the low-risk program has been a modest success in an incredibly challenging environment. Deradicalizing and demobilizing combatants when conflict is ongoing and the country is still reeling from twenty-five years of state collapse is an uphill battle. However, the key success of the low-risk program has been its ability to make inroads in reintegrating terror-

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256. *Id.*

257. The U.N. official involved with the pilot project said, "That is usually the most crucial part—when they go back." While current pilot project funding does not allow for follow-up activities, it is hoped that such measures will be included in a full project. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. Interview with Anneli Botha, *supra* note 187.

ism defectors and detainees in a manner that respects fundamental international human rights and humanitarian law principles.   Going forward, the program needs to build upon this base and institutionalize its success.   To do so, I offer six recommendations.   These recommendations also serve as normative proposals for other fragile states with ongoing conflicts that are or will be grappling with large numbers of disengaging terrorists, such as Syria and parts of Nigeria.[262]

A. *Create a Transparent Rights-Based and Rights-Respecting Classification System*

One of the biggest problems is the perception that the security forces are carrying out arbitrary and unfair classifications.   The ramifications of being classified as high-risk versus low-risk can be literally fatal.[263]   High-risk disengaging combatants face the possibility of the death penalty through a trial by a military court, without access to a lawyer and other due process safeguards.[264]   Low-risk combatants avoid criminal responsibility altogether, receiving amnesties in practice.[265]   Considering the stakes involved, it is vital that robust, codified, transparent, rights-respecting guidelines be developed for NISA screening of terrorists and that international human rights monitors be allowed some access and oversight.

Further, ensuring respect for human rights is strategically important to ensure success of the program.   A key difference between the low-risk rehabilitation centers and traditional counter-terrorism approaches is the level of openness and transparency afforded to the DDR system.   Much of counter-terrorism relies on strong intelligence and secrecy, and little is known about how secret service and special military units combatting terrorism around the world operate.   By contrast, a DDR program engaging in CVE practices, such as the

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262.   Obi Anyadike, *The Road to Redemption? Unmaking Nigeria's Boko Haram*, IRIN (Oct. 1, 2015), http://newirin.irinnews.org/boko-haram-road-to-redemption (explaining Nigeria's deradicalization treatment program and the challenges it faces in disengaging large numbers of terrorists). There have yet to be significant deradicalization programs in Syria, but should ISIS fighters suffer heavy defeats, there will likely be a need to reintegrate large numbers of former terrorists and fighters. According to the United States, there are somewhere between 19,000–25,000 ISIS fighters in Syria and Iraq. Jim Scuttio et. al., *ISIS Fighters in Libya Surge as Group Suffers Setbacks in Syria, Iraq*, CNN (Feb. 4, 2016), http://www.cnn.com/2016/02/04/politics/isis-fighters-libya-syria-iraq.

263.   *Supra* Part III.E.

264.   *Supra* Part III.E.

265.   *Supra* Part III.A.3.

Baidoa rehabilitation program, "can and does publicize infor-mation."[266] Media frequently visits the Baidoa facility and there is significant oversight and assessment, including by human rights monitors.[267] The rehabilitation camp is integral to the "strategic communications" of the military effort, "providing a ray of hope for Al-Shabaab members who want to disengage."[268] But to be a suc-cessful tool of strategic communications, people need to feel that the system is fair. Fairness begins with the classification system, and this requires standard guidelines and transparency.

B. Codify and Write into Law Best Practices and Policies

One of the key challenges identified by the U.N. and imple-menting international NGOs was the frequent rotation of staff within Somali government and institutions.[269] For example, the focal point for implementation of the national program within the Ministry of In-terior Security has changed eight times within the last two years.[270] Within Baidoa, a significant amount of progress has been achieved because the local NISA representatives "were fantastic and saw the long-term perspective."[271] However, currently the success or failure of a particular program depends, in large part, on individual personal-ities.[272] Nothing is codified, and so the system is inherently unstable. Therefore, the Somali administration must prioritize codifying into law best practices and policies.

The draft anti-terrorism bill needs to be passed, so that there are updated laws that delineate terror-related crimes and their sen-tences. A formal amnesty law should also be created and passed by parliament to set strict policies for when amnesties can be offered and how it will complement that DDR program. As Mallinder notes, creating a national amnesty program promulgated by legislation—increasing the perceived and actual legitimacy of the agreement—will then likely further peace processes and be respected by the peo-ple.[273] The legal framework governing the rehabilitation camps, as

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266. Telephone Interview with Patrick Loots, *supra* note 171.

267. Telephone Interview with Carl Jenkins, *supra* note 158.

268. Telephone Interview with Patrick Loots, *supra* note 171.

269. The majority of interviewed individuals cited throughout this Note are officials at either the U.N. or the implementing NGOs.

270. Telephone Interview with Patrick Loots, *supra* note 171.

271. Telephone Interview with Carl Jenkins, *supra* note 158.

272. *Id.*

273. Mallinder, *supra* note 66, at 141..

well as standard operating procedures that build on best practices gleaned and lessons learned from the Baidoa experience need to be developed.

Finally, this should be supplemented with regular, independent monitoring to ensure compliance with procedures. While ensuring that there are rules in place is vital to the legitimacy and long-term sustainability of the program, it is equally necessary to make sure that the rules are actually being followed, and those violating procedures or laws are held accountable.

C. Invest in the Criminal Justice System and Slowly Shift Away from Military Tribunals for Terrorism Cases

While the considerable security risks and fragility within the criminal justice system mean that, at least in the short-term, conducting civilian criminal trials for terrorism cases may simply be practically unfeasible, there needs to be considerable long-term investment in police, justice, and correctional capabilities. The police, essentially made up of former members of militia groups,[274] needs to be rebuilt into a force that is accountable to the people, investigates cases fairly, and preserves order and stability. The justice and correctional systems need to be robust and impartial. Access to justice also needs to expand beyond urban centers and engage meaningfully with traditional and alternative justice mechanisms, which are used by the overwhelming majority of people in South-Central Somalia. Once this is done, military tribunals can begin to reduce caseloads and transfer cases to civilian courts.

The barriers to institutional development are currently very high and very few systems are in place. For example, one of the things that the current DDR unit representative is doing is trying to set up an official (not personal) e-mail address, that stays with the office even after he leaves.[275] Therefore, the needs are currently very basic. The institutional vacuum, however, also presents an opportunity to set up structures the right way and ensure that they serve the people of Somalia.

D. Continue to Allow Freedom of Movement and Access to Family

The low-risk rehabilitation center must not become a *de facto*

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274. *See supra* note 136 and accompanying text.

275. Telephone Interview with Carl Jenkins*, supra* note 158.

detention center and individuals should continue to have freedom of movement and access to their families. Treating these disengaging combatants as civilians, not criminals—in addition to being a humane approach to counter-terrorism—is likely to better win hearts and minds.[276] One of the strongest features of the Baidoa center is the considerable human rights provisions afforded to participants. This should be maintained and extended to the other two centers in Mogadishu and Beletweyne.[277]

E. Put Women at the Core of Counter-Terrorism, CVE, and DDR Programming

It is important to put women at the core of counter-terrorism programming because they have different needs, motivations, and vulnerabilities compared to men, and because they also can play a vital role in prevention of future radicalization of those around them. Although the Baidoa facility has made attempts to cater to the specific needs of female disengaging combatants, this must be improved and built upon. The reasons women join terrorist organizations are different from those of men, and therefore programming needs to be targeted.[278] The needs of women in Somalia and their vulnerabilities upon exit of the program are also greater than those of men.[279] Therefore, rehabilitation design needs to account for the unique challenges faced by female disengaging combatants in Somalia.

Further, women can also play a strong role in early warning and prevention.[280] Mothers, sisters and aunts often pick up on early

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276. *Id*. (stating that the deradicalization camp was trying to present individuals with an alternative to joining Al-Shabaab).

277. *Id.* (discussing problems at the other two centers).

278. Interview with Fauyiza Abdi, Founder, Women in International Security, in Nairobi, Kenya (Jan. 12, 2016) (on file with author) (arguing that CVE programming that treats women the same as men is likely to miss key motivations). Other CVE experts have also endorsed this targeted approach. *See, e.g.*, Interview with Anneli Botha, *supra* note 187; *see also infra* note 280 and accompanying text.

279. Telephone Interview with Carl Jenkins, *supra* note 158.

280. Interview with Abdullahi Halakhe, CVE Expert and East Africa Researcher, Amnesty International, in Nairobi, Kenya (Jan. 5, 2016) (on file with author). The Somalia National Countering Violent Extremism Strategy, launched on September 12, 2016, Press Release, Office of the President, Fed. Republic of Som., President Mohamud Launches National Strategy for Countering Violent Extremism (CVE) (Sept. 12, 2016), http://www.villasomalia.gov.so/president-mohamud-launches-national-strategy-for-countering-violent-extremism-cve, notes:

> Women . . . have an essential role to play at the heart of our prevention efforts in Somalia since mothers, sisters and daughters are often the bread winners of

signs of radicalization long before an individual decides to commit to joining a terrorist group.[281] Putting them at the center of CVE policy can help in prevention and mitigation of radicalization.

F. Create a Broader Development Framework, with a Focus on Youth and Employment-Generation

If individuals go through the program successfully, but return to their homes without job opportunities, they may rejoin their old terrorist group, a new terrorist group, or, at a minimum, engage in criminality.[282] Therefore, there needs to be a broader development framework to support the rehabilitation programs. The varying nature of the amount of time spent within the rehabilitation program (ranging from one month to one year) means that it does not make sense to craft robust vocational training programs. However, once the combatant successfully leaves, vocational training should be included as part of follow-up. Especially in Somalia, where seventy-five percent of the population is estimated to be under the age of thirty,[283] any employment-generation initiatives need to focus on the youth.

CONCLUSION

This Note has focused on understanding the emerging legal framework for dealing with detained and defecting Al-Shabaab members in Somalia. Part I surveyed broader counter-terrorism and DDR policies and their evolution. Part II looked at the history of Al-Shabaab in Somalia. Part III described and analyzed the current anti-terrorism framework in Somalia, focusing on the center for rehabilitation of low-risk disengaging combatants in Baidoa and the criminal

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Somalia and are uniquely positioned in homes and communities to understand changes in the behaviors of children and in their respective locals, and to provide powerful countervailing incentives.

FED. REPUBLIC OF SOM., *supra* note 132, at 14; *see also Somalia: President Mohamud Launches National Strategy for Countering Violent Extremism (CVE)*, RBC RADIO (Sept. 12, 2016), http://www.raxanreeb.com/2016/09/somalia-president-mohamud-launches-national-strategy-for-countering-violent-extremism-cve.

281.   Interview with Abdullahi Halakhe, *supra* note 280.

282.   Telephone Interview with Carl Jenkins*, supra* note 158.

283.   United Nations Population Fund, *Population Estimation Survey 2014 for Somalia* 42 (2014), http://somalia.unfpa.org/sites/arabstates/files/pub-pdf/Population-Estimation-Survey-of-Somalia-PESS-2013-2014.pdf.

justice response to high-risk combatants. Finally, Part IV offered recommendations to improve the current system.

Somalia is attempting to rebuild after twenty-five years of State collapse. While a federal, fully-formed government has now been in place for four years,[284] the security situation remains highly precarious and Al-Shabaab attacks occur in the country frequently.[285] However, by creating a robust counter-terrorism framework that is contextualized and tailored to Somalia but implements international best practices, Somalia and international partners can begin to deradicalize many Al-Shabaab fighters and lower the threat that the group presents, both in Somalia and across the region.

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284. *The World Factbook: Africa: Somalia*, CENT. INTELLIGENCE AGENCY (Nov. 10, 2016), https://www.cia.gov/library/publications/the-world-factbook/geos/so.html (expand "Government:: Somalia" section).

285. *Somalia Travel Warning*, U.S. DEP'T STATE: BUREAU CONSULAR AFF. (May 24, 2016), https://travel.state.gov/content/passports/en/alertswarnings/somalia-travel-warning.html.