

# The Limits of Punishment

*Transitional Justice and Violent Extremism*



May, 2018



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#### **COVER IMAGE**

NIGERIA. 2017. Maiduguri. After being screened for association with Boko Haram and held in military custody, this child was released into a transit center and the care of the government and Unicef. © Paolo Pellegrin/Magnum Photos.

*This material has been supported by UK aid from the UK government; the views expressed are those of the authors.*

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# Introduction to the Project

CALE SALIH, *Project Lead*

## What is this project?

*The Limits of Punishment* is a research project led by the United Nations University's Centre for Policy Research, in partnership with the Institute for Integrated Transitions, and supported by the UK Department for International Development. It seeks to understand if, when and how transitional justice, in combination with other conflict resolution tools, can contribute to transitions away from conflict in settings affected by major jihadist groups.<sup>1</sup> Specifically, it aims to answer two questions:

1. What are the effects of current approaches toward punishment and leniency for individuals accused of association with jihadist groups in fragile and conflict-affected states?
2. What factors should policymakers consider in designing alternative and complementary strategies leveraging transitional justice tools to better contribute to sustainable transitions away from conflict?

To answer the first question, the project undertook three fieldwork-based case studies that assessed nationally-led approaches to handling individuals accused of having been associated with: al Shabaab in Somalia; Boko Haram in Nigeria; and the Islamic State (IS) in Iraq. The case studies look at a broad range of formal and informal mechanisms of punishment and leniency. These include, inter alia: amnesties; prosecutions; traditional justice; and disarmament, demobilisation, reintegration (DDR), rehabilitation, and similar programs that, in practice, offer some individuals alternatives to criminal justice. The case studies demonstrate the risks of excessively heavy-handed and at times indiscriminate approaches that penalise broad sectors of local populations accused of association with these groups, and assess the quality and limitations of existing leniency programs for such individuals.

To answer the second question, the Institute for Integrated Transitions' Law and Peace Practice Group – a group of leading transitional justice experts – analysed the empirical evidence of the case studies in light of broader lessons learned from decades of international practice in the field of transitional justice. On this basis, the Group developed a framework to assist national policymakers and practitioners – as well as their international partners – in applying transitional justice tools as part of a broader strategy to resolve conflicts involving groups deemed violent extremist. The framework offers a range of approaches toward effectively balancing leniency and accountability, that can be tailored to conflict settings marked by violent extremism.

## Who is this project for?

The primary audiences for this volume are national policymakers and development and conflict resolution practitioners in fragile and conflict-affected states affected by jihadist violence. National authorities in these states are investing significant efforts into defeating these groups militarily, and prosecuting and/or detaining their members and associates. In some limited cases, they have also attempted political negotiations or other non-punitive strategies. This project's findings aim to help national actors develop tailored and balanced strategies toward

handling individuals accused of association with jihadist groups in ways that are more likely to contribute to conflict resolution.

The project's findings are also relevant to international financial and technical assistance providers. These include donor countries, many of which are spending significant resources on supporting counter-terrorism (CT), Countering Violent Extremism (CVE), and stabilisation efforts in Africa, the Middle East and elsewhere. Other intended beneficiaries of this project include multilateral organisations, namely the United Nations, which is increasingly investing in Preventing Violent Extremism and related work.

Finally, the project is relevant to the growing community of experts and academics working on CT and CVE. It contributes in particular to the evidence base on how to: protect human rights in the context of counter-terrorism operations; induce and manage individual- and faction-level defections from extremist groups; and promote reconciliation in areas formerly controlled by these groups. It also offers a foundation for further research and analysis exploring other questions related to dealing with jihadist groups, including that of whether and how states can negotiate with them. Further, although the focus of this project is on jihadist groups, the findings may be relevant to other types of violent groups with ideological agendas and that control territory and populations.

## Why does this project matter?

In recent years, some of the highest profile jihadist groups have been militarily pushed back from large territories they once controlled. This has created new stabilisation and peacebuilding opportunities and challenges, particularly in the communities most directly impacted by the groups. But it has also raised a new set of critical questions in need of urgent answers, including whether current CT and CVE policies in such settings effectively leverage these opportunities and meet the challenges in a sustainable manner; whether there are unintended consequences for individuals accused of having been associated with jihadist groups; and whether there are lessons to be learned from other settings that could usefully be applied.

This project zooms in on a critical, and significantly understudied, piece of the puzzle: justice responses to individuals accused of having been associated with jihadist groups. As discussed above, the project defines “justice” approaches broadly, looking at formal and informal mechanisms of leniency and punishment.

The project's findings are relevant to the target audiences for two key reasons:

**First**, jihadist groups form a key part of the changing landscape of conflict, posing exceptionally difficult challenges for states. These groups have proliferated and grown in prominence in recent years, with the number of conflicts involving IS and its affiliates having quadrupled from 2014 to 2015.<sup>2</sup> Since 2010, the number of Salafi-jihadist fighters in the battlefield has risen sharply.<sup>3</sup> And in 2015, a large share of deaths resulting from organised violence took place in incidents involving ISIS, al Qaida, and its affiliates.<sup>4</sup> These trends suggest that jihadist groups will be a feature of many of today's and tomorrow's deadliest wars, and that policymakers will need to find ways to deal effectively with them.

Yet, military defeat of major jihadist groups such as Boko Haram in Nigeria, IS in Iraq, and al Shabaab in Somalia, appears elusive. Even where significant territory has been retaken, declarations of victory appear premature. In Nigeria, for instance, Boko Haram has continued to launch attacks well after the government declared “a technical victory” over the group in 2016.<sup>5</sup> Iraq in 2017 won back all major territory from IS and formally declared victory against the group,<sup>6</sup> but it now faces significant stabilisation and political reform challenges, with many experts warn-



ing of the risk of an IS 2.0 emerging among marginalised Sunni populations.<sup>7</sup> And al Shabaab, despite years of military pressure from Somali national forces and AMISOM, remains in control of significant parts of Somalia and capable of undertaking major terrorist attacks.<sup>8</sup>

**Second**, the elusiveness of military defeat suggests that, while coercive measures obviously have a role to play, states must consider complementing military campaigns with other approaches rooted in conflict resolution.

Among the conflict resolution tools available to states, transitional justice tends to be especially overlooked or assumed not to apply to “terrorists,” who are often seen as deserving no less than maximum punishment. However, in conflict settings, individuals become associated with jihadist groups in diverse violent and non-violent roles, and under a range of coercive, survival-driven and voluntary conditions. This diversity requires equally multi-layered and nuanced approaches to justice and accountability.

Approaches that cast the punishment net too widely carry a high risk of penalising civilians who had little choice but to develop some association with the jihadists that ruled their villages and towns, and those who have no direct association at all. These individuals may include: civilians who became associated with the group in non-violent support roles, such as drivers and cooks; victims of the group, including women who have been forcibly married to fighters; those who merely lived under the group’s control and were unable to escape; and unaffiliated relatives of accused members of the group. Penalising such individuals on a mass scale, as our case studies demonstrate, risks further alienating local communities from the state and possibly contributing to the birthing of new cycles of revenge and violence, thereby undermining stabilisation and conflict resolution goals.

Equally important, and as shown in our Somalia case study, ad hoc political deals that let senior leaders of a group off with no visible accountability measures risk exacerbating impunity. Any leniency measures must be carefully balanced with victims’ rights and societal demands for justice, lest they be seen domestically and/or internationally as illegitimate and allowing serious terrorists to get away with murder.

An approach that balances leniency and accountability can help contribute to conflict resolution by facilitating individual exits from a group, promoting rehabilitation of some former associates, especially those who had minor ties to a group, and enabling longer-term reconciliation and recovery within society. This balance is challenging for states to strike in any context, and even more so in complex conflict settings involving jihadist groups. This project offers ideas to help achieve that balance, using transitional justice strategies that can better contribute to conflict resolution, stabilisation and reconciliation.

## What’s in this volume

**CHAPTER 1** presents **Ronald Slye’s and Mark Freeman’s Framework Paper**, “Toward a Transitional Justice Framework for Preventing and Overcoming Violent Extremism.” The paper builds on the empirical evidence presented in the case studies, as well as broader lessons from decades of international experience in the field of transitional justice. It offers national policymakers and practitioners – as well as their international partners – a framework for developing alternative responses to individuals accused of association with violent extremist groups. The paper provides: an overview of amnesty and accountability themes that arise across the three case studies; an analysis of the range of alternatives that transitional justice offers to deal with problems of extreme violence and atrocity; a strategy formation framework outlining the key

considerations for policymakers to effectively prevent and counter violent extremism; and a list of additional areas that require further research and analysis.

**CHAPTER 2 is Mara Revkin's Iraq case study**, “After the Islamic State: Balancing Accountability and Reconciliation in Iraq.” This case study addresses how Iraqi and Kurdistan Regional Government (KRG) authorities can, in the aftermath of the retaking of Mosul and other formerly IS-controlled areas, accurately and fairly distinguish between IS affiliates who pose a genuine threat to national security and civilians who merely lived and worked in areas controlled by the group. It also assesses how trust can be rebuilt in multi-religious, multi-ethnic communities, where Sunnis are feared or resented for their actual or perceived collaboration with IS, and what strategies can help bring an end to cycles of violence and revenge. It further considers whether transitional justice frameworks could offer an alternative to the dominant, highly punitive approach, allowing for amnesty for individuals who are not accused of serious crimes. The report ends with policy recommendations. This case study is based on the author's fieldwork and interviews conducted in diverse locations in Iraq in April and December 2017, observations of trials of IS affiliates, and a large-scale survey of more than 1,400 residents of Mosul.

**CHAPTER 3 is Vanda Felbab-Brown's Nigeria case study**, “In Nigeria, We Don't Want Them Back: Amnesty, Defectors' Programs, Leniency Measures, Informal Reconciliation, and Punitive Responses to Boko Haram.” This case study provides an overview of the conflict with Boko Haram, the group's rule and treatment of populations under its control, and societal perceptions toward individuals accused of association with the group. It analyses Nigeria's overall response to Boko Haram, including the military campaign, as well as unsuccessful attempts at negotiation and debates over amnesty for the group. It details two leniency measures that have been developed for some individuals accused of ties with Boko Haram: a program for “repentant” low-risk male combatants; and a rehabilitation centre for low-risk children and women, such as those who were married to Boko Haram fighters. The report also outlines reintegration and reconciliation efforts by non-governmental organisations, and assesses prospects for accountability of Nigerian state security forces and aligned militias. It ends with policy recommendations for Nigerian and international policymakers. This report is based on the author's fieldwork and interviews in Abuja, Maiduguri and Ibadan in January 2018, as well as a wider review of existing literature.

**CHAPTER 4 is Vanda Felbab-Brown's Somalia case study**, “The Hard, Hot, Dusty Road to Accountability, Reconciliation and Peace in Somalia: Amnesties, Defectors' Programs, Traditional Justice, Informal Reconciliation Mechanisms, and Punitive Responses to al Shabaab.” This case study offers an overview of the conflict with al Shabaab, the group's rule and treatment of populations under its control, and societal perceptions toward those associated with the group. It analyses state-led approaches to al Shabaab, including: presidential declarations of amnesty and military pressure to induce defections; screening practices of low-value defectors; and separate treatments for high-value, low-risk, and high-risk defectors. Specifically, the case study analyses the quality and consequences of: a disarmament, demobilisation and reintegration (DDR)-like program for low-risk al Shabaab defectors; military justice for high-risk defectors; and ad hoc political deals struck with high-value defectors. The case study also considers the role of traditional justice mechanisms in dealing with individuals accused of al Shabaab association, and of Somali non-governmental organisations in informal reconciliation processes. Felbab-Brown ends with detailed policy recommendations for Somali and international policymakers. This case study is based on the author's fieldwork and interviews in Mogadishu, Somalia, and Nairobi, Kenya, in December 2017, and a wider review of existing literature.

## Endnotes

1. We use the term “jihadist” with some hesitation given its various connotations within Islam, but in general we use it to refer to non-state armed groups that: self-identify as jihadist; share some baseline ideological convictions (including the use of violence against rulers who govern in ways these groups deem to be at odds with Islam); and are run by leaders who have some links to a transnational community of other individuals and organisations who self-identify as jihadist (even if overall the groups have primarily locally-rooted identities and agendas). See ICG’s justification of applying this terminology to some of its work: “Exploiting Disorder: Al Qaeda and the Islamic State”, International Crisis Group (14 March 2016).
2. Erik Melander, Therése Pettersson, and Lotta Themnér, “Organised violence, 1989-2015,” *Journal of Peace Research* 53, issue 5 (5 September 2016): 727-742. Cited in “Civil War Trends and the Changing Nature of Armed Conflict”, United Nations University’s Centre for Policy Research, March 2017.
3. Seth Jones, “A Persistent Threat: The Evolution of al Qa’ida and Other Salafi Jihadists”, RAND 2014.
4. Melander, Pettersson and Themner, p. 732.
5. Hilary Matfess, Peter M. Lewis, and Nathaniel D.F. Allen, “Unbroken Boko Haram: Buhari Prematurely Declares Victory”, *Foreign Affairs*, 21 March 2016. As recently as February 2018, Boko Haram abducted 110 schoolgirls. See “Nigeria forces repeatedly warned before Boko Haram abducted 110 schoolgirls: Amnesty”, AFP-JIJI, 20 March 2018.
6. “Iraq ‘completely liberated’ from ISIS, says prime minister”, AP, 10 December 2017.
7. Mara Revkin, “After the Islamic State: Balancing Accountability and Reconciliation in Iraq”, UNU-CPR, 31 May 2018.
8. Vanda Felbab-Brown, “The Hard, Hot, Dusty Road to Accountability, Reconciliation and Peace in Somalia”, UNU-CPR, May 2018.

# The Limits of Punishment

*Transitional Justice and Violent Extremism*

**FRAMEWORK PAPER**



Ronald Slye and Mark Freeman

May, 2018

Toward  
a Transitional Justice  
Framework for  
Preventing and  
Overcoming Violent  
Extremism

## About the Authors

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he was a Human Rights Fellow and James Kent Scholar. He is the author of [\*Necessary Evils: Amnesties and the Search for Justice\*](#) (Cambridge UP, 2010) and [\*Truth Commissions and Procedural Fairness\*](#) (Cambridge UP, 2006), which received the American Society of International Law's highest award. Currently he is co-authoring a new book, *Negotiating Transitional Justice* (Cambridge UP, forthcoming 2019), which draws on the years he worked as adviser inside the Havana peace talks between the Colombian government and FARC-EP.

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## COVER IMAGE

Iraq. Fishkhabur, Dohuk Province. 2014. Yazidi families fleeing their homes in Sinjar, where ISIS militants had moved in, arrive at the Fishkhabur border crossing between Iraq's Dohuk Province and Syria. © Moises Saman/Magnum Photos

*This material has been supported by UK aid from the UK government; the views expressed are those of the authors.*

## Executive Summary

Several of today's deadliest conflicts involve violent extremist groups that have transnational reach; combine political, ideological and criminal agendas; and demonstrated capacity to exploit dysfunctional relations within and among local populations, elites, and states. Some of these groups have also succeeded in gaining control over large territories and populations, in which the state's predatory behaviour and/or inability to provide security often leaves locals little choice but to adapt to the presence of these groups through some form of association. Locals become associated with these groups in diverse violent and non-violent support roles, and under varied coercive, survival-driven and/or voluntary conditions.

Building on the empirical evidence of three country case studies – Nigeria (Boko Haram), Iraq (IS/Daesh) and Somalia (al Shabaab) – this paper seeks to assist national policymakers, and their international partners, in developing alternative responses to individuals accused of association with violent extremist groups. In particular, it offers a pragmatic framework for understanding how well-tailored transitional justice can contribute to more viable transitions away from conflict in settings confronted by such groups.

The case studies reveal multiple, often interrelated, factors that explain why a particular individual joined the extremist group. Yet, government officials, policymakers, and local communities often assume extremist group membership or support based merely upon demographic traits or unreliable evidence, and thus adopt policies that often undercut the objective of weakening such groups.

Harsh and overly aggressive prosecution practices, plus lack of clarity surrounding screening criteria, undermine the ability of individuals to seek a sustainable exit from violent extremist groups. Likewise, poorly conceived approaches to amnesty have made their usage less legitimate in the eyes of the population, despite the need for some leniency as part of any comprehensive attempt to prevent and counter violent extremism.

In this regard, lessons from other countries' experiences of facing illegal armed groups and militia suggest that, with appropriate adaptations, transitional justice could help places like Nigeria, Somalia and Iraq construct the framework for a strategy against violent extremist organisations capable of 1) enticing exit, 2) providing accountability, 3) offering redress to affected communities, and 4) addressing the conditions conducive to the creation and support of such organisations.

A transitional justice strategy may utilise, among other things, accountability mechanisms, truth commissions, reparations and healing programmes, and legal and institutional reforms. A successful strategy would incorporate combinations of these elements that build and reinforce one another, in a way that integrates the specific opportunities and constraints of the country. The more piecemeal the approach, the less likely it is to further its intended outcomes.

A first aspect of constructing a viable transitional justice strategy involves analytical customisation. There needs to be an in-depth empirical analysis of the particular organisation, the violations that have been committed, and their impacts on the ground.

The strategic objectives of a transitional justice strategy should normally encompass a mix of the long term (e.g. a society free of violent conflict; a society committed to robust protection of human rights and reconciliation), medium term (e.g. defeating an extremist group; providing increased access to fundamental social services) and short term (e.g. creating disincentives for joining an extremist group; prosecuting a set number of people; disarming others; healing and assisting victims).

The development of short, medium and long-term goals and the strategy to further them should be developed through a process that is as inclusive as politically feasible. As recounted in all three case studies, both the public and those to whom the policies are specifically directed have often been unclear or mistaken about the purpose and details of a particular programme, producing a number of negative effects.

In this regard, it is crucial for policymakers to understand that every transitional justice policy choice (on amnesty, accountability, reparations or anything else) will have a “signalling” function for the target armed group. Depending on how it designs and presents the measure, the state will be conveying a *de facto* intention to weaken or defeat the group militarily, initiate negotiations with elements of the group, promote peace and reconciliation, or other objectives.

The legal framework applicable to violent extremist groups is another key consideration. A careful review of the relevant international resolutions and treaties offers a more nuanced picture that provides room for a broader range of policy options and alternative accountability mechanisms than most assume.

In the area of prosecution, policies in the case studies reflect few of the basic lessons of transitional justice, often taking a dragnet and opaque form. A better approach would involve narrowly focusing prosecutorial resources on high-level members of the group, and on those who are most directly responsible for the worst acts of violence.

Well-crafted amnesties can also be critical in the fight against violent extremism, and can positively advance (rather than contradict) the broader objectives of transitional justice policy. For this to happen, there must be conditions attached to the amnesty, such as disarmament, truth telling, reparations, participation in other justice processes, non-recidivism, and more.

Truth commissions, at their best, provide a platform for individuals to share personal truths concerning past violations with the larger community, while also offering a vehicle for deep analysis of the structural and institutional causes of violent conflict. Although they are normally undertaken at a national level, they can also be implemented at a local or regional level.

Reparations and healing can further accountability by providing tangible redress to victims of past violations, contributing to the reintegration of perpetrators, and advancing the medium and long-term goal of creating peaceful and inclusive societies. Ideally, they should combine individual and communal approaches.

Despite the broader policy choices transitional justice offers, the case studies reflect a strong tendency to treat violent extremist groups as entities to be eradicated, and their affiliates – no matter how loosely associated – shown no mercy. In light of the atrocities associated with such groups (and their own insistence that no reconciliation with the state and political order is possible), the tendency is understandable. Yet, affected states have numerous alternative policy choices available that, when combined with greater understanding of the multiple reasons individuals stay in or leave from violent extremist groups, could improve the chance of achieving multiple policy objectives at once.

In that regard, transitional justice represents a middle path, offering adaptable tools that situate the problem and the solution somewhere between the extremes of accommodation and liquidation, and between prevention and punishment. That fact alone makes it necessary for policymakers directly confronted by violent extremism.



## Introduction

Many of today's deadliest conflicts involve violent extremist groups that have transnational reach; combine political, ideological and criminal agendas; and demonstrate capacity to exploit dysfunctional relations within and among local populations, elites and states. Various such groups are self-defined jihadists who articulate extra-state goals that seek to fundamentally alter the political status quo in the region where they operate or beyond. Some have also succeeded in gaining control over large territories and populations. In these areas, the state's predatory behaviour and/or inability to provide security often leaves locals little choice but to adapt to them by some form of association, from traditional combat functions through a wide range of non-violent support roles, including "wives," cooks, drivers or even governance functions, such as dispute resolution and taxation. While some locals may be partly motivated by affinity for the group's ideology, many become associated for more practical reasons, including economic subsistence and self-preservation.

Resolving the complex and violent conflicts that involve such groups and their members, supporters and associates is a daunting challenge that requires carefully organised, targeted interventions. Unfortunately, affected states often rely on ad hoc, heavy-handed responses – frequently with strong public backing – that risk exacerbating violence by feeding into a worldview promoted by these groups, which often characterises authorities as predatory, corrupt and illegitimate. Locals caught between a violent extremist group and an overly militarised state response have few viable options for ending association with the former.

Predictably, the judicial side of state response tends to correspond to the militarised one: primarily seeking punishment through detention, prosecution and forms of retribution akin to collective punishment. In some cases, this is combined with amnesties intended to induce defections and sow internal division. Yet, a much broader spectrum of amnesty and accountability choices is available for states faced with violent extremism. In particular, transitional justice offers more varied options that could help affected states adopt a better balance between the interdependent goals of prevention, punishment, conflict resolution and reconciliation.

This paper builds on the empirical evidence presented in three country case studies on amnesty, accountability and defection processes that form part of the "Limits of Punishment" project:

MARA REVKIN, *After the Islamic State: Accountability and Reconciliation in Iraq*;

VANDA FELBAB-BROWN, *'In Nigeria, We Don't Want Them Back': The Challenges of Amnesties, Defectors Programs, Informal Reconciliation, and Punitive Responses to Boko Haram*; and

*The Hard, Hot, Dusty Road to Accountability, Reconciliation and Peace in Somalia: Amnesties, Defectors Programs, Traditional Justice, Informal Reconciliation and Punitive Responses to Al Shabaab.*

It is grounded in their findings, as well as broader lessons from decades of international experience with transitional justice, and meant to assist national policymakers and practitioners – as well as their international partners – in developing alternative responses to individuals accused of association with violent extremist groups.

The paper has four sections. First, there is a brief discussion of amnesty and accountability themes that arise across the case studies. Second, there is an analysis of the range of alternative policy choices that transitional justice offers to deal with extreme violence and atrocity. Third, a strategy-formation framework is presented, outlining the key transitional justice considerations relevant for policymakers committed to preventing and countering violent extremism effectively. Finally, the paper raises a number of questions requiring further research and analysis.

## Case Studies

This paper draws upon original field research covering three situations involving extremist violence: Nigeria (Boko Haram), Iraq (IS/Daesh) and Somalia (al Shabaab). While each is unique, in both the nature of the challenges and the state responses, there are common themes. In general, all three have seen states apply both over- and under-inclusive levels of punishment and accountability; use a heavy-handed, securitised approach that has exacerbated, or at best shifted, the problem; send mixed signals to members of the extremist group and the local population, further undermining the effectiveness and legitimacy of the state response; and generally fail to address the needs of locals caught in the middle.

These problems are examined through two broad vectors. The first concerns assumptions about the characteristics of members, supporters and associates of violent extremist groups (including combatants and non-combatants who have played non-violent support roles). The second concerns the nature of official responses (based on the groups' perceived characteristics) and the environment in which these are formulated.

### A. Assumptions about Members, Supporters and Associates

#### 1. Motivations

To design a coherent, effective transitional justice strategy for violent extremist groups, it is imperative to understand why individuals associate with them. They may be pushed into one because of circumstances or life choices, or pulled in because of what is on offer.

Most independent research suggests that people often become associated with such groups for a combination of structural, social and individual factors, including but not limited to physical and food security, family and peer networks, financial incentives, coercion, status and identity. Understanding how such forces impact individuals and communities and the latter's experiences within or under armed groups is vital to designing a strategy with appropriate incentives – carrots and sticks – to encourage exit and deter future association.

In each case study, multiple, often interrelated factors explain why a particular individual joined. While some are ideologically motivated, government officials, policymakers and many locals overestimate ideology's role in membership creation and retention. For instance, surveys indicate that close to two thirds join al Shabaab in Somalia because of perceived exclusion and marginalisation, experiences of injustice and corruption, and lack of economic opportunity. While persons who join for non-ideological reasons may develop some ideological affinity once inside the group, de-radicalisation programmes (featured in the Somalia and Nigeria studies) are likely to be less effective for them, even if they provide external benefits, such as persuading a community it is safe to accept back someone formerly associated with a group.

#### 2. Over- and under-inclusive assessments

In each case study, government officials, policymakers and local communities often assume extremist group membership or support based upon inaccurate indicators. These assumptions are used to develop official and unofficial responses to individuals that frequently undercut efforts to entice defections, increase reintegration and bolster accountability.

At one level, the assumptions tend to be over-inclusive, capturing a broad swathe of persons who may have dramatically different relationships with the extremist group. This risks generating new grievances that may make those wrongly accused more open to recruitment or retention by the group. But the assessments also appear under-inclusive. By using scarce resources to

detain and prosecute many who are innocent of serious crimes, the authorities are diverted from dealing with those who are actual sympathisers or members. These over- and under-inclusive determinations centre on three types of characteristics that are often used as proxies to determine membership: family; ethnicity or clan; and territory. Each is examined below.

First, the case studies illustrate a local tendency to assume that relatives of members are also members or supporters. This disproportionately impacts women and children, who often have no affiliation with the organisation or whose association is weak and circumstantial. The consequences of misidentification can be dire, including banishment, seizure of property and detention imposed disproportionately on women and children who have participated in de-radicalisation programmes.

In Nigeria, the spread of unverified stories of women associated with Boko Haram being killed after they return to their communities contributes to an atmosphere of fear and further reluctance for contact or reception of any kind. This contributes to some conditions, such as socio-economic and political marginalisation, that may push people into such an organisation in the first place. In Somalia, women and children are often viewed as spies. At best, they are not welcomed by the local community and government; at worst, they are subject to expulsion or other punishments. In Iraq, relatives of Islamic State (IS) members – some of whom were personally victimised by the group – have become targets for retaliation and extra-judicial violence by security forces, para-state militias and civilians. Relatives have also been forcibly displaced and dubbed “IS families” – a term that stigmatises them further. The influence of tradition-based justice mechanisms that rely on a principle of collective accountability (e.g., tribal law in Iraq and *xeer* in Somalia) puts relatives at yet further risk.

Some women and children are active members of violent extremist organisations. Boko Haram and IS have used them as suicide bombers; Al Shabaab uses women in its intelligence apparatus. Yet, many women and children (exact percentages are difficult to determine) are coerced into such activities or exist in the groups’ orbit, but not ranks. Moreover, children who commit violence for such groups have, by definition, attributes of both victim and perpetrator. Across the case studies, though, official responses reflect the use of few, if any, analytic tools that take such distinctions into account.

The studies illustrate that government officials and local populations also sometimes use demographic traits, such as gender, age, ethnicity or clan, as indicative of affiliation. In Iraq, for example, there is a tendency to assume that Sunnis who lived under IS rule rather than flee when it captured their town are sympathisers or supporters, and that all males of a certain age are active members. Those who indicate sympathy to any aspect of IS are often assumed to be active supporters: an interviewed Iraqi judge called IS ideology so poisonous as to justify punishment of mere belief, regardless of whether the person had committed criminal violence. In Nigeria, those captured by extremist groups are often presumed to be supporters, or at least “infected” or “brainwashed”. These descriptors contribute to the perception that they are beyond rehabilitation, thus bolstering public support for a heavy-handed response and creating further barriers to reintegration. Worse, such assumptions exacerbate existing ethnic cleavages or clan conflicts; divert scarce resources from more directed and effective screening and assessment; and result in overly broad penalisation of local populations, which in turn contributes to marginalisation and hostility to the state that increase the appeal of such groups.

In short, attributing membership or criminal activity based on family, ethnicity, clan, age or territory leads to collective guilt and punishment policies. In all three studies, this is evident in formal procedures of screening, detention and criminal accountability; tradition-based justice mechanisms; and informal processes of stigmatisation, banishment and confiscation. A mix of state, para-state and non-state actors perpetrate such forms of punishment and reveal persistent reliance on denunciations for identifying suspects. Especially in divided societies lacking basic

security, this opens the door for individuals to settle scores, often based on unrelated personal, family, clan, ethnic or territorial conflicts. More distrust between and within local populations and the government is the inevitable consequence.

## B. Government Policies and Responses

### 1. Coordination and coherence gaps

Each case study illustrates the challenges presented by lack of policy coherence and coordination in government response. A mix of actions frequently undercut each other, sending contradictory signals that lessen trust and confidence.

Some of this is understandable, as policy coherence is intrinsically difficult to achieve with multiple armed groups and criminal groups operating in the same theatre. In all three cases, however, the perception and reality of large disparities in the carrots and sticks provided to groups creates confusion about government intentions, increases mistrust between locals and the government, and generates perverse incentives for movement between the groups.

The Nigerian paramilitary Civilian Joint Task Force (CJTF) arose in response to Boko Haram and has been used by the government to combat it, including as a source of identification, denunciation and screening. Dissatisfied with government support, members of the CJTF, which itself has committed serious abuses, have threatened to become insurgents unless incorporated into state security structures or given seed money for businesses. In Iraq, the Popular Mobilisation Forces – an umbrella of largely Shia militias, some strongly backed by Iran – were formed in 2014 to combat IS. They have been instrumental in the fight against it and so are viewed as heroes by much of the public. However, they have also been implicated in serious human rights abuses and challenge the state's claim to a monopoly on use of force. Thus, in both countries, organisations created to combat violent extremism risk exacerbating the conditions that led to that threat, by further alienating the local population with their own violence and demanding additional benefits from (or even challenging the legitimacy of) the state.

Other armed groups have emerged as breakaway factions of violent extremist groups: for example, Ansaru and the Islamic State in Nigeria, both of which grew out of Boko Haram factions. Such groups complicate state efforts to induce defections or promote negotiations, not least because memberships may be fluid. In that regard, excessively punitive approaches that leave no clear exit ramp could have the perverse effect of driving would-be defectors into the arms of another armed group. Incoherent policies may thus have the unintended consequence of shifting the problem from one group to another, leading members and supporters to move to equally violent ones that have not yet elicited a punitive response.

Even state responses to armed groups that have arisen independently of the extremist group and due to different factors have implications for developing a coherent counter-extremism approach. For example, Nigeria used amnesty and generous reintegration packages to deal with insurgents in the Niger Delta. However, many Nigerians view this policy negatively, as a pay-off that rewarded criminality without ending the violence. This colours their view of amnesty or other leniency measures for Boko Haram as a golden parachute for terrorists. The government has not addressed such concerns coherently, leading to distrust of leniency that sends a counterproductive signal to extremist group members who might want to defect or be reintegrated into society but see no clear path.

Related to lack of coherence is lack of coordination, which is evident between national and sub-national governments in Somalia, Nigeria and Iraq, as well as between informal authorities, such as militia groups in Nigeria and Somalia and formal defectors' programs. In particular, there are unclear relationships between national, local, and tribal laws and legal authorities. In Iraq,

for example, there is lack of coordination between the central government and the Kurdistan Regional Government (KRG), even on basic matters such as lists of wanted persons. This has resulted in the re-detention and duplicative punishment of IS suspects who move between the two jurisdictions. Formal laws and processes the central government and KRG promote and use often exist in tension with one another and local tribal law. The latter, in contrast to formal state law, tends to focus on collective guilt and repairing relationships between families, clans or tribes. Thus, while tribes have helped fill governance vacuums left by the state, increased tribal governance produces its own challenges for coordination, leading to unclear signals on policy and wasted resources.

Ultimately, the above examples are symptomatic of a deeper problem: lack of unified assessment and policymaking capacity. This in turn encourages erratic decisions and contributes to the legal uncertainty and lack of public trust noted in all three case studies.

## 2. Screening and prosecutions

Problematic membership assessments, evident across the case studies, contribute to equally problematic screening and prosecutorial procedures. Lack of clarity as to how individuals will be processed, combined with extremely harsh penalties in a generally militarised environment, create double disincentives: members are unclear how to exit extremist groups and what cooperation with the government might entail. If a key objective of state-run justice approaches is to encourage sustainable exit from such groups, screening and prosecution practices must not undermine it.

In Somalia, individuals are screened into three categories: low risk, high risk and high value. Only the first are eligible for disarmament, demobilisation and reintegration (DDR) programmes, which offer a de facto alternative to criminal justice. By contrast, high-risk individuals can expect harsh detention and punishment, often including execution; while high-value ones not only seem to enjoy near impunity, but also are often allowed to retain their militia forces. Nigeria is slightly different, as it uses but two categories: low and high risk. Only the former, with formal limiting qualifications, are eligible for defectors' programs that offer a similar de facto alternative to criminal justice. As for Iraq, it does not appear to differentiate on a risk basis, screening instead for past links to the group. Anyone determined to have ties or merely suspected of them is likely to face detention, prosecution and imprisonment, or forcible displacement.

Of the three cases, Somalia appears to consider more nuanced categories, using a multi-factor analysis based upon a questionnaire to assess risk, with an individual scored between zero and two for each question. At the same time, its experience shows the difficulty in consistently and transparently assessing who belongs in which category. In addition to legitimate concerns about the predictive value of some factors used to assess future risk (one question concerns how strongly the individual supports or rejects democracy), results are calculated such that positive and negative answers may point in the same direction. Thus, a person who indicates a strong preference for democracy is given a score of plus two, the same as a person previously arrested for violent activity; rather than one factor lessening the other's impact, they combine to give a score of four. Even by its own terms, therefore, the assessment instrument produces incoherent results. In addition, the tolerance of minimal accountability for high-value defectors, some of whom have been implicated in serious human rights violations, has created widespread consternation. Finally, lack of screening precision has led to over- and under-inclusive problems and resulted in highly violent and ideological individuals being detained with those less ideologically supportive of, or even indifferent to, the organisation. Shameful detention conditions have provided further opportunity for recruitment by groups.

In regard to criminal prosecution, each of the three states has been active. In Somalia, those identified as high risk are tried by military courts, with a high chance of a death sentence. In Nigeria, high-risk suspects languish in detention for years. Iraq's counter-terrorism law provides a minimum life-in-prison sentence and allows the death penalty for anyone who has committed, incited, planned, financed or assisted in an act of terror. The government reported 194 terrorism-related executions in 2016.

Yet, beyond the nature of the court sentences lie deeper defects in all three government responses, including over-broad, sometimes outdated laws and little forensic evidence, resulting in many convictions based on confessions or denunciations that are often the result of torture. Combined with screening criteria that are imprecise, largely unknown to the public and often arbitrarily applied, the problems in all three state responses reveal themselves as cumulative and self-reinforcing.

### **3. Amnesty**

Carefully crafted, principled amnesties can aid conflict prevention and resolution, as in Argentina, South Africa, Macedonia and Uganda, to cite a few examples. If used too frequently or inconsistently, however, they can undercut public confidence and become less effective at balancing carrots and sticks to induce negotiated exits from armed groups and subsequent demobilisation.

In Nigeria and Somalia, amnesty is both misused and little understood as a constructive tool to address extremist organisations. For instance, amnesties declared in Somalia are lacking in clear criteria and procedural transparency, and provide little if any accountability. High-value members of al Shabaab have received economic and other benefits, and implicit promises that they will not be prosecuted, with little effort by the government to articulate the wisdom of such an approach to the public. Meanwhile, in Iraq, backlash against an amnesty law that was perceived as too lenient on terrorists and other violent criminals, such as kidnappers, resulted in major amendments that have rendered all IS members ineligible for amnesty, even those who became associated with the group against their will and did not commit any serious crimes while affiliated.

### **4. Reintegration**

Reintegration of committed ideologues and high-level members of extremist groups is always challenging. For them, prosecution and detention may be a more natural, if not always realistic, response. By contrast, reintegration is more achievable with low-level members and those linked to but not supportive of the group, especially if combined with alternatives to prosecution and detention. In Somalia, this has saved perhaps 2,000 low-risk al Shabaab defectors from the military justice system, where they likely would have been sentenced to death. Yet, such an approach is often thwarted by weak communication of exit ramps and reintegration programming, deep local fears and prejudices and, frequently, poor treatment of those who pass through the system. These variables negatively affect women and children who, as noted, are often assumed to be associated with extremist organisations because of familial, tribal or clan ties, or simply because they were unlucky enough to have been captured by the organisation. State policy also appears disproportionately to penalise young men who, due to their age, are presumed to have been violent actors. In short, failure to distinguish between the committed core and non-affiliates (or affiliates amenable to exit) facilitates recruitment by extremist groups and decreases departures from them.

## Alternative Approaches: Lessons from Transitional Justice

Many extremist groups present difficult conflict resolution challenges, including barriers to negotiations, diverse rank-and-file motivations, fragmented leadership, territorial control and transnational reach. Nevertheless, dozens of states, from Peru to Bosnia, Sierra Leone and Indonesia, have grappled with non-state armed groups posing comparable challenges and sharing numerous characteristics. These and other states have devised creative, customised approaches to transitional justice that have helped induce defections, incentivise negotiations and promote reconciliation. Building on lessons from relevant experiences – as well as from prior experiences within Iraq, Nigeria and Somalia themselves – can help inspire more effective strategies against groups like IS, Boko Haram and al Shabaab.

Quality transitional justice begins with deep analysis of the moral, legal, political, economic and psychological causes and effects of a country's past and present violence. So informed, governments can then address legacies of mass violence and historical injustice more holistically, so as to contribute to sustainable transition from violent conflict. A key aspect is to identify what motivations and factors influence those who were involved in conflict or perpetrated violence, what solutions will help address their needs as well as those of victims, and what structural reforms can lessen risk of any deepening of or return to violence. With these objectives in mind, a transitional justice strategy may utilise, *inter alia*, accountability mechanisms, truth commissions, reparations and healing programmes, and legal and institutional reforms. An effective one incorporates combinations that build and reinforce one another, so as to integrate specific opportunities and constraints. The more piecemeal the approach, the less likely there will be success.

### A. Criminal Prosecutions

Criminal prosecutions are the most familiar element of transitional justice practice. A successful prosecution strategy can help address legacies of mass abuse and conflict by removing particularly violent individuals from society (specific deterrence); signalling that such activity has consequences (general deterrence); reinforcing the moral repudiation of such activity (expressive function); and fulfilling retributive expectations, particularly of persons and communities most affected.

They also have limitations. First, while they may provide strong individual accountability for wrongdoing, they are ill-equipped for analysing and exposing broader structural and institutional factors that contributed to violence. Secondly, while they may satisfy the need for retribution, they often contribute little to healing and may exacerbate perceptions of bias and injustice. Thirdly, they require a highly-resourced, stable environment to be credible, and operate on the premise that crime is the exception in society, not the rule. If that premise is reversed, criminal justice systems cannot cope: collecting evidence that warrants prosecution and punishment requires time and resources societies mired in or emerging from conflict lack or prefer to allocate elsewhere. Fourthly, when security is especially bad, identifying offenders and acquiring reliable evidence can be very hard. Evidence is often inaccessible or destroyed, leading to prosecutions that rely heavily on witness testimony and confessions. This encourages torture and/or facilitates false denunciations.

## B. Alternative Accountability Mechanisms

Recognising prosecution's limits, policymakers in conflict-affected societies have used creative alternatives, such as conditional amnesties, hybrid plea bargaining schemes and quasi-judicial processes. Each has some individual accountability, may incorporate victim and survivor truth-telling, often involves suspended or reduced sentences and sanctions, and can entice defections and promote disarmament.

South Africa's Truth and Reconciliation Commission included a conditional amnesty process for which individuals had to self-identify and apply, make full disclosure of the acts for which they sought amnesty, and demonstrate that these had a political objective. The process thus contributed to truth telling and was incorporated into a broader victim-centred process. The amnesty carrot was combined with, and depended on, a credible prosecution threat. Police viewed the threat as credible, as a high-level officer was successfully prosecuted and sentenced to multiple life sentences prior to the opening of the amnesty process. As a result, a number of officers applied for amnesty. In contrast, a military commander and former defence minister's acquittal lessened the threat's credibility to members of the military, very few of whom then applied. Nevertheless, the experience underscores the potential value of crafting alternative accountability mechanisms in a way that incentivises offender participation through the combined stick of credible prosecutions and carrot of conditional amnesty.

In post-genocide Rwanda, a multi-tier system of prosecutions and alternative accountability included international and domestic court trials as well as use of a tradition-based justice system (*gacaca*) for low-level offenders. Those brought before the *gacaca* system could be sentenced either to prison or community service, depending on the severity of the offence. Offenders were divided into three categories: planners and organisers of the genocide, as well as those who committed rape or sexual torture; those who participated in killings and other violent crimes but did not qualify for the first category; and those who committed crimes against property. While the design and implementation of the *gacaca* process evolved and faced fierce criticisms at many stages, it is an example of the adaptation of a local dispute resolution process that incorporated truth telling, reconciliation and reparations and was complemented by a more traditional retributive justice system.

Timor-Leste created a truth commission that oversaw community reconciliation procedures for perpetrators of less serious crimes, not including murder, rape and torture. Victims were allowed to question individual perpetrators at a public hearing overseen by local leaders, resulting in a court-approved sentence of "acts of reconciliation" (e.g., community service or donation of money or services to victims) required for reacceptance by the local community. This provided some form of individual accountability while also contributing to truth telling, healing and reconciliation.

More recently, Colombia created peace and justice tribunals that drew, in part, upon South African and Timorese methods. Paramilitary members who disarmed, offered full disclosure of conflict-related crimes, made reparations to victims and guaranteed non-repetition, were eligible for reduced sentences. A variation adopted in the negotiations with the FARC-EP rebels resulted in an accountability system encompassing conditional amnesty, a special tribunal able to reduce sentences depending on the timing and quality of confessions, a missing persons office and a truth commission.

While all these examples have flaws, they offer the possibility to make meaningful contributions to accountability, truth telling, healing and incremental conflict resolution. Above all, they show that accountability is not necessarily synonymous with criminal justice, but can be integrated creatively with other policy priorities, even in conditions of insecurity and fragility.



### C. Truth Commissions

Whether or not prosecution is possible, truth-telling mechanisms such as truth commissions will often be advocated, as they are currently in Nigeria and Somalia. The standard function of truth commissions is to investigate causes, patterns and effects of past human rights violations and atrocities over a limited period and produce a final report with findings of fact and recommendations for redress and reform. Because they provide a space for victims, survivors and others to testify about their experience – always in private, occasionally also in public – they can contribute to a national dialogue (or even a national narrative) about the recent past. As such, they can offer important benefits within a holistic strategy to address past violations. First, their creation implicitly serves as official acknowledgment of a legacy of abuse in need of historical clarification. Secondly, they offer a chance for deeper analysis of the structural and institutional causes of and contributors to past violations. Thirdly, their findings and recommendations can contribute to subsequent prosecutions, reparations and institutional reforms. Finally, while prosecutions and other accountability measures are more perpetrator-focused, truth commissions are victim-centred, offering opportunity to highlight the grey areas between categories such as victims, perpetrators, witnesses, bystanders and heroes.

### D. Reparations and Healing

Reparations and healing programmes often get less priority than other parts of transitional justice, yet can be crucial for redressing past harms and legitimising alternative accountability measures that include leniency. Compensation or services can be provided directly to individual victims, or communally and/or regionally oriented as in Morocco and Peru, among others. Community-oriented reparations may be particularly relevant for societies confronting extremist groups. They can include creating community structures and support for regions most adversely affected by past violations, through funding for educational institutions, health care facilities and other measures directly related to harms suffered, such as meeting the burden of reintegrating former combatants.

### E. Institutional Reforms

Trials, modified plea bargaining schemes, conditional amnesties, truth commissions and reparations can all contribute in the midst or aftermath of atrocity, yet be insufficient without institutional reforms to create an environment that anticipates and prevents the conditions that enabled atrocities. Such reforms typically focus on the security services, including police, military, intelligence and related institutions. They can also aim more broadly at the justice system, including the judiciary and new constitutional or legislative protections for human rights; governance structures, which might include devolving political power to marginalised regions or redressing inequities in land distribution; reforms geared to teaching more inclusive forms of citizenship and accurate history; and so on.

Of course, measuring the effectiveness of transitional justice initiatives in furthering long-term goals such as conflict prevention or reconciliation faces the same challenges as measuring any multi-dimensional public good. Too many other independent factors contribute to the ostensible outcome. Yet, we can point to at least two direct benefits of any good transitional justice strategy. First, it expands policy attention beyond the immediate effects of violence by surfacing systemic, environmental and institutional issues that enable such violence. Secondly, it produces outputs valuable in their own terms. Victims are acknowledged and get to tell their stories before a truth commission. Fair trials and convictions express public condemnation.

Alternative accountability mechanisms uncover important information and provide a modicum of justice for victims and communities, especially if accompanied by reparations and healing programmes. All in turn can make durable peace more viable.

## Transitional Justice and Violent Extremism: Key Considerations

Lessons from other countries' experiences with illegal armed groups and militias suggest that, with appropriate adaptations, transitional justice could help Nigeria, Somalia and Iraq construct the framework for a strategy against extremist organisations capable of 1) enticing exit, 2) providing accountability, 3) offering support to victims, and 4) addressing conditions conducive to creation and support of such groups. Policy constraints may be large and the error margin small, but the opportunities are clear. Four overarching considerations bear attention: customisation; consultation and testing; the applicable legal framework; and strategy formation.

### A. Customisation

A first step in constructing a viable transitional justice strategy involves in-depth empirical analysis of the particular armed group. Key questions include: Is the group hierarchical or decentralised? If decentralised, does it have a coherent vision and purpose, or is its self-identity diverse? If the latter, is the diversity determined by geography, the local leader's personality, tribal or clan dynamics or something else? Have members grown up inside the group (like those who have spent most of their life under al Shabaab, so know nothing different) or mostly recent recruits? What is the breakdown between those who joined for ideological reasons and those who did not? Do the latter develop a strong ideological affinity with the group or continue to be motivated by other concerns? The answers will inform assessment, sorting and screening processes that form part of any transitional justice response.

It is also important to develop a sophisticated understanding of the violations committed by the group and the impact on victims. Does it prey upon a particular segment of the population? Are women and children subject to different treatment than men? What does the public view as its worst violations? These answers will inform discussion of accountability, including the choice between prosecutions and alternative mechanisms, as well as of reparations and healing.

Understanding relations between an extremist organisation and its local operating environment is likewise critical. Important questions might include: How much territory does it control, and how strong is that control? What practices and dynamics define its relationship with the population? A group that exploits locals to fulfil governance functions, such as security and services, requires a different transitional justice approach than one that is only a violent predator. In Iraq, many individuals faced pressure to work for IS's civilian bureaucracy, which taxed, governed and delivered services; al Shabaab derives its entrenchment capacity in Somalia from providing governance in multiple forms; both impose harsh punishments for non-compliance with policies, such as edicts to pay zakat. Such details must be understood in order to formulate a customised transitional justice response that does not hold individuals accountable for support activities likely committed under duress or for survival.

At the same time, any assessments about the group must be based on reliable, regularly updated sources, since extremist organisations, like the surrounding national and regional environments, are fluid and evolving. Boko Haram's origins are in a social justice movement that arose out of poor socio-economic conditions, pervasive corruption and exclusionary politics in northern Nigeria, but a number of groups have spun off since. Similar fluidity is observable with IS, al Shabaab and their respective predecessors, al Qaeda in Iraq and the Islamic Courts Union.

Another aspect of a customised transitional justice strategy relates to suppleness of the diagnosis. Responses seen in the case studies often show a reductionist view of those associated with groups like IS, al Shabaab and Boko Haram. There is a tendency to see individuals as simply either victims or perpetrators, thus deliberately or inadvertently missing the blurred lines between them and ignoring such categories as bystander, witness and sympathiser. As such, opportunities are missed for transitional justice techniques that could encourage exit and reintegration, rather than punishing persons for acts outside their control and so increasing alienation and undercutting peacebuilding.

Transitional justice practice, as well as international law, teach how important distinctions (e.g., combatant versus non-combatant roles; subordinate versus superior responsibility; isolated versus representative cases) can help construct a strategic architecture that employs carrots and sticks effectively. For example, a sharper distinction can be made with extremist groups between those who exerted more agency over their association and actively support the organisation, and those whose involvement was coerced. High-risk members are more likely to be found among the former, low-risk or no-risk among the latter. In addition, among those who voluntarily joined, it is important to identify their motivating factors. Decision-makers have overemphasised ideology and thus missed other factors, particularly 1) grievances against systematic injustice, corruption, abusive governance and persecution by rival groups, and 2) motivations that can span economic interest, political ambition, tribal or clan identity or rivalry and family ties. A more systemic distinction could also be made between: high- and low-level members, with the former facing more retributive forms of accountability unless there is a countervailing interest in negotiation; those who played violent roles and those who exercised non-violent support functions; and those who committed serious violent crimes and those who did not.

Of course, low state capacity, especially where extremist groups operate and have controlled territory, will always make it problematic to formulate these distinctions reliably. This is particularly true for groups whose tight command and control structures make it more difficult to develop reliable intelligence on the nature and motivations of their members and supporters. Yet, however hard such assessments are, an effective transitional justice approach depends on them.

## B. Consultation and Testing

Another front-end consideration of transitional justice strategy concerns consultation and testing. An important part of the process of developing strategic goals and the means to implement them is extensive outreach to experts and the public (itself a legitimising act for transitional justice policy). Small pilot projects to test promising but unproven ideas before going to scale are also helpful, especially on questions as transcendental as amnesty and accountability in the midst of conflict.

The authors of each case study recommend an inclusive consultation process that explores how to balance reconciliation with justice through a combination of punitive and non-punitive mechanisms, including reparations programmes. To do this well in a conflict-affected state, consultations at local, regional and national levels must be carefully sequenced to build on each other. While the security environment is a major challenge, civil society leaders and members of the business sector may provide access to areas and populations that otherwise would be difficult to reach.

Such consultations may result in multiple important outputs. First, they may uncover more accurate information about what public support is feasible. Indeed, each study offers evidence that the population may be more open to less punitive approaches than the government assumes. Secondly, a serious consultation process can increase public ownership and understanding of the strategic options and challenges; an important result, since each study reveals that lack of transparency and understanding of why choices were made have contributed to lack of trust in government and thus lack of support for its approaches. Finally, consultations may give diverse sectors of society, some perhaps in conflict, space to begin a dialogue to create positive local developments that can support a national process.

### C. Applicable Legal Framework

Another key front-end consideration is that while transitional justice, by design and necessity, offers considerable flexibility on specific interventions states can devise, these are subject to overarching principles in international law applicable to armed conflict, human rights and criminal law, as well as binding UN Security Council resolutions. In the case of groups deemed terrorist, the norms appear especially harsh and punitive, based on a literal reading of the relevant treaties. Yet, a careful review of the treaties (and of UN Security Council resolutions) reveals a more nuanced picture that leaves room for a broader range of policy options and alternative accountability mechanisms than most assume.

For example, the Council's resolutions urge accountability but also encourage rehabilitation and reintegration. Thus, states are required to "bring to justice" those responsible for terrorism by criminalising such acts under domestic law and punishing those responsible in a way that reflects the seriousness of their acts (UNSCR 1373 (2001)), and responsibility for the acts extends to those who finance, plan, prepare or perpetrate them. But in the case of foreign fighters, states are called upon at the same time to rehabilitate and reintegrate returning individuals (UNSCR 2178 (2014)). As for treaty law, international lawyers who insist on absolutist interpretations often overstate the case. There is ample room under international law to construct nuanced, targeted interventions that include alternative accountability mechanisms and programmes aimed as much at rehabilitating and reintegrating ex-associates of extremist groups as punishing them. While accountability receives strong emphasis, it is not limited to prosecution or punishment; and even with prosecutions, there is general recognition that states have broad discretion in choosing whom to prosecute or punish, particularly in situations involving multiple responsible parties. This is so even for individuals considered responsible for terrorism or other atrocity crimes, especially those below the command level. Conditional amnesty or special plea-bargaining schemes incorporating both truth-telling and reparations can also be reconciled with international law.

Concerning the extremist groups examined in the case studies, it is noteworthy that the UN Security Council has passed resolutions with respect to Boko Haram and IS. UNSCR 2349 (2017), focusing on Boko Haram and the Lake Chad Basin crisis, calls on governments and the relevant UN agencies to pursue a laundry list of goals, including prosecution; access to medical and psychosocial services for survivors of abduction and sexual violence; human rights-compliant disarmament and demobilisation; de-radicalisation; and rehabilitation and reintegration. It also singles out the CJTF and "other community-based security groups" for DDR and prosecution. However, it does not provide guidance on how to prioritise these objectives if they come into tension with one another, as is likely with prosecution and reintegration. By contrast, UNSCR 2379 (2017) on IS in Iraq is far less comprehensive, focusing on prosecution of its violations of international criminal law (including war crimes, crimes against humanity and genocide) and calling upon the Secretary-General to establish a team to collect evidence.

It does not refer to other armed actors such as tribes and militias, nor to the need for support to victims and survivors, rehabilitation and reintegration, disarmament, de-radicalisation or demobilisation.

#### D. Strategy Formation

It is almost axiomatic that there can be no effective transitional justice strategy without a central place where strategy formation of some sort takes place. Unfortunately, such centres are the exception, not the rule, in fragile and conflict-affected societies. The consequence is ad hoc planning and wildly scattered results. Unless this is remedied, in-depth organisational and environmental analysis has nowhere to land, making it impossible to craft strategy that produces transformative opportunities for defection and exit, while striking the appropriate balance of military response, criminal justice, tradition-based reparation, conditional amnesties, rehabilitation, reintegration and more. Only an identifiable strategy formation centre – even one with initially low capacity – can produce the careful consideration required for harmonising carrots and sticks in a way that reinforces the combined goals of weakening extremist organisations, holding individuals accountable, assisting victims and addressing root causes.

## Transitional Justice and Violent Extremism: Specific Choices

Beyond transitional justice's front-end considerations lie the policy choices themselves. There are three broad but combinable paths relevant for confronting violent extremist groups. First are mechanisms that focus on perpetrators. These include conditional amnesties, special plea-bargaining schemes and classic prosecutions – any of which may in turn be linked to DDR, truth-telling, documentation work, de-radicalisation, rehabilitation or healing. Second are victim-centred mechanisms, including truth commissions and reparations (understood broadly as compensation, restitution, rehabilitation and similar measures). Third are institutional reforms, which may include, *inter alia*, the security and justice sectors and governance.

### A. Creating the Optimal Mix

Identifying the right mix of transitional justice mechanisms is a strategic, not technical exercise. It involves developing clear short-, medium- and long-term objectives that build on each other; undertaking broadly inclusive outreach and communication; ensuring that form of transitional justice follows rather than drives the functions; and tying the mechanisms to access conditions and benefit retention.

#### 1. Developing and linking strategic objectives

The objectives of a quality transitional justice strategy should normally encompass a mix of the long term (a society free of violent conflict and committed to robust protection of human rights and reconciliation), medium term (defeating a violent extremist group and providing increased access to fundamental social services) and short term (creating disincentives for joining such a group, prosecuting some and disarming others and healing and assisting victims). Short-term objectives should be linked to and support the medium- and long-term ones. A short-term transitional justice strategy designed to weaken an extremist organisation that uses heavily punitive means may foster further recruitment and instability and thus undercut the medium-term goal of defeating the group and long-term goal of creating a society free of violent conflict.

Unfortunately, governments too often have a check-the-box approach, rather than make a serious effort to customise a multi-dimensional strategy. The resulting simplified approach fails to take account of the full policy spectrum, as well as lessons from abroad that could help inspire creative solutions. While the result may sometimes be attractive on paper for donors and political supporters (e.g., by use of the “right” words), implementation will likely be ineffective.

#### 2. Outreach and communication

Short-, medium- and long-term goals and the strategy to further them should be developed in as inclusive a process as politically feasible. In all three case studies, however, both the public and those to whom the policies are directed have often been unclear or mistaken about purposes and details.

First, unclear articulation of the purpose and contours of a policy or programme may lead to mixed or negative signals. Without strategic communication, an amnesty designed to encourage DDR may be viewed as a golden handshake for a warlord or simple impunity. A prosecution prioritisation strategy that focuses on those most responsible and offers alternative processes

for low-level members will not entice the latter if, due to poor outreach and communication, they fear they may be arbitrarily screened as high-risk and swept into the harsher system. Secondly, it is advisable to include as many important stakeholders as possible, so as to make it more likely that strategic objectives and means will better address legitimate grievances and needs. Thirdly, widespread acceptance by stakeholders makes explaining and justifying choices easier. Fourthly, inclusive consultation with civil society, the public and security actors – as recommended in each case study – is more likely to lead to greater legitimacy and a tighter fit between a policy designed to further strategic objectives and its implementation.

Nigeria's Policy Framework and National Action Plan for Preventing and Countering Violent Extremism articulate an overarching strategy. However, the authority of these documents is weak, and they do not include an enforcement mechanism or a strategy for harnessing existing institutions to their objectives. There is thus a significant gap between rhetoric and action. While numerous factors are at work (including capacity, sectarian and management issues), more inclusive consultation and outreach could result in a more effective strategy, and increased buy-in and commitment to the policy.

### **3. Form and function**

The “form” of any transitional justice strategy should follow the “function” it is meant to perform. Consider amnesty, a tool deployed in many armed conflicts involving groups carrying out atrocity crimes. If no negotiation is deemed possible or desirable with the particular group or parts of its leadership, amnesty would be designed to degrade the rank-and-file by promoting defections. This is seen over and over, from Somalia, to Syria, Turkey, Algeria, Guatemala and Uganda, when a state believes it can or must win militarily. If the state is interested in facilitating negotiations, however, the amnesty would include conditions designed to facilitate pursuit of a negotiated solution. If talks are already underway, the amnesty would be different again.

Especially when state or state-affiliated forces have retaken territory from an extremist group, as in Iraq, conditional amnesties may also be a tool to prevent mass penalisation of local populations that had become associated with the group under coercive conditions. In such contexts – and particularly when tied to complementary mechanisms that address victims' rights – such a scheme may help address blurred lines between victim and perpetrator and contribute to reconciliation.

Whatever the case, policymakers must understand that their approach to amnesty or other transitional justice measures will have a signalling function vis-à-vis the target group. Depending on how it designs and presents the measure, the state conveys intention to weaken or defeat the group militarily, initiate negotiations with elements of it, promote peace and reconciliation, or more. States must thus think about transitional justice as an ends-led communications tool, not as a box of legal mechanisms.

### **4. Reinforcement through Conditionalities**

Once clear policy and communications goals have been identified, the hardest but most important choices on transitional justice arise. At one level, these concern the right mix of “hardware”, such as whether there will be prosecutions, amnesty, truth telling, reparations or reform. Although this is often treated as a bulk exercise, in which “more” is presumed to be better, in fact more can be worse. The art of transitional justice lies in “how” each element is designed and reinforces each other, rather than the accumulation of institutions and programmes not tailored to the challenge.



In this regard, one of the most important “software” devices is the use of conditions: devices whose purpose is both to restrict access for certain transitional justice benefits and allow for their revocation if their terms are violated. Conditions operate as commitment technologies, “nudging” their targets to favour certain actions by stipulating the terms of access or retention of benefits. They also perform a further vital role, helping lift otherwise disaggregated transitional justice bodies and initiatives into an interdependent system that fits a clear strategic objective and incorporates real-world constraints. Indeed, what stands out from the best transitional justice experiences around the world is how they use conditions to balance imperatives of prevention and punishment, creatively sequence mechanisms, structure interrelationships among the combination of transitional justice bodies and respond to particular contexts and the expressed needs and aspirations of affected communities.

\* \* \*

With the above in mind, what follows is discussion of some of the major choice points in a transitional justice strategy that could be tailored to address violent extremist groups. For each choice, it provides a summary of the purposes that could be furthered; guiding principles to increase the choice’s effectiveness and legitimacy; and a summary of the specific mechanisms available to choose from. How each choice can impact the effectiveness of others is also examined.

## B. Criminal Prosecution

### 1. Purposes

As noted, prosecutions can serve multiple purposes, including specific or general deterrence, moral repudiation and formal punishment. While a prioritisation strategy can achieve some or all these purposes, it should be crafted with the desired functions and outcomes in mind. For instance, if individuals choose to join an extremist group, intensive prosecution may deter some or perhaps many and also give others a strong incentive to take advantage of a defectors’ programme. But if membership is driven by threat or coercion, the same strategy is unlikely to contribute to deterrence and more likely to become another factor that pushes individuals into joining the group.

As a rule, over-prosecution strains resources unnecessarily; is less likely to further rehabilitation and reintegration; and risks signalling to members a stark choice: stay with the organisation or be prosecuted. When it results in detention, especially in poor conditions, it may push low-level affiliates, who were not originally strong supporters, toward violent behaviour and ideology. Under-prosecution likewise has risks, including allowing dangerous individuals to continue to recruit and commit violence; lessening the positive impact of general deterrence on those contemplating joining; and alienating victims and others who suffered greatly and demand some form of retributive punishment.

### 2. Guiding considerations and options

a) *Whom to prosecute?* The more narrowly prosecutorial resources focus on senior members and those most directly responsible for the worst acts, the more effective and legitimate prosecution strategy will be. While some argue that international law mandates prosecution of a wide range of actors responsible for acts of terror and other international crimes, the requirements are not so fixed. States are required to focus on prosecution of those most responsible for the worst crimes, but prioritising high-level offenders directly involved in violent acts will likely satisfy this requirement. Trying to prosecute too many can weaken useful alternatives under a

thoughtful transitional justice strategy (e.g., conditional amnesties or suspended sentences), waste limited resources that could be better used elsewhere (e.g., victim reparations and healing programmes) and exacerbate rather than lessen cycles of violence. Cumulatively, all this may weaken confidence in government's ability to address the multiple challenges presented by violent extremism.

b) *Due process* is part and parcel of any serious prosecution strategy. International law, and often national constitutions, obligate states to provide it to suspects. The policy rationale is strong: allowing suspects to know, hear and challenge the evidence against them in an open, transparent process makes a correct outcome more likely. In all three studies, however, due process appears as the exception, with trials often based upon membership in the extremist organisation rather than a specific criminal act. In Iraq, arbitrary arrests based on poorly sourced "wanted persons" lists, military involvement in pre-trial investigation, heavy reliance on secret informants' testimony and a weak public defence system threaten basic due process. Somalia's military courts sentence most alleged al Shabaab members to death without adequate transparency or procedural rights. Nigerian judges sometimes indicate that detainees cannot be brought to trial because there is no evidence of wrongdoing or they were tortured.

Providing due process to members of extremist organisations has another essential function: it signals commitment to justice and accuracy that may even reinforce reasons for exit. Studies have shown that group members who come into contact with the state and are treated fairly are more likely to defect, whereas harsh, arbitrary treatment only reinforces the group's narrative of the state as predatory and unjust. Visibly affording due process weakens such rhetoric, while signalling that those who did not directly support or engage in atrocity crimes will be treated differently. Due process also can increase victims' confidence that those actually responsible for wrongdoing are the ones being held to account.

c) *Transparency* is also important in prosecution strategy. It can ensure that stakeholders receive the intended policy signals, and provide a standard by which to evaluate how well the government implements its strategy. In Somalia, for example, opaque screening that subjects high-risk detainees to prosecution and death penalties increases the uncertainty of low-level members who might otherwise be enticed to defect. In effect, it forces them to risk their lives twice: first, to escape al Shabaab, then, by taking the substantial risk of being classified as high risk. It may also result in victims and others having less confidence in the state's ability to devote its limited capacity for prosecutions to the most dangerous members. Greater transparency in the process' rules, norms and mechanics could help avoid these costs.

d) *Consistent treatment* across organisations – treating likes alike – contributes to legitimacy and thus effectiveness of prosecution strategy. However, inconsistent treatment seems to be the rule with regard to violent extremism. In Nigeria, perception of inconsistent approach to serious violations by CJTF and the military, on the one hand, and Boko Haram on the other, creates a legitimacy deficit both for those who supported Boko Haram due to state persecution, abuses and corruption, and for victims of atrocities by state and militia forces. This does not mean that violence committed by CJTF or military forces needs to be treated the same as Boko Haram's. CJTF may have greater claims to legitimacy and public support given their resistance to Boko Haram, and the legal incentives that work for them will likely be different than those for Boko Haram. Nevertheless, it is important that any differential treatment be designed to further overall strategic goals and is communicated, justified and explained to all stakeholders.

Similar issues need to be considered in Iraq with respect to the predominately Shia Popular Mobilisation Forces, a state-affiliated but largely autonomous militia that was instrumental in regaining territory from IS. A failure to hold it accountable for serious abuses, while harshly penalising individuals accused of only tangential association with IS, is likely to drive local

grievances among Sunni Arabs in particular and further feed the narrative of a Shia-dominated government persecuting Sunnis.

e) *Civilian or military courts?* Civilian prosecutions will generally be viewed as more legitimate than those in military courts. Nevertheless, there may be good reasons (e.g., a volatile security environment) to hold trials in the latter on an exceptional basis. Also, military courts may have greater capacity and thus be the only viable option for a period. At the same time, the legitimacy of a military process can be increased the more the proceedings are transparent, and the more due process rights are provided. For military courts to be acceptable as a temporary necessity, however, the state needs to show its commitment to create or enhance civilian courts so they can take over as soon as possible. In Somalia, for instance, the government has accepted a new civilian court with enhanced capacity and security, built with UN and donor aid, thus signalling a desire to move to a more civilian-run judicial process.

f) *What to prosecute?* It is important that offences are clearly articulated and publicised, and prosecutorial priorities are likewise formalised and explained. The case studies, however, illustrate a tendency to criminalise mere membership in the extremist group rather than commission of a specific act. This implicitly lumps together die-hard believers and coerced followers, raising problems of legality and effectiveness by not sending a clear responsibility message that can contribute to general deterrence and by expending precious prosecutorial resources on individuals who could benefit from an alternative accountability process. The better path is to articulate the prosecutable offences and apply the law to those who commit the crimes, regardless of affiliation.

g) *Punishment options.* A wide variety of sanctions can result from successful prosecution. Capital punishment is the most problematic, as it risks the process' international, and sometimes local, legitimacy and irrevocably punishes a person whose prosecution may have been flawed. The threat of such punishment may also lessen defection or negotiation: if execution is probable, why stop fighting?

Incarceration presents its own risks, as confinement conditions can significantly impact the rehabilitation and reintegration possibilities of group members. Jailing hardened believers with low-level members, who often may not be strong believers or may have themselves been victims, risks exposing the latter to violence and an ideology or network that can motivate or facilitate more violence on release. Overly harsh conditions also lessen possibilities for prisoner rehabilitation, making the chances of eventual reoffending more likely. As such, the more governments can distinguish among detainees with respect to place and conditions of confinement, the more legitimate and effective incarceration will be. For example, separate facilities depending on risk and rank could be important. Those who were captured or coerced by the group – disproportionately women and children – should normally be housed separately rather than detained, as they are more victims than culprits. Even treating them as low-level perpetrators risks alienating them and harming efforts to eliminate incentives to join such groups.

Punishment options can also include individual contributions to victim reparations and healing. A person convicted of acts of violence against a community could be required to perform services that benefit that community, or to contribute monetary or in-kind reparations. This is likelier to be successful with those who can be treated in an alternative accountability system, but some high-level individuals who have been prosecuted may also be appropriate to include in a programme. This approach may, however, require legal or institutional reforms. Nigeria's law, for example, appears not to recognise the right of victims to reparations.

h) *Forms of responsibility.* Liability for violent acts can be thought of as existing along a continuum, even though roles are rarely static. At one end are those who directly engage in the acts; at the other are those who provide incidental support, such as drivers or cooks. In between are those who order, direct or incite the acts, or give financial, political or other support.

Determining whom to prosecute based upon forms of responsibility should take into account both the nature of the responsibility and the level of engagement. Thus, one who gives financial support to an extremist group by paying a mandatory tax, as with IS, Boko Haram and al Shabaab, would be less of a candidate for prosecution than a wealthy warlord or businessman who provides substantial proactive support. Similarly, one involved in low-level violence (e.g., killing livestock) would be less suitable for prosecution than one who kills a village's residents. Assessment of whom to prosecute should also be tied to both specific and general deterrence, as well as other strategic goals. It is inefficient to expend limited resources on those who may be effectively dealt with by another process.

## B. Amnesty

### 1. Purposes

By definition and design, amnesties are major exceptions to the ordinary application of law and should be used sparingly, in conjunction with the promise of benefits for peace and stability. Since amnesties can take many forms, it is important for a state to be clear about what is contemplated, as well as requirements and effects. At one extreme are general amnesties, applicable to entire categories of individuals with no other eligibility criteria and no quid pro quo. They can be effective for enticing defections and demobilisation but quickly be considered illegitimate by stakeholders if not linked to other important transitional justice and conflict resolution processes. General amnesties that apply to individuals most responsible for violent crimes will not only be viewed as illegitimate, but also risk being illegal under international and domestic law. On the other end of the continuum are conditional amnesties with specific eligibility criteria and that require something in return, like disarmament, truth telling, reparations and/or cooperation with law enforcement. They can be important in furthering investigation, acknowledgement, reparations, peace and accountability and thus advance the broader objectives of a proper transitional justice strategy.

### 2. Guiding considerations and options

a) *Justification.* Because they offer an extraordinary benefit for an otherwise punishable crime, amnesties should be used rarely and carefully; coupled with clear and transparent criteria and conditions linking them to other important aims; and explained to stakeholders, including victims. Nigeria and Somalia have used them a number of times. The 2009 amnesty Nigeria gave MEND is often viewed as improper, as recipients not only avoided punishment, but also received generous payoffs. In Somalia, presidents have declared amnesties in an ad hoc fashion, often with no eligibility requirements, conditions or clear legal effects, while high-value defectors have received impunity deals widely perceived as red-carpet treatment for terrorists. Both countries thus are challenged in designing an appropriate, widely accepted amnesty. Frequent issuance makes their amnesties look unprincipled and undercuts the notion of an extraordinary measure meant to achieve a strategic objective.

b) *Eligibility.* Determination of eligibility for an amnesty can be viewed as the reverse of the determination of who should be prosecuted. In general, high-level individuals and those most responsible for violent acts are properly subjects of criminal proceedings, rather than a conditional amnesty. The corollary is that low-level individuals and those least responsible for violent

acts are generally appropriate candidates for a conditional amnesty. Distinctions can be based, among other things, on a person's rank in the organisation's hierarchy, notwithstanding the structural fluidity common to extremist groups. Some high-ranking individuals may warrant a form of leniency via a conditional amnesty as key players in an effort to negotiate an end to the conflict. If so used, however, it is important that the individual be subject to some form of accountability (including public truth telling that may include the participation of victims) and concrete acts of reparation or healing. In addition, such a concession should be clearly articulated and justified to relevant stakeholders.

An amnesty may also vary eligibility and conditions on the basis of organisational affiliation. However, such distinctions need to be justified carefully, so as not to foster the perception of uneven or special treatment, which would undercut medium- and long-term conflict resolution goals. In this regard, while the three case studies have at their centre a prominent violent extremist group, each operates in an environment involving other armed groups that commit widespread violence, including state security forces. A conditional amnesty available to members of many or all such groups might be the most sensible option – and has ample precedents in multi-actor conflicts (e.g., Colombia).

While broadening individual eligibility may increase cross-group buy-in, it can have the opposite effect of alienating or hardening the position of members of extremist groups. In Nigeria, Boko Haram has taken a strong stand against benefiting from an amnesty, arguing it has done nothing wrong so requires no legal protection. Rather, they argue, the state should be asking for amnesty for its many crimes. In this regard, making clear that an amnesty is centred on acts committed and willingness to meet conditions rather than organisational affiliation lessens the appeal of anti-state narratives, especially if the same eligibility standard applies to state and non-state actors alike. As such, conditional amnesty must be finely-grained to distinguish among categories of individual responsibility within a particular organisation, so that members not directly involved in violent crimes may benefit, while those who were involved are subject to more punitive processes.

c) *Conditions.* Attaching conditions to eligibility and retention of amnesty enables it to advance DDR, accountability, truth telling and reparations. Conditions can establish a link between the crimes being forgiven and the needs of affected communities. The more they are attached to obtaining or maintaining an amnesty, the more legitimate it will be. Too many, however, may lessen attractiveness to its potential beneficiaries and increase the operational complexity and cost. As such, a balance needs to be struck between the minimum conditions needed to sell the amnesty to important stakeholders, including victims, and the maximum after which few if any intended beneficiaries will participate, or reliable implementation becomes unrealistic. Conditions that further accountability include disclosure obligations; questioning by victims, their representatives or other affected parties; reparations; enhanced penalties for recidivism; and temporary restrictions on future political activity. These both hold a perpetrator to account and provide accountability and redress to victims. Tying amnesty to participation in DDR can induce defections, so weakening the target organisation and lessening the immediate threat it poses.

d) *Consultations.* Because conditional amnesty will be part of any serious transitional justice strategy for dealing with violent extremism, it could be used to spur an inclusive consultation process on transitional justice questions as a whole. The consultations could include inquiries about not only the purpose, terms and eligibility requirements for an amnesty, but also the broader range of strategic choices, including prosecutions, truth commissions, healing and reparations programmes and institutional reforms. Ideally the consultations would elicit the preferences of important stakeholders, which might then lead to more informed choices

about ends and means, form and function. For example, in Somalia, it is reported that many women's NGOs strongly oppose any form of amnesty for al Shabaab members. This hard-line position appears to shift, however, if an amnesty is combined with truth telling and apology. Consultations that lay out possibilities and trade-offs with respect to amnesty and the other choices (as done in Uganda in the late 1990s and early 2000s) are more likely to result in greater buy-in from important stakeholders, so have a higher possibility of success.

e) *Importance of prosecutions.* The carrot of conditional amnesty is only as sweet as the stick of prosecution (or battlefield death) is strong. If the threat is not convincing, the amnesty can entice neither participation by eligible beneficiaries nor continued adherence to its conditions. To be worthwhile, it must be designed in conjunction with a prosecution strategy that complements rather than contradicts it.

## C. Truth Commissions

### 1. Purposes

Truth commissions offer a platform for individuals to share their own truths concerning past violations with the larger community, as well as a vehicle for deep analysis of the structural and institutional causes of those violations. They can be used to facilitate conversation at local, regional or national levels, and contribute to meeting a state's obligation to provide victims a process for access to complex individual and collective truths concerning past violations. The NGO Soyden has undertaken analogous community-level processes that may provide a model for a larger effort in Somalia. In Nigeria, lessons may be gleaned from a previous truth commission that investigated and reported on violations attributable to military governments between 1966 and 1999.

As noted elsewhere, communication of goals, policies and strategic choices is key to addressing the atrocities of extremist organisations. Truth commissions can make important contributions in this regard, especially when they have a strong public outreach mandate. For each case study country, a local variant on the classic forms of a truth commission that deals with the lack of official and public understanding of the multiple ways in which individuals may be associated with such an organisation could be beneficial. The studies show that victims – those kidnapped, coerced to provide a service or who simply remained in territory occupied by the group – are often conflated with active supporters. This leads to punitive reactions that alienate potential allies who might otherwise be reintegrated and assist in enticing defections or give insight into better ways to combat the group's appeal. A truth commission with a clear dialogue mandate could provide space to highlight the many ways people may come into contact with the group, thus helping overcome the tendency to label them simplistically as victims or perpetrators, members or non-members.

### 2. Guiding considerations and options

a) *Scale.* Truth commissions nearly always are undertaken at national level, but there is no reason they could not decentralise operations (as many commissions have done) or operate entirely at local or regional level. In general, the more consistent the experience of violations is across a national territory, the more appropriate it may be to have a centralised, national body; the less consistent the experience, the more decentralised the process should be. The issues and experiences in the north of Nigeria, for example, are dramatically different from those in the south. The areas in all three case studies that have been occupied by extremist groups arguably require a different focus from those that have not. Distinct experiences contribute

to the cleavages in each society, making it important that even an emphasis on local processes should feed into a national dialogue.

b) *Links to other processes.* As noted, truth commissions can complement both prosecutions and conditional amnesties. In the former case, information collected can be used, if the mandate allows, to further investigations related to possible prosecution. Such a commission would normally require strong investigative powers and resources. Yet, even without these, the relationship between its truth-seeking (investigative) and truth-telling functions needs to be clearly demarcated, and the trade-offs between them clearly addressed. Thus, testimonial immunity may be given to encourage truth telling, but only if such testimony cannot be used in a prosecution. This may require careful thought about who is eligible to testify. Creative options might include offering a reduced or suspended sentence in return for a credible, detailed confession before a truth commission by an already convicted person.

As South Africa demonstrated, a truth commission can also be linked to a process in which participation is a condition for receiving amnesty. The effectiveness of such a requirement is increased if the participation occurs before amnesty is granted, thus allowing its quality to inform the grant and creating a greater incentive for the beneficiary to be honest and forthcoming.

c) *Breadth of the mandate.* It is important to think about mandate along three dimensions: temporal, material, and personal. The first concerns the period under examination. In choosing a commission's temporal jurisdiction, reasoned justifications are needed for the cut-off dates. If these are perceived to be arbitrary or exclude important actors or events, legitimacy will be reduced. In an extreme case, it may even doom the commission, giving it the aura of an exclusionary or antagonistic political initiative, rather than an independent, nation-fortifying inquiry into past traumas.

Material jurisdiction can be narrowly focused on the worst acts of violence (killing, rape, torture) or expansively oriented to include violations of some or all international human rights law (ranging from civil and political rights to economic, social and cultural rights). The broader a mandate, the thinner engagement will be with each type of violation. Competing interests are at play: narrow substantive focus allows more robust investigations and more intensive engagement with specific perpetrators and victims; wider focus allows more analysis of the systemic and institutional forces that contributed to the conflict, including the root causes and drivers of extremist violence.

The commission's personal jurisdiction can be limited to specific groups (Boko Haram, IS, al Shabaab) or left open to encompass violations committed by members of any side. Narrowing personal jurisdiction too much risks alienating important stakeholders and feeding perception of the commission as one-sided in contexts where different communities have been victimised by different groups. Yet, it may make sense in some localities or regions to emphasise violations attributed to a particular organisation, while not precluding examination of violations committed by others, including state and state-affiliated armed groups. As with the other choices involved in crafting a transitional justice strategy, inclusive consultation about the concerns of important stakeholders will contribute to more informed choices concerning the scope of the mandate and related trade-offs.

## D. Reparations and Healing

### 1. Purposes

Reparations and healing further accountability by providing tangible redress to victims, thus aiding reintegration of perpetrators and advancing the medium- and long-term goals of creating peaceful, inclusive societies. Reparations can be provided to individuals, groups or communities and be monetary, in-kind or symbolic. Whatever their form, the purpose is to contribute to a process by which victims can begin to recover morally, physically and economically from atrocity. Reparations can also give a strong legitimacy boost to alternative justice processes such as conditional amnesties, as well as to prosecutorial strategies focused on a limited number of perpetrators. The more leniency given perpetrators via limited prosecutions and conditional amnesties, the more robust the reparations programme (and any accompanying institutional reforms) should be.

Healing processes can take many forms, including rituals arising out of religious or local cultural practices. Psychosocial services at an individual level can offer important help to victims of particularly violent crimes and the bereaved, but healing can also result from other means. Giving victims a voice in the formation of transitional justice policy, including consultations on its design, can further healing. Optional participation in truth commission proceedings or a conditional amnesty process – being able to hear and question its beneficiaries – can further healing. If managed well, structured interactions between victims and perpetrators can even aid healing of both in some cases. Likewise, victims who achieve some healing might in turn assist in the rehabilitation and recovery of other victims and affected communities.

### 2. Guiding considerations and options

a) *Tailoring reparations to violations.* The form reparations takes is a function of the type of violations; available resources; and cultural norms. Direct medical and psychosocial services may be appropriate for victims of particularly violent acts; those who lost property or were displaced may require in-kind restitution of land or sufficient alternative resources with which to rebuild lives. In Iraq, IS reportedly expropriated the property of individuals in Iraq who fled areas they captured; at the same time, the military is said to have “gifted” abandoned properties to well-connected persons. This underscores the importance of tailoring reparations to particular violations and making sure they are applied evenly to those committed by all parties to the conflict. Consultation with victims and other relevant stakeholders are key to ensuring that reparations are considered fair and helpful.

b) *Individual and communal reparations.* A programme that combines individual and communal reparations is more likely to be viewed as legitimate and effective. The challenge with the former is establishing clear eligibility criteria and setting levels of compensation realistic both in ability to make a difference to the recipient and in terms of the availability of state resources. Concentrating on only a few victim categories risks resentment, particularly if the recipients are primarily from one community. An inclusive programme that does not discriminate based upon the nature of the perpetrator or perpetrator group is more likely to be acceptable. Consequently, criteria must be carefully considered and communicated so as not to create unreasonable expectations among victims and others.

Communal reparations can be both substantive and symbolic. The former might include providing services to a community that was displaced or had much land or infrastructure destroyed. In Iraq, where there has been expropriation and it is difficult to determine ownership, land might be restored to the community for viable economic activity. However, it would be crucial to ensure that the local governance structure is inclusive and transparent in membership and



decision-making. As for symbolic reparations, these can take the form of institutional apologies; memorials that acknowledge past violations and pay tribute to their victims; renaming of towns and streets; and so forth.

c) *Healing programmes*. Healing policies can be individualised (e.g., specific services to victims) or more community-focused, fostering engagement and dialogue between families or groups that were in conflict. However, the case studies indicate that communities are very reluctant to welcome back those who were even involuntarily associated with a violent extremist group. Overcoming such reluctance must draw on many mechanisms discussed above, under conditions that involve persuasive security guarantees and a quid pro quo. A targeted prosecutions policy focused on the most responsible could be combined with an outreach and communications strategy concerning who is or is not being prosecuted, and who does and does not present a clear risk. Such an approach could contribute to greater understanding of who is properly blamed for violations and with whom co-existence and reintegration is feasible. Similarly, a transparent amnesty process combined with a truth-telling obligation could produce narratives highlighting the different risks presented by members of the extremist organisation, and so lessen resistance to allowing some returns. A carefully crafted community dialogue that begins to break down the binary view – either perpetrator or victim – could further reduce community resistance. All policies together could help lay foundations for the collective healing process any society must eventually face.

## Concluding Observations and Areas for Further Research

Transitional justice strategy formation, always complex, is even more so regarding extremist groups with whom a majority of society cannot imagine coexistence. Suggestion of even the most limited accommodation with members of such groups is often rejected categorically. Yet, expecting military and political liquidation looks no more realistic than a policy of universal embrace of such groups. In this regard, transitional justice represents a middle path, offering tools that situate the problem and the solution somewhere between the extremes of acceptance and liquidation, and between accommodation and punishment. That fact alone makes it a necessity for any serious policymaker directly confronted by violent extremism.

Whatever transitional justice strategy a government adopts, it needs continuously to assess and re-evaluate its efficacy. Some of this is accomplished through quantitative analysis (e.g., number of individuals subject to prosecution or DDR processes), with information ideally collected separately for women and children, since existing strategies and local prejudices disadvantage them. Yet, over-reliance on quantitative data can be misleading. Defectors may cycle in and out of the system unless meaningful job opportunities are provided, and unless there is substantial progress in addressing underlying factors and grievances that made the violent extremist organisation an attractive option. The presence of numerous other armed actors, including state-aligned militias, means that a defection or demobilisation process may merely displace the centre of violence, not diminish it. This is a subject that requires further study.

Additional research could also aim at clarifying synergies and tensions between violent extremist groups and other armed groups in a conflict arena, including criminal bands, private militias, insurgents and state security forces. This goes beyond an exercise in classification of the different types of groups; it requires a political economy analysis of the blurred borders and interplay among them. This will help determine what kinds of transitional justice interventions can make a lasting difference, and which instead will have at best a cosmetic impact, or at worst a damaging one.

Likewise, there may be some benefit in further research on the overarching international environment and its impact on extremist groups. Western governments and the UN Security Council have generally supported the decision of affected governments to treat extremist organisations through an aggressively punitive and military lens, which has produced the concerns noted throughout this paper. Western support has also been directed to efforts at enticing negotiated exits and providing rehabilitation and reintegration for ex-combatants, but these have been hampered by donor restrictions precluding “benefit” to extremist organisations (including any current or ex-members, even if low level or involuntarily associated). Yet, experience in conflict resolution and transitional justice from elsewhere shows that national policymakers will often consider a different approach if the international legal architecture, political framework and economic incentives point in that direction. Overlapping concerns – such as foreign fighters and the transnational nature of extremist groups – may offer the best window of opportunity for any possible adjustment of strategy.

Whether and how to harmonise tribal and informal justice systems with more formal systems also requires study. The formers’ emphasis on collective guilt is problematic, but Iraqi tribal justice offers important governance functions like security, dispute resolution and stability, particularly in areas where state institutions are viewed as weak or illegitimate. Somalia’s *xeer* system may provide some healing and reintegration, but undercuts these by its restriction to males and vulnerability to capture by inter-clan conflicts. Nevertheless, such traditional processes, including Soyden’s efforts in Somalia, may provide an entry point for developing a transitional justice strategy with increased local buy-in. Though tribal leaders may resist the

increased codification and lesser control that may come from integration into the national justice system, it would be useful to understand the tensions better and identify common interests that could advance a compromise that furthers a transitional justice strategy's conflict resolution goals.

Arguably the most important research question, however, is whether, when, what and how to negotiate with violent extremist groups. The possibility of negotiation confronts national and international policymakers alike, despite the discomfort, even distaste, the mere suggestion produces. Yet, it is worth noting that negotiation with groups considered both terrorist and fanatical has been accepted more than once: Afghanistan tried comprehensive peace talks with the Taliban, Uganda with the LRA and Sierra Leone with the RUF.

The choice to sit down with incomprehensibly violent groups will always be controversial, and thus any attempt should be driven less by hope and more by realism and a desire for restoration of public security. At the same time, in reckoning with the identities, ideologies and actions of groups such as IS, Boko Haram and al Shabaab, it is undeniably difficult to imagine negotiating comprehensive solutions with them. That is because such solutions operate on the premise that the group in question has the will and capacity to transform into a new and unarmed form with which society can co-exist.

When it comes to IS, Boko Haram or al Shabaab, that is a premise that, today at least, none of the affected governments (and indeed, none of the armed groups themselves) appears to take seriously. At the same time, the existence of amnesty and rehabilitation programmes in Iraq, Somalia and Nigeria implies that a capacity to transform does exist, at least at the individual if not institutional level. Nigeria has tried to negotiate peace with Boko Haram, and Somalia has brokered immunity deals with high-value al Shabaab defectors. Such efforts show recognition that military confrontation alone cannot end these insurgencies, and negotiation has a role.

Meanwhile, many "partial solution" negotiations are possible that do not depend on the group's transformation out of extremist violence. These include negotiation of prisoner exchanges, humanitarian corridors, partial or global ceasefires and much more. All are public goods in the form of violence reduction and prevention, independent of future benefits they may have for confidence building toward eventual comprehensive negotiations. As such, the link between transitional justice goals and negotiation goals requires closer attention and thought. If organised well, transitional justice – conditional amnesties in particular – can play a vital role in incentivising and facilitating negotiations of different types.

As noted, however, the tendency is to treat violent extremist groups as entities to be eradicated, and to show no mercy to affiliates. In light of the atrocities associated with such groups and their insistence that no reconciliation with the state is possible, that is understandable. Yet, every affected state needs strategists capable of broadening the lens of official response beyond the moment's crisis, assessing alternatives (including negotiation scenarios) and formulating new ideas that improve the chance of achieving multiple objectives in the face of great constraints and insecurity.

Unfortunately, none of the case studies shows the existence of centres for such strategy formation. They expose instead a patchwork of nerve centres and interventions, disconnected from effort at national dialogue, structured communication or victim-centred consultation. But lack of a strategy formation centre can be overcome with modest political will. Transitional justice can then begin to have an outsized impact on security and the politics associated with preventing and overcoming violent extremism. It can illuminate not only the broad spectrum of creative, realistic policy options, but also what today's extremist groups have in common with other illegal armed groups – from paramilitaries to local militia, organised criminal bands, violent secessionists or politically-motivated rebels – and where and how they differ.

# The Limits of Punishment

*Transitional Justice and Violent Extremism*

**IRAQ CASE STUDY**



Mara Redlich Revkin

May, 2018

After the  
Islamic State:  
Balancing  
Accountability  
and Reconciliation  
in Iraq

## About the Author

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## COVER IMAGE

IRAQ. Baghdad. 2016. The aftermath of an ISIS bombing in the predominantly Shia neighborhood of Karada in central Baghdad. © Paolo Pellegrin/ Magnum Photos with support from the Pulitzer center.

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## Introduction

The Islamic State (hereafter “IS”) is a Sunni jihadist group that captured and held substantial territory in Iraq and Syria starting in 2013 in an effort to establish a state-like “caliphate” purportedly based on the model of Islamic governance first laid out by the Prophet in the sixth century.<sup>1</sup> Unlike some other armed groups that are concerned primarily with violence and warfare, IS’s ideology revolves around statecraft and governance of civilians.<sup>2</sup> At the height of its expansion in late 2014, IS controlled – and governed, to varying extents – 20 major Iraqi cities with a total civilian population greater than 5 million.<sup>3</sup> In these cities, IS monopolised not only recruited and trained fighters, but also operated service-providing and humanitarian institutions such as schools, hospitals, and municipal departments. Employees of IS’s civilian bureaucracy faced pressure to swear allegiance to the group and were functionally part of its workforce, but generally did not carry weapons or otherwise perform military functions. Many civilian residents of IS-controlled territory and relatives of IS members had no choice but to cooperate with the group because opposition was equated with “apostasy” and therefore punishable by death. When IS retreated from Iraqi territory in 2017, it left behind a population that Iraqi authorities now overwhelmingly regard as complicit in terrorism. The Iraqi government is currently facing the monumental challenge of reintegrating this population into Iraqi society, but in doing so, has taken a heavy-handed approach that fails to differentiate between voluntary and involuntary cooperation with IS, and between more serious crimes and lesser offenses. This approach, which is widely perceived as collective punishment of Sunnis, appears to be generating new grievances that could fuel the emergence of what many analysts predict will be an “IS 2.0.”

The Iraqi government has detained more than 19,000 people on terrorism-related charges – mostly related to IS – and convicted at least 8,861 since 2013. Of these, at least 3,130 have been sentenced to death on terrorism-related charges and at least 250 have already been executed.<sup>4</sup> Although international law prohibits capital punishment of juveniles, Iraq’s Prime Minister has indicated that detainees as young as 16 may be eligible for capital punishment.<sup>5</sup> The rapid pace of these trials – some as brief as 10 minutes with a conviction rate of around 98 percent<sup>6</sup> – has raised concerns about due process. In addition to the punitive counter-terrorism policies carried out by uniformed Iraqi and Kurdistan Regional Government (KRG) authorities,<sup>7</sup> civilians are vulnerable to extra-judicial punishments by private citizens and militias. Revenge killings of suspected IS affiliates or sympathisers are widespread,<sup>8</sup> sometimes perpetrated by individuals who were personally victimised by IS.

The retaking of Mosul in 2017 and other previously IS-controlled cities raises several difficult questions. How can Iraqi and KRG authorities accurately and fairly differentiate between IS affiliates who pose a genuine threat to national security and civilians who merely lived and worked in areas controlled by the group? How can trust be rebuilt in multi-religious, multi-ethnic communities where Sunnis are feared or resented for their actual or perceived collaboration with IS? What strategies are available to bring an end to cycles of violence and revenge? And finally, given that the dominant approach to populations governed by and associated with IS have been highly punitive, are there any alternative transitional justice frameworks that would allow amnesty for individuals who are not accused of serious offenses? While it is important that IS members be held accountable for their crimes, many Sunni Arabs only loosely associated with IS are being accused of and punished for crimes that they did not personally commit. This report is organised as follows. Section 1 describes the methodology, Section 2 provides an overview of the conflict dynamics in Iraq, Section 3 presents preliminary results

of a survey of 1,409 residents of Mosul as a case study of life under IS rule and its aftermath, Section 4 analyses current approaches to accountability in Iraq and their consequences, and Section 5 concludes with recommendations for alternatives.



# 1. Methodology

Understanding the experiences and attitudes of Iraqis who personally experienced IS rule, as well as the views of other key stakeholders and policymakers, is an important first step in the process of designing evidence-based policies that will facilitate the stabilisation and reintegration of areas recaptured from IS. Toward this end, this report is based on fieldwork and interviews conducted in Iraq in April and December 2017. Research was conducted in Baghdad, Erbil, Mosul, a camp for internally displaced persons (IDPs) near Hawija (Hajj Ali), and Tel Kayf, the location of a counter-terrorism court that was established by the Iraqi government to prosecute the large number of alleged IS members detained in Ninewa Province. The 48 individuals interviewed include eight lawyers or law professors, nine judges and prosecutors, and nine family members of IS members (wives and mothers). The research also included observations of two trials of alleged IS members at the court in Tel Kayf and observation of a tribal reconciliation session in Baghdad – attended by representatives of 30 tribes from Anbar Province – that was organised to discuss social, legal, and security issues related to the recapture of territory from IS. Interviewees affiliated with IS or from IS-controlled areas are cited anonymously with pseudonyms for their own protection.<sup>9</sup>

In addition to qualitative evidence from the above sources, the report includes preliminary quantitative results from a large-scale survey of 1,409 residents of Mosul that is part of the author's dissertation. As Iraq's second largest city after Baghdad and the de facto capital of IS during the three and a half years that it was controlled by the group, Mosul is at the centre of current debates over accountability, reconciliation, and reconstruction. The survey was administered in March 2018 by a respected Iraqi research firm, the Independent Institute for Administration and Civil Society Studies (IIACSS), which has previously conducted the Arab Barometer and World Values surveys in Iraq. The sample was drawn from 47 randomly selected neighbourhoods of East and West Mosul. Filter questions intentionally limited the sample to adult Sunni Arab Iraqis. Given massive out-migration from Mosul by non-Sunnis and non-Arabs (due to their persecution by IS), the numbers of respondents belonging to these groups would have been too small to draw any conclusions about the larger populations to which they belong. Section 3 of this report presents some preliminary results of a selection of relevant questions from the larger survey on (1) respondents' experiences with IS governance and violence, (2) their experiences with the Iraqi government – both currently and prior to IS's arrival in June 2014, (3) tribal identities and institutions, and (4) harms experienced during the battle for Mosul. The survey also included two embedded experiments designed with Dr. Kristen Kao, a Postdoctoral Research Fellow at the University of Gothenburg, that assesses respondents' preferences for the punishment, forgiveness, and reintegration of hypothetical individuals who cooperated to varying extents with IS – for example, as taxpayers, wives, fighters, cooks, or cleaners.<sup>10</sup> Preliminary results of this experiment indicate that many residents of Mosul would prefer less punitive responses to individuals who were affiliated with IS in non-combat roles than Iraq's Counter-Terrorism Law currently allows.

## 2. Conflict Overview

The Iraqi state and U.S.-led Coalition's fight against IS is only the most recent layer in a long history of violent conflicts that includes former President Saddam Hussein's persecution of Kurds, Shiites and dissidents during the 1980s and 1990s, the 2003 U.S. invasion of Iraq and overthrow of Hussein's government, and the subsequent al-Qaeda-driven insurgency against the U.S. occupation. The collapse and retreat of IS into Syria in 2017 has unfolded in the context of these pre-existing – and in some cases, unresolved – conflicts, but it also raises new challenges that stem from the group's unique organisational structure and state-building aspirations. Although IS no longer controls territory in Iraq, the country is at risk for the reactivation of old conflicts and the emergence of new ones, particularly around contested areas.<sup>11</sup>

Micro-conflicts between individuals, communities and the state are extremely important in Iraq, where historically marginalised groups have longstanding grievances that predate the rise of IS by decades. Some groups, notably the Kurds, viewed the conflict with IS as an opportunity to reassert pre-existing claims to disputed territories.<sup>12</sup> Micro-conflicts are present not only between groups but also between individuals. At the individual level, some Iraqis have leveraged the conflict dynamics to exact revenge on personal enemies by accusing them – often falsely – of joining or supporting IS.<sup>13</sup> A UNDP officer identified property disputes as the most pressing post-IS issue in the Iraqi city of Yathrib where some residents are “falsely accusing others of joining IS as a pretext for seizing their land.”<sup>14</sup> Although the Iraqi government's conflict with IS is over for the time being – although many warn of the potential for an “IS 2.0” – the past several years of violence and instability have fuelled other conflicts that are still in need of resolution.

### The Rise and Fall of IS

The group now known as IS has deep roots in Iraq and emerged from the remnants of al-Qaeda in Iraq, a Sunni jihadist group founded in 2004 in the aftermath of the U.S. invasion, which paved the way for Shia dominance in Baghdad and the alienation of the formerly powerful Sunni minority. In 2006, elements of al-Qaeda in Iraq announced the formation of a new splinter group, the Islamic State in Iraq (or ISI). In 2010, Abu Bakr al-Baghdadi was elected as the leader of ISI after his predecessor was killed in joint US-Iraqi operations. Baghdadi would remain the leader as the group evolved into IS. In 2011, as the world was watching the Arab Spring unfold, Baghdadi was quietly starting to expand ISI's influence within Iraq, exploiting the grievances of local Sunni populations who felt marginalised by the sectarian policies of then (Shia) Prime Minister Nouri al-Maliki. He also began expanding beyond Iraq, and in July of that year, sent operatives into Syria to start building a base of operations there. Back in Iraq, meanwhile, ISI carried out dozens of bombings and 8 major prison breaks, freeing hundreds of jihadists who had been detained in Iraqi jails.

By March 2013, as the Syrian civil war intensified, Raqqa fell to the Syrian opposition and several armed groups, including ISI, started fighting for control of the city. Eventually, ISI prevailed and quickly spread into other areas of Syria and Iraq, and it became clear that this was not simply a military organisation, but rather, a group that was trying to become something resembling a state – as its name had always suggested. By this time, IS was operating a variety of state-like institutions designed to govern, indoctrinate, and extract resources from civilians living in its territory including courts, religious police, and taxation. By late 2013, Baghdadi had relocated

from Iraq to Syria and renamed the group the “Islamic State in Iraq and Syria” known by the acronym ISIS, to reflect its expanding territorial claims. Around this time, Al-Qaeda formally cut ties with ISIS over several ideological and strategic disagreements. Despite losing al-Qaeda’s support, ISIS continued to capture more territory in Syria and Iraq with major victories in Tikrit and Mosul in June 2014. Shortly thereafter, ISIS announced the establishment of a “caliphate” and changed its name yet again to the “Islamic State” or IS, dropping references to Syria and Iraq and thereby signalling its intent to establish a global caliphate that would transcend what it regards as artificial, Western-imposed borders.

In June 2014, Iran entered the conflict by sending 2,000 troops to support Iraqi forces.<sup>15</sup> By August 2014, Iran was also providing weapons to Kurdish forces (the Peshmerga) to support their fight against IS,<sup>16</sup> which had advanced to within 25 miles of the KRG capital of Erbil.<sup>17</sup> At the invitation of the Iraqi government, the United States also entered the conflict in August 2014 by launching airstrikes at IS targets, dropping humanitarian aid for thousands of Yazidis,<sup>18</sup> a religious minority group fleeing a genocidal attack by IS on Mount Sinjar, and by supplying the Kurdish Peshmerga with weapons. In response to the fall of Mosul in June 2014, former Prime Minister Nouri al-Maliki signed a decree to form the Popular Mobilisation Forces (PMF),<sup>19</sup> an umbrella of at least 50 primarily Shia militia groups – some strongly backed by Iran – to supplement the regular Iraqi armed forces. Estimates of the size of the PMF, which has been described as Iraq’s “second army,”<sup>20</sup> vary widely between 60,000 and 140,000.<sup>21</sup> In comparison, Iraq’s regular army (excluding police) in 2014 was estimated at 250,000, and the Kurdish Peshmerga to be between 80,000 and 190,000.<sup>22</sup> At that time, IS was believed to have 7,000 and 10,000 fighters between Iraq and Syria.<sup>23</sup> In 2016, the Iraqi parliament passed a law that nominally integrated the PMF into the national armed forces by requiring its commanders to report to the Prime Minister.<sup>24</sup> However, the PMF remains largely autonomous in practice.<sup>25</sup> The PMF have played a crucial role in retaking territory from IS, but have also been accused of grave human rights abuses in the process, including forced displacement of local Sunni populations and extrajudicial executions of individuals accused of having been affiliated with IS.

By 2016, it was clear that IS had overextended itself by capturing more territory than it could effectively govern and defend. Over the past year, IS has lost all the major cities it controlled in Iraq and is at the time of writing in the process of retreating to a shrinking corner of Syria. Although the Iraqi government officially declared victory over IS in December 2017,<sup>26</sup> the massive collateral damage, destruction, and displacement caused by more than three years of violence raise a new and vexing set of challenges. First, the conflict with IS unfolded in the context of a long history of unresolved ethno-sectarian disputes that are now being reactivated. Second, the blanket stigmatisation of all individuals associated with IS – whether as combatants, civilian employees, family members, or merely residents of IS-controlled territory – has hindered the restoration of trust and social cohesion in areas retaken from IS. Third, Iraqi security forces’ collective punishment of Sunnis who lived in IS-controlled areas and failure to address the political and economic grievances that contributed to the rise of IS in the first place could fuel a new insurgency. All of these new and emerging challenges risk sowing the seeds of future conflict and will need to be taken into account in any Iraqi strategy to defeat IS while contributing to a sustainable transition away from conflict.

## The Significance of IS’s Control of Territory

IS’s control of territory has important implications for post-conflict reintegration, stabilisation, and accountability because the group’s coercive power over civilians living in its territory has made it difficult for authorities to differentiate between voluntary and involuntary collaboration. Some residents of IS-controlled territory cooperated with the group because they genuinely

supported it – whether for ideological or opportunistic reasons – but many others (and perhaps most) cooperated only because resistance was punishable by death and therefore futile. Often, leaving these areas was not even an option because of the heavy costs of resettlement elsewhere or because IS eventually banned travel and migration outside of its territory. Nonetheless, Iraqis who stayed in IS-controlled territory rather than fleeing to IDP camps or government-controlled areas (“stayers”) are widely feared and resented by “leavers” – those who did manage to escape.<sup>27</sup> As one Sunni Kurdish internally displaced person (IDP) expressed this sentiment, “All [IS] is a red line, including those people who did not fight with [IS] but did not say no to them and lived among them.”<sup>28</sup> Although many residents of IS-controlled territory were opposed to the group and only complied with its policies for reasons of self-preservation, there is a widespread assumption – among Iraqi policy makers and many other Iraqi citizens – that people who lived for years under IS rule in cities such as Mosul are universally complicit in IS’s crimes.<sup>29</sup> This faulty assumption – that mere residence in IS-controlled territory is an act of support – has resulted in the application of over-broad counter-terrorism laws and policies that many Iraqi Sunni civilians regard as a form of collective punishment.

### Stigmatisation of IS Affiliates and Extrajudicial Punishment

Individuals associated with IS – whether as combatants, civilian employees, family members, or merely residents of IS-controlled territory – have been stigmatised and penalised by local communities, tribal authorities and state and state-aligned forces. Many Iraqis experienced extreme human rights abuses at the hands of IS and understandably feel betrayed and threatened by Sunni Arabs who collaborated with the group. This is particularly true of ethnic and religious minorities such as the Yazidis, who were systematically massacred and enslaved by IS on a scale that the United Nations has determined to be genocide.<sup>30</sup> As one Yazidi activist explained, “Although we had good relations with them [Sunni Arabs] before, we simply cannot live with them any longer.”<sup>31</sup> Dave van Zoonen, a researcher based in Erbil, has interviewed Yazidis who said that individuals complicit in IS’s crimes must be banished from their areas “for at least four generations” in order for coexistence to be possible in the distant future.<sup>32</sup> Revenge killings of suspected IS affiliates or sympathisers are widespread,<sup>33</sup> sometimes perpetrated by individuals who were personally victimised by IS. For example, Yazidi militias have been implicated in reprisals against Sunni Arabs believed to have been complicit in the capture and enslavement of Yazidi women.<sup>34</sup>

### Civilian Employees of IS

Not only combatants but also civilian employees of IS’s bureaucracy – including its departments of health, agriculture, education, and municipal services – are being prosecuted on terrorism charges, even though the vast majority claim to have never received any military training or carried a weapon. Many of these individuals are public sector employees who were working in vital institutions – such as hospitals and sanitation departments – when IS captured their cities in 2014. When IS took over these public-sector institutions – and the payroll – many employees remained in their former jobs, whether because: they could not afford to quit; IS pressured them to continue working; or simply the vital services they provided were indispensable to the survival of the civilian population. Now, these public-sector employees are being punished both legally and economically. According to Ahlam Allami, President of the Iraqi Bar Association, judges and prosecutors do not differentiate between individuals who joined IS voluntarily and those who were coerced into joining due to the group’s complete control over the economy in areas it controlled: “In these areas, Daesh [IS] was the only employer. So we should try to

have some empathy and understanding for the people who worked for Daesh's bureaucracy in order to survive and support their families."<sup>35</sup>

During fieldwork conducted by the author in Mosul in April 2017, a public elementary school principal in a neighbourhood that had been retaken from IS seven months earlier complained that the Iraqi government had not yet reinstated the salaries of any school administrators or teachers in Mosul.<sup>36</sup> Teachers, like all other public-sector employees who worked for IS's civilian bureaucracy, are required to undergo a prolonged screening process to prove that they did not join or support IS. Hospital employees, including doctors, are subject to the same background checks and are being denied security clearances due to their prior employment by IS.<sup>37</sup>

### "Stayers"

The return and reintegration of thousands of IDPs to areas recaptured from IS has generated new tensions within communities that were divided between supporters and opponents of IS, as well as those who tried to stay neutral. In Ninewa alone, 87,000 displaced families have returned to their places of origin, while 290,000 were still displaced as of October 2017.<sup>38</sup> In January 2018, the IOM reported that the number of Iraqis returning to their places of origin (3.2 million) had surpassed the number of IDPs (2.6 million) for the first time since the beginning of the conflict with IS.<sup>39</sup> One of the resulting social fault lines is between these "leavers" and "stayers" – those who experienced several years of IS rule and are now widely (and often erroneously) assumed to have collaborated with and supported the group. As one resident of Mosul explained, "People assume that everyone who stayed in Mosul [after June 2014] is an IS supporter or member, but many of us were victims."<sup>40</sup> The principal of a school in Hodh Sitta near Hawija said that even though only six men from the village had joined IS, the entire community was regarded with distrust and suspicion: "We were treated as if we were Daesh, too, not real Iraqis. In everyone's minds, and that included the government and the media, it's simple: Hawija is [IS]."<sup>41</sup> Since most of those who stayed in IS-controlled areas were Sunni Muslims and the majority of those who left were Shia or other religious and ethnic minority minorities persecuted by IS, the return of these "leavers" has fuelled sectarian tensions. In some demographically mixed areas including Yahtrib in Salah ad-Din, Shia have demanded the construction of walls to exclude Sunnis from certain neighbourhoods.<sup>42</sup>

### Family Members

Relatives of IS members are another social group that has become a target for retaliation and extra-judicial violence by Iraqi security forces and by other civilians. Kinship ties to the group are considered a sufficient basis for retaliation even if the relatives of IS members did not personally commit any crimes. A key principle of tribal law, which is influential in Iraq – particularly in areas where state authority is weak – is the attribution of collective guilt to the family or tribe of the perpetrator of a crime. This principle allows for the relatives of an IS member to be held vicariously responsible for crimes that he or she committed individually.<sup>43</sup> As a result, women and girls who married IS members – and their children – often have difficulty returning to their former communities after the cessation of conflict, even if their husbands or parents are dead or missing. In Iraq's Hajj Ali IDP camp, widows of IS members interviewed in December 2017 said that they hoped to stay in the camp indefinitely because they believed that they and their children would be safer there than in their former homes in Hawija, where family members of IS members are vulnerable to retaliatory violence. One widow of an IS member, whose brother's house in their village near Hawija was attacked with grenades as a result of his

family ties to the group, said, “I am afraid that if I return, my neighbours would kill me in my sleep.”<sup>44</sup> In other areas, displaced relatives of IS members are allowed to return to their former homes but only conditional on payment of “blood money” to victims of IS.<sup>45</sup> A UNDP officer estimated that “only 5 percent of IDPs are ‘ISIS families’<sup>46</sup> and 95 percent have no relationship to the group.” Nevertheless, in many areas, IDPs are collectively stigmatised and distrusted.<sup>47</sup>

## Extrajudicial Punishment

Individuals suspected of association with IS are frequently threatened with expulsion or forcibly evicted from their homes. In the town of Zankura in Anbar, residents gave a list of 150 names of alleged IS members to the Iraqi army and demanded that they be barred from returning to the area.<sup>48</sup> In several governorates – Salah ad-Din, al-Anbar, and Ninewa – residents suspected of having ties to IS have received “night letters” warning them to leave by a certain deadline or else be expelled by force.<sup>49</sup> Many of these threats have followed written tribal agreements that identify specific individuals accused of association with IS and demand their temporary expulsion or permanent banishment from the community according to the tribal law doctrine of “bara’ah” (“disavowal”). For example, in the Iraqi Governorate of Salah ad-Din, several tribes published a list of the names of 113 individuals who are accused of association with IS and therefore permanently banned from the community.<sup>50</sup> In other areas, tribes have imposed temporary bans on IS-affiliated returnees. For example, in Tikrit, family members of alleged IS members have been banned from returning for a five-year period.<sup>51</sup> Under tribal law, these banned individuals can be killed if they return.

Not only tribes but also state authorities and militias are participating in the forced eviction and displacement of persons associated with IS. In Mosul, Iraqi security forces ordered IS-affiliated families to leave their neighbourhoods or cities, justifying these evictions as necessary “to avoid communal tensions.”<sup>52</sup> In Hit, Iraqi security forces ordered IS-associated families to leave the city, marking their houses with the warning, “you should leave within 72 hours.”<sup>53</sup> In other areas, Iraqi security forces – notably the PMFs – have been accused of preventing Sunni IDPs from returning to their homes in order to reduce Sunni turnout in the upcoming parliamentary elections.<sup>54</sup>

In Salah ad-Din, the governorate council passed a decree in August 2016 permanently banning anyone proven to have been affiliated with IS from the governorate.<sup>55</sup> The same decree ordered the expulsion of immediate relatives of IS members for at least ten years, stating that they are only permitted to return if determined to be “safe,” and established a committee responsible for the seizure and redistribution of IS members’ properties. Alarmingly, the decree specifies an exemption for individuals who kill their IS-affiliated relatives or turn them over to Iraqi authorities, thereby creating incentives for extra-judicial executions.<sup>56</sup>

In all these examples, it is unclear what evidentiary standards – if any – are being used to determine whether someone is a family member, supporter, or member of IS. Furthermore, those deemed to be associated with IS through these extra-legal processes do not appear to have an opportunity to defend themselves or appeal these determinations. Although many Iraqis recognise the counterproductive effects of overly punitive responses to terrorism, the Iraqi government has shown little interest in prioritising the prosecution of more serious crimes over lesser ones, or showing any lenience in dealing with lower-level IS personnel, civilian employees, and family members. As Prime Minister Haider al-Abadi stated in July 2017, “No terrorist escapes punishment and we will not issue an amnesty for the murderous terrorists.”<sup>57</sup> In many cases, harsh punishments appear to be driven by “a fear that IS will return to Iraq” and a resulting impulse to permanently eradicate its members.<sup>58</sup> However, in light of evidence that

state-perpetrated injustice – including the economic marginalisation and mass incarceration of Sunnis – was a causal factor in the initial emergence of IS, Iraqi authorities risk perpetuating the same grievances that have fuelled extremism in Iraq if the punishments they impose are perceived as unfair or disproportionate to the crimes committed.

### 3. Life Under IS Rule and Its Aftermath: A Survey of 1,409 Residents of Mosul

A survey of 1,409 residents of Mosul provides insight into the many forms of violence and injustice experienced by this population in recent years and the challenges that the Iraqi government will face in building social cohesion, security, and legitimacy in this city and other areas that experienced IS rule. The results are organised according to the following themes: (1) respondents' experiences with IS governance and violence, (2) their experiences with the Iraqi government – both currently and prior to IS's arrival in June 2014, (3) tribal identities and institutions, (4) harms experienced during the battle for Mosul, and (5) preferences concerning the punishment, forgiveness, and reintegration of individuals who "collaborated" to varying extents with IS. First, Table 1 presents basic demographic information about the sample. As noted above, the sample was intentionally limited to adult Sunni Arab Iraqis who were living in Mosul in June 2014 when IS arrived.

**Table 1: Demographics**

		Percentage of Respondents
<b>Gender</b>	Male	50%
	Female	50%
<b>Education</b>	Illiterate/No formal education	14%
	Elementary	38%
	Primary/Basic	17%
	Secondary	16%
	Professional or technical diploma	5%
	BA	9%
	MA and above	<1%
<b>Age</b>	18–24	17%
	24–34	21%
	35–44	14%
	45–54	9%
	55–65	6%
	65 and older	3%

#### Experiences with IS Violence and Governance

Although civilians who lived under IS rule are widely suspected of supporting the group, a significant majority of those surveyed were victims of IS violence (Table 2). Although IS initially allowed civilians to enter and exit Mosul, by March 2015 the group began to severely restrict travel and migration outside of its territory.<sup>59</sup> As a result, many residents of Mosul were trapped inside the city. IS imposed strict policies, including taxes, and severely punished those who refused to comply. For example, IS considered refusal to pay zakat (a mandatory charitable contribution prescribed by the Quran) to be a form of apostasy and therefore punishable by death.<sup>60</sup> Therefore, it is unsurprising that compliance with the group's policies was widespread. For example, 34 percent of the sample reported paying zakat to IS and an even higher percentage of the sample reported paying utility fees for water and electricity (Table 2). Additionally, the sample experienced significant violence and property destruction at the hands of IS.



**Table 2: IS Violence and Governance**

	Percentage of Respondents
<b>Violence Experienced During IS Rule</b>	
Arrested by IS	17%
House damaged	28%
House confiscated by IS	20%
Member of household injured	10%
Member of household killed	8%
<b>Taxation</b>	
Paid electricity fees to IS	38%
Paid water fees to IS	47%
Paid zakat to IS	34%

## Experiences with the Iraqi Government

Of relevance to the Iraqi government's efforts to build social cohesion, security, and legitimacy in areas recaptured from IS is the finding that many residents of Mosul regard state institutions and authorities with distrust. In many cases, negative attitudes toward the Iraqi government appear to be linked to personal experiences with corruption and injustice. 28 percent of respondents said that they have "no trust" or "not very much trust" in the Iraqi judiciary, raising concerns about the ability of the Iraqi justice system to fairly adjudicate the cases of the thousands of individuals who are facing trial on IS-related charges. 22 percent said that they had been asked to pay a bribe by an Iraqi government official prior to June 2014; 6 percent had been arrested; 25 percent said that they had experienced police harassment, and 13 percent said that they had experienced sectarian discrimination as a result of being Sunni (Table 3).

**Table 3: Experiences with the Iraqi Government Before June 2014**

	Percentage of Respondents
Arrested	6%
Experienced police harassment	25%
Experienced sectarian discrimination	13%
Asked to pay a bribe	22%

## Tribal Identities and Institutions

The vast majority of Mosul residents (more than 99 percent) identify with a tribe, as is true of Iraqi society more broadly. However, for many survey respondents, national and religious identity are more important than tribal identity. When asked, "Which of the following best describes you?" a plurality of respondents (48 percent) said "an Iraqi national," 39 percent said "a Muslim," 7 percent said "a resident of Mosul," and only 4 percent said "a member of my tribe."

## Harms Experienced During the Battle for Mosul

While discussions of post-conflict accountability in Iraq focus heavily on crimes committed by IS, residents of Mosul and other areas affected by the conflict have experienced multiple waves of violence perpetrated by a range of state and non-state actors. 71 percent of the 1,409 survey respondents were living in Mosul for at least part of the battle to expel IS from the city. During the operation, 52 percent of survey respondents experienced serious property damage, 22 percent reported that a member of their household was injured, and 13 percent reported

that a member of their household was killed by one or more of the following forces: IS, the United States, the Iraqi Counter-Terrorism Service, the Iraqi Army, the Iraqi Federal Police, and the PMF. 24 percent said that they have personally witnessed or heard about cases in which Iraqi Federal Police or the PMF had stolen property or money from civilians in the aftermath of the battle, suggesting that many Mosul residents see these security forces as threats rather than protectors (Table 4).

**Table 4: Harms Experienced During the Battle for Mosul**

	Percentage of Respondents
<b>Violence</b>	
House was seriously damaged during the battle	52%
Member of household injured	22%
Member of household killed	13%
<b>Witnessed or heard about looting by</b>	
Iraqi Army	10%
Iraqi Federal Police	24%
Popular Mobilisation Forces (PMF)	24%

## Survey Experiments on Preferences for Reintegration of IS “Collaborators” with Dr. Kristen Kao

In order to understand the attitudes of Mosul residents toward individuals perceived as IS “collaborators,” I worked with Dr. Kristen Kao to design two experiments embedded in the Mosul survey that assess respondents’ preferences for the punishment, forgiveness, and reintegration of hypothetical individuals who cooperated to varying extents with IS. The first experiment randomly varied the identity of hypothetical “collaborators” who are now seeking reintegration into Mosul society (e.g. gender, age, and co-tribal identity) and the type of collaboration (e.g. someone who paid taxes to IS, someone who was married to an IS fighter, a cook who prepared food for IS fighters, a janitor who worked in IS’s department of municipal services, or an IS fighter). Respondents were asked to choose which type of punishment (e.g. 6 months of community service, imprisonment for 3 or 15 years, or capital punishment) they considered most appropriate for the “collaborator.” The two most frequently selected options were “no punishment” (28 percent) and “capital punishment” (33 percent), indicating that there is considerable variation in the preferences of Mosul residents for accountability. In general, preferences for punishment appear to be highly dependent on the type of “collaboration,” as suggested by Table 5, with IS fighters and those who were most closely associated with fighters (cooks for and wives of fighters) receiving consistently harsher punishments than those less closely associated with fighters (janitors who worked for the IS municipality and taxpayers). Multivariate regression analysis supports this conclusion.<sup>61</sup>

We also found significant differences between “stayers” (those who remained in Mosul for the duration of IS’s three-year rule) and “leavers” (those who left relatively soon after IS’s arrival in June 2014) in their preferences for punishment of former IS collaborators: “Stayers,” on average, preferred more lenient punishments for the collaborator-types most closely associated with IS: fighters, wives of fighters, and cooks for fighters. Given the extent to which “stayers” were victimized by IS, including being used as human shields during the battle for Mosul, this result has important implications for the design of post-conflict transitional justice processes because it suggests that those who have been exposed to the highest levels of violence and abuse by a rebel group are not necessarily more vengeful and retributive toward collaborators, and may even be more empathetic and forgiving.

**Table 5: Punishments Preferred for Types of Collaboration (Percentage of Respondents)**

Act	No punishment	Community Service	3 Years Prison	15 Years Prison	Death Penalty
IS Fighter	2%	2%	5%	13%	78%
Cook for Fighters	3%	14%	22%	26%	36%
Wife of Fighter	17%	17%	16%	18%	31%
Janitor	41%	27%	11%	6%	15%
Paid Taxes	74%	8%	5%	4%	9%
Total	28%	14%	12%	14%	33%

Additionally, we found variation in perceptions of the voluntariness of different types of collaboration (Table 6). The vast majority of respondents (92 percent) perceived paying taxes to IS as an involuntary act, which is unsurprising given that IS imposed mandatory taxes and harshly punished tax evasion, while a smaller percentage (29 percent) perceived working as a janitor for the IS municipality to be involuntary. Almost all respondents (97 percent) perceived fighting for IS to be voluntary. In general, these results suggest that many residents of Mosul recognize that some “collaborators” were coerced into cooperating with or working for IS against their will.

**Table 6: Perceptions of Voluntariness of Collaboration**

	Percentage of Respondents	
	Voluntary	Involuntary
<b>“Do you see the following acts as voluntary or involuntary?”</b>		
A cook for IS fighters	88%	12%
An IS fighter	97%	3%
Married to an IS fighter	84%	16%
A janitor who worked for the IS municipality	71%	29%
A resident of Mosul who paid taxes to IS	8%	92%

In a second experiment that randomly varied the punishments imposed on three different types of “collaborators” – a wife of a fighter, a cook for fighters, and a janitor who worked for the IS municipality – respondents were asked whether they would allow this person to become their neighbour – a measure of preferences for reintegration. We found that many Mosul residents are willing to allow the reintegration of IS “collaborators” back into their neighbourhoods who are subjected to more lenient and restorative punishments – such as community service – than the current legal framework allows. For example, in the case of a hypothetical 35-year-old woman married to an IS fighter, 27 percent of respondents would allow her reintegration into the community despite receiving no punishment at all – even though Iraqi courts routinely sentence wives of IS fighters to life in prison.<sup>62</sup> Imposing a punishment of 6 months of community service, three years in prison, or 15 years in prison does not significantly increase the willingness of respondents to accept her as a neighbour. In general, regression analysis of this experiment suggests that harsher punishments do not necessarily improve prospects for reintegration of former “collaborators.”

Together, these two experiments reveal a mismatch between the harsh punishments prescribed by Iraq’s current legal framework and the preferences of ordinary Iraqis, suggesting the need for legislative reforms and an inclusive national conversation about how best to balance demands for accountability with the need for reconciliation.

## 4. Current Approaches to Accountability and Their Consequences

### “No Negotiations”

The Iraqi government’s stated objective in its conflict with IS was to force the group’s withdrawal from Iraqi territory and eradicate its personnel. In other recent sub-national conflicts including those in Colombia, Somalia, and Sierra Leone, governments have established Disarmament, Demobilisation, and Reintegration (DDR) or similar programs to incentivise defections or as part of a peace deal, but no such program has been adopted in Iraq. As President Muhammad Fuad Masum summarised the government’s approach on the occasion of Mosul’s recapture from IS: “We will continue the battle against the few remaining remnants of the terrorist Daesh [IS] gangs relentlessly and tirelessly until every last inch of the territory of our country is purged of this abomination and it is fully defeated and crushed.”<sup>63</sup> Iraqi security forces overwhelmingly view the solution to IS as one of elimination rather than rehabilitation. One federal police commander in Mosul, when asked how Iraqi security forces planned to prevent the re-emergence of IS, said that the strategy was to “kill them.”<sup>64</sup>

IS commanders and fighters had begun surrendering to Iraqi forces in large numbers by October 2017<sup>65</sup> and senior IS leaders reached out to at least one Iraqi military commander in an attempt to broker “deals” for themselves. But the Iraqi army was uninterested in negotiating the terms of surrender. As Captain Ali Muhammad Syan said, “We tell them no way, no negotiations, turn yourselves in and we’ll turn you over to the court, which will decide.”<sup>66</sup> Some IS fighters reported that their commanders had instructed them to surrender to Kurdish forces, who had a reputation for taking prisoners rather than executing them,<sup>67</sup> as Iraqi security forces have done on numerous occasions.<sup>68</sup>

These reports indicate that IS fighters and commanders were willing to cooperate with Iraqi forces in the hope of staying alive. IS commanders in neighbouring Syria have occasionally negotiated with counter-IS forces on the terms of their surrender and withdrawal. For example, in August 2017, Hezbollah and the Syrian government permitted 310 IS fighters to withdraw from a besieged enclave on the Lebanon-Syria border.<sup>69</sup> In Raqqa, talks between IS and local tribal leaders resulted in a deal that allowed safe passage out of the city for the group’s fighters as they retreated to the group’s remaining territory in Deir Ezzor.<sup>70</sup> Despite evidence that IS commanders are willing to make deals, Iraqi military and political leaders appeared to be uninterested in the possibility of negotiated surrenders or withdrawals.

### A Harsh and Overbroad Legal Framework

A harsh and overbroad legal framework governing terrorism-related offenses in Iraq has enabled the mass incarceration of tens of thousands of individuals (both pre- and post-trial) whose connection to IS is often tenuous. At least 19,000 individuals have been detained on IS-related charges by federal Iraqi authorities according to officials,<sup>71</sup> and at least 4,000 individuals have been detained on IS-related charges by Kurdish Regional Government (KRG) authorities.<sup>72</sup> As with all of the government-provided statistics cited in this report, these numbers should be interpreted as rough and incomplete estimates given their lack of specificity and the impossibility of external verification. It has been suggested that “no one [in the Iraqi government] – perhaps not even the prime minister himself – knows the full number of detainees.”<sup>73</sup>

## Counter-Terrorism Laws

Detainees are being tried in both KRG and Iraqi courts under their respective counter-terrorism laws. The legal basis for convictions issued by KRG courts is uncertain for two reasons. First, the KRG's counter-terrorism law (No. 3/2006) expired in July 2016. At that time, a KRG committee recommended bringing charges under Iraq's penal code (no. 111/1969) "in order to prevent a legal vacuum,"<sup>74</sup> however, KRG prosecutors have continued to charge suspects accused of joining IS under the expired law because they are seeking harsher sentences than the penal code allows.<sup>75</sup> Second, KRG courts are in many cases prosecuting suspects for crimes committed in Mosul and other areas of federal Iraq that fall outside of their territorial jurisdiction. Some of these crimes also occurred in disputed territories where both the federal Iraqi government and KRG claim jurisdiction – notably Sinjar District (the site of IS's massacre of the Yazidis) and Tel Afar District, one of the last areas lost by IS before its retreat into Syria. As a matter of territorial jurisdiction, KRG authorities should be transferring suspects accused of committing terrorism-related offenses on federal Iraqi soil to federal Iraqi authorities, but they have resisted doing so.<sup>76</sup>

Unlike the KRG, federal Iraq has a legal basis for the detention and prosecution of IS suspects: the 2005 Counter-Terrorism Law. In some terrorism cases, the Criminal Procedure Code (1971) and the Penal Code (1969) are also applied.<sup>77</sup> The Counter-Terrorism Law has been criticised as excessively harsh. Even an Iraqi judge interviewed for this report admitted that "judges can be very harsh, sometimes as harsh as Daesh [IS]" because of social and political pressure to show no mercy to IS and because the Counter-Terrorism Law does not allow them sufficient flexibility in sentencing.<sup>78</sup> Article 4 stipulates the death penalty for anyone who has committed, incited, planned, financed, or assisted a terror act and a life sentence for anyone who covers up such an act or harbours those who perpetrated it. Article 2 defines a terrorist as "Anyone who organised, chaired or participated in an armed terrorist gang."<sup>79</sup> Iraqi judges and prosecutors interpret this law as criminalising *membership* in a terrorist group – including IS – regardless of whether or not the group member engaged in any violence or other criminal acts. The language of the law is similar to and was likely influenced by United Nations Security Council Resolutions of the early 2000s that referred, *inter alia*, to the "incitement" of terrorist acts.<sup>80</sup> Judges, at their discretion, can reduce the punishment to less than a life sentence in terrorism cases with mitigating circumstances. For example, a counter-terrorism advisor to the Iraqi government reported that some "Ansar" – a term used to refer to supporters of IS who did not pledge allegiance and therefore cannot be considered "members" – have received a relatively lenient sentence of three years in prison. Falling into the "Ansar" category are, for example, civilians who have appeared in IS propaganda videos watching public executions.<sup>81</sup> However, the lack of publicly available data on terrorism trials makes it difficult to assess the prevalence of reduced sentences.

## Terrorism-Related Trials

Of the 3,130 individuals who have been sentenced to death on terrorism-related charges since 2013, at least 250 have already been executed and the pace of executions has increased over time.<sup>82</sup> Two mass hangings of 42 and 38 convicted IS members took place in September and December 2017.<sup>83</sup> The true number of executions may be even higher but remains unknown due to lack of transparency and poor record-keeping by the government. Despite the lack of comprehensive data, patterns can be discerned from individual cases documented by the media and human rights organisations. It is clear from these cases that not only combatants but also civilian employees of IS are being sentenced to death. One judge told Human Rights Watch, "I had a case yesterday of an [IS] cook and I have recommended giving him the death penalty. How could the [IS] fighter have executed someone if he had not been fed a good meal the night before?"<sup>84</sup>

A special counter-terrorism court was established by the Iraqi government in Tel Kayf specifically to deal with the large volume of cases from Mosul.<sup>85</sup> According to a judge interviewed in Mosul, at least 4,000 detainees are awaiting trial by this court.<sup>86</sup> Cases are heard by a panel of three judges whose verdicts are then sent to the Court of Cassation in Baghdad for review by an additional 30 judges.<sup>87</sup> Convicted defendants have the right to appeal their sentences. Those who claim to have been tortured have the right to request a medical examination.<sup>88</sup> A concern raised by an Iraqi lawyer, Ziad Saeed, is that many of the judges and prosecutors who are involved in the trials of alleged IS members are from communities that were victimised by IS, and therefore feel anger and grief that could influence their judgments.

The author's observation of two trials in Tel Kayf and transcripts of additional trials reported by journalists confirm that many suspects are being convicted solely on the basis of membership in IS, as evidenced by swearing an oath of allegiance, without proof of specific offenses.<sup>89</sup> A senior Iraqi judge justified the criminalisation of membership as follows: "Terrorism is not just about the act of killing people; it is also an extremist ideology. Sometimes, unarmed members of terrorist groups are even more dangerous than those who carry weapons – for example, a cleric who writes a fatwa that inspires thousands of people to join. So, the act of belonging to one of these groups is a crime itself, and if joining is followed by a violent action, then that is a second crime that warrants an even greater punishment."<sup>90</sup> A judge interviewed in Mosul expressed a similar view: "Daesh [IS]'s ideology is so dangerous that we cannot afford to show any leniency even for those who were only believers and did not commit specific crimes."<sup>91</sup> His argument was that extreme punishment is the only solution to extreme beliefs.

Defining membership as a crime, regardless of actions, appears to be a slippery slope toward prosecuting "thought crimes." Furthermore, prosecutors and judges define membership very broadly and subjectively. According to a public prosecutor interviewed at the court in Tel Kayf, it is not even necessary to prove that a person swore allegiance (known as "*bayah*") to establish membership: "Swearing *bayah* is strong evidence of membership but even without it, we can infer membership from other facts. For example, if someone was manufacturing the coating for missiles used by IS and never swore *bayah*, then this person can be considered functionally a member of the group because of the nature of his work."<sup>92</sup> The lack of clear definitions and sentencing guidelines makes it very easy for "Ansar" (supporters who did not pledge allegiance) to be found guilty of membership by implication.

Some observers have drawn an analogy between the Iraqi government's criminalisation of membership in IS – without requiring proof of specific criminal acts – with the widely criticised de-Ba'athification policy introduced by the Coalition Provisional Authority in 2003 which resulted in the permanent removal of all Iraqi government and military personnel from public-sector employment. As Abdulrazzaq al-Saeidi of Physicians for Human Rights explained, "Being a member of the Ba'ath Party does not mean that the person is a criminal. It's a political affiliation. But nonetheless, all members of the party were punished."<sup>93</sup> Collective punishment of Sunnis by the de-Ba'athification policy is frequently cited as a catalyst for sectarian grievances that fuelled the rise of IS.<sup>94</sup> Now, the Iraqi government seems to be "repeating the same mistakes" for which the de-Ba'athification policy was criticised, according to Anne Hagood, a UNDP consultant working on reintegration challenges in areas retaken from IS.<sup>95</sup>

Many IS "members" were employed in civilian jobs for which they did not undergo any military training or carry weapons. For example, the author observed the trial of an animal farmer who was working for a slaughterhouse in Mosul when IS arrived in June 2014. After IS took over the slaughterhouse and informed him that he would be fired unless he agreed to pledge allegiance to the group, he complied. Although the man claimed that he never received any military training or fought on behalf of IS, the judges nonetheless found him guilty of the crime of membership in a terrorist group and sentenced him to 15 years in prison. The whole trial lasted only 30 minutes.<sup>96</sup>

Additionally, intellectually disabled individuals have been sentenced to death, in violation of international law.<sup>97</sup> During one 22-minute trial observed by the author at the counter-terrorism court in Tel Kayf, a panel of three judges sentenced to death a 37-year-old who claimed to be suffering from a brain tumour and was too weak to stand during the hearing – a guard needed to bring him a chair. The man, a former day labourer who joined IS under pressure from a friend, admitted to undergoing a few days of training. However, when a commanding officer deemed him to be unfit for military service as a result of his illness, he was demoted to the job of guarding a warehouse. When he pleaded to the judges that his brain tumour interfered with his cognitive functioning, one of them laughed and said, “Of course you are mentally ill. Daesh [IS] loves to recruit mentally ill people.”<sup>98</sup> When interviewed after the trial, the chief justice insisted that “we do not give the death penalty unless we are 100 percent certain that the person poses a threat to Iraqi society,”<sup>99</sup> but it is difficult to reconcile this statement with the obvious physical incapacity of the defendant.

Hallan Ibrahim, a journalist who has observed more than 30 trials at the counter-terrorism court in Tel Kayf, said that the panel of three judges hears around four cases per day and estimated that the average length of each trial is between 20 and 25 minutes. He has witnessed the convictions of numerous unarmed civilian employees of IS including a cook who was sentenced to 15 years in prison and an accountant who worked for an office that distributed salaries to IS fighters and was sentenced to life in prison.<sup>100</sup> Sometimes, civilians who merely cooperated with IS economically – without joining the group – are prosecuted for supporting terrorism indirectly. Nifal al-Tai, director of the Iraqi Bar Association’s Ninewa branch, observed one case in which a baker who provided bread to IS received a life sentence.<sup>101</sup>

The broad scope of the Counter-Terrorism Law raises the question of whether relatives of IS members can be considered members themselves by proxy and therefore criminally liable under the counter-terrorism law. Iraqi judges and officials interviewed for this report claimed that a family relationship to IS alone is not proof of criminality. As the Chairman of the National Reconciliation Committee stated, “Being a wife of a Daesh member is not a crime per se, but if she committed a crime such as murder or torture, then she will be held accountable according to the law.” Hisham al-Hashimi, a counter-terrorism advisor to the Iraqi government, reported that women who served in IS’s female police force, known as the al-Khansaa Brigade, are being sentenced to between one and seven years in prison.<sup>102</sup> Even housewives who were married to IS fighters but never worked for the group can still be prosecuted for harbouring terrorists, according to Judge Said Jabar Hussein<sup>103</sup> – notwithstanding that these women had little control over their husbands’ decisions to join IS and could not leave or divorce them without endangering their own lives or losing their children.<sup>104</sup> For example, one woman from Shirqaat said that when her husband decided to join IS in 2014 and she expressed misgivings about the group’s extreme ideology, he told her that if she did not agree with his choice, “You can leave and I will keep the kids.”<sup>105</sup> In many cases, wives and children of IS fighters were often victims of IS’s violence themselves and may have been coerced into facilitating crimes such as the enslavement of Yazidi women, but judges and prosecutors do not appear to be taking into account these mitigating circumstances of duress. Even family members of IS personnel who are not found guilty by a court may still be punished by administrative processes that exclude IS-affiliated persons from important social services and benefits. According to Christopher Holt of the International Rescue Committee:

Family members of individuals charged or detained under the Anti-Terrorism Law are often unable to obtain civil documentation, including civil IDs and housing cards or register for government services, including the public distribution system (food and fuel rations), because their security clearance is rejected. Women, whose husbands are suspected IS militants who have been killed, detained, or are missing, cannot obtain civil

documentation in their own name or even birth certificates for their children without filing a missing person's report for their husband or obtaining a death certificate. Most women chose not to do this, due to the risks to their own safety which they believe will result from acknowledging in public or in court that they are or were married to an ISIS member.<sup>106</sup>

In addition to punishing alleged IS members, thus, the Counter-Terrorism Law indirectly penalises their family members by triggering the denial of basic public services and resources.

### **A Flawed Amnesty Law**

Until recently, Iraq had a General Amnesty Law (No. 27/2016) that, in theory, allowed for the pardon of individuals convicted of association with IS or other terrorist groups when certain conditions were met. The law, adopted in August 2016, allowed for the granting of amnesty to anyone who could demonstrate that they joined IS or another extremist group against their will and did not commit any serious crimes (such as torture or killing) while a member.<sup>107</sup> The burden of proof was on the accused rather than on the state. Sunni politicians had lobbied for this legislation to provide a mechanism for the release of Sunni political prisoners who had been wrongly arrested and convicted for ties to terrorism by the government of former Prime Minister Nouri al-Maliki.<sup>108</sup> However, several members of parliament and Prime Minister Abadi criticised the August 2016 version of the law for containing loopholes that would have allowed the release of dangerous criminals. Their concerns pertained to provisions that permitted kidnappers and terrorists to apply for pardons if their crimes did not result in death or permanent disability of the victims (Article 4) and that allowed prisoners who have served at least one third of their sentences for terrorism or criminal offenses to “buy” their way out of their remaining jail time for the price of 10,000 Iraqi dinars (around \$7.50 USD) per day (Article 6).<sup>109</sup> Even without this provision, reports of prisoners – including convicted IS members – paying bribes to get out of prison are rampant.<sup>110</sup> As a result of the backlash to the law, Prime Minister Abadi's office submitted amendments that, among other changes, cancelled the provision that had allowed amnesty for IS members who could prove that they joined against their will and had not committed any serious crimes while associated with the group. These amendments, ratified in November 2017,<sup>111</sup> now preclude pardons for anyone convicted of terrorism, regardless of mitigating circumstances. The amendments also exclude several other serious crimes from eligibility for amnesty, including kidnapping, drug trafficking, and counterfeiting currency.<sup>112</sup> Individuals convicted of crimes not designated as exceptions are still eligible for amnesty. Although the amendments are a setback for proponents of amnesty, the law still includes some important protections for the rights of the accused, including provisions that allow retrials for detainees convicted on the basis of forced confessions or evidence provided by secret informants.<sup>113</sup>

Even during the brief 15-month period in which it was possible for convicted IS members to apply for a pardon, judges resisted applying the amnesty law. Senior counter-terrorism judges interviewed in 2017 indicated that they “do not believe that anyone who did anything to support ISIS deserves an amnesty. So they're simply not applying this law.”<sup>114</sup> A senior judge who serves on the Amnesty Committee, a judicial body in Baghdad that processes amnesty requests submitted by convicted prisoners, provided statistics indicating that 190 amnesty requests were granted in 2016 while 422 were rejected (a 69 percent rejection rate). In 2017, 298 amnesty requests were granted by the committee and 1,887 were rejected (an 86 percent rejection rate).<sup>115</sup> Although these statistics are not disaggregated by crime committed (whether terrorism or other offenses such as kidnapping), the judge confirmed that some convicted IS members were pardoned during these years – primarily members who supported the group ideologically but did not commit any other crimes.<sup>116</sup> The judge said that he supports pardoning



those whose only crime was belief in the group's ideology: "Beliefs and ideas are okay until someone commits a crime in the name of those ideas."<sup>117</sup> However, other judges interviewed for this report were resistant to the idea of offering amnesty to any IS members, even those who never participated in violence.<sup>118</sup> Meanwhile, the KRG has not adopted any amnesty law, so individuals convicted of terrorism charges by KRG courts have no means of applying for pardon.

## Procedural Flaws

In addition to the substantive flaws in Iraq's counter-terrorism and amnesty legislation described above, the legal system suffers from a number of procedural flaws that make it even more difficult for individuals accused of association with IS to receive fair treatment. In particular, the following four problems threaten the basic due process rights of detainees and criminal defendants before, during, and after trial: (1) arbitrary arrests based on poorly sourced wanted lists, (2) the military's involvement in pre-trial investigations, (3) heavy reliance on the testimony of secret informants, and (4) a weak public defence system.

### Arbitrary Arrests

Iraqi government statistics indicate that at least 19,000 individuals have been detained on terrorism-related charges since 2014,<sup>119</sup> and a counter-terrorism advisor to the Iraqi government estimated in December 2017 that the number of detainees accused of association with IS may be as high as 36,000.<sup>120</sup> In most cases, these arrests are based on very flimsy evidence of association with IS, and sometimes on no evidence at all. Men, women, and children have been detained by Iraqi and KRG authorities on suspicion of association with IS simply based on demographic traits (being a fighting-age male) or spatial proximity to Mosul and other contested areas. During the battle for Mosul, thousands of men and boys as young as 14 – which the Iraqi government considers "fighting age" – were quarantined in pre-trial detention for months and in some cases years in makeshift prisons.<sup>121</sup> Release was conditional on passing a lengthy and arbitrary "screening" process.<sup>122</sup> Many of these detainees were arrested in IDP camps to which they had fled from the fighting simply for having a last name that is similar to one on a wanted list or because they were denounced – often falsely – by another resident of the camp.<sup>123</sup>

Wanted lists are poorly sourced and widely recognised as inaccurate. Different Iraqi security forces maintain their own wanted lists and make little effort to communicate or cross-check their respective intelligence.<sup>124</sup> According to Abdelaziz al-Jerba, director of the al-Tahreer Association for Development, there are at least 45,000 names in these various databases.<sup>125</sup> Individuals may be arrested based on similarity between their surname and one that appears on a wanted list.<sup>126</sup> Lack of coordination between Iraqi and KRG authorities on the maintenance of wanted lists can lead to further injustice, resulting in duplicative punishments of IS suspects who travel between the two jurisdictions. A humanitarian officer in Baghdad was aware of cases in which alleged IS members who have already served a prison sentence in either the KRG or federal Iraqi territory "were rearrested because the relevant authorities were not informed, or their databases were not updated and the person didn't carry the proof of the decision or release document."<sup>127</sup>

### The Military's Involvement in Pre-Trial Investigations

Once suspects are arrested, they are vulnerable to further rights violations as a result of the Iraqi military's heavy involvement in pre-trial investigative processes that should be the responsibility of the police and civilian judiciary. Lawyers reported that the Iraqi army has, in recent years,

begun to perform quasi-judicial functions that threaten the separation of military and civilian institutions. According to Nifal al-Tai, the Iraqi Army has been conducting preliminary interrogations and investigations of terrorism suspects since 2005.<sup>128</sup> Prisoners are more likely to be tortured or abused by military investigators than by civilian judicial investigators. The mother of a detained IS fighter used the term “army justice” to refer to the military’s problematic role as a quasi-judicial entity.<sup>129</sup>

### **Reliance on Secret Informants**

One of the reasons for the inaccuracy of the “wanted lists” described above is their reliance on the testimony of secret informants. Tips from secret informants are used to construct the wanted lists along with intelligence extracted from detainees, often under conditions of duress or torture.<sup>130</sup> A humanitarian officer in Baghdad familiar with these lists questioned the veracity of the information they contain: “One of the main concerns is that the information sources are not always reliable. Many times, the “informants” will accuse individuals based on their personal preferences and/or political affiliations and will try to use this as an opportunity to attack supporters of opposite parties.”<sup>131</sup> Human Rights Watch has documented cases in which secret informants proposed the addition of names to wanted lists “because of tribal, familial, land, or personal disputes.”<sup>132</sup>

In addition to the role of secret informants in mass arrests, their testimonies are also used to prosecute suspected IS members once they have been taken into custody, in violation of defendants’ right to confront the witnesses against them – a right that is enshrined in the International Covenant on Civil and Political Rights, which Iraq has ratified.<sup>133</sup> Iraq’s Counter-Terrorism Law allows for the conviction of defendants based solely on testimony provided by secret informants whose statements they are unable to challenge.<sup>134</sup> Iraq has been accused of imposing the death penalty based on testimony of secret informants.<sup>135</sup> There have been some efforts to combat false denunciations by secret informants. According to Khalid Obaide, a law professor, the Central Criminal Court in Baghdad has convicted 482 secret informants for providing false testimony and sentenced them to prison terms ranging from five to ten years.<sup>136</sup> However, secret informants continue to wield considerable influence in the detention and prosecution of suspected terrorists. Iraqi authorities’ heavy reliance on the testimonies of secret informants to identify and prosecute alleged IS members makes it easy for innocent people to be falsely accused and unjustly punished for crimes that they did not commit.

### **A Weak Public Defence System**

The weakness of Iraq’s public defence system makes it difficult for alleged IS members to receive a fair trial. Under Iraqi law, a person can only be prosecuted in the presence of a lawyer.<sup>137</sup> Since the vast majority of individuals accused of association with IS cannot afford a private lawyer, they must rely on public defenders who are paid only around \$20 per case, according to one public defender interviewed at the counter-terrorism court in Tel Kayf.<sup>138</sup> Public defenders have no financial incentive to invest time and effort in building a strong case for their clients. Private lawyers, too, are disincentivised from taking on the cases of alleged IS members. Iraqi authorities have issued arrest warrants for at least 15 private lawyers since July 2017 on charges of affiliation with IS. All of these lawyers were defending IS suspects at the time of their arrest, raising concerns that Iraqi authorities are trying to discourage private legal representation of IS suspects through intimidation.<sup>139</sup>

## Tribal Justice

Alongside the state legal system, tribal justice is playing an important but controversial role in social, security, and legal issues related to the recapture of territory from IS. Tribalism is an integral part of the fabric of Iraqi society, where tribes have been important providers of justice, security, and services since the founding of the modern Iraqi state in 1921.<sup>140</sup> Estimates of the percentage of Iraqis who identify with one of the country's approximately 150 tribes range from 75<sup>141</sup> to 100 percent.<sup>142</sup> More than 99 percent of the 1,409 survey respondents in Mosul said that they identified with a tribe. In fragile and conflict-affected states such as Iraq, it is common for non-state actors including tribes to assume functions that in strong states are exclusively performed by the government, such as security provision and dispute resolution. Many Iraqis prefer to resolve inter-personal and inter-communal disputes – including disputes related to IS – through tribal law rather than state law.<sup>143</sup> Some who are seeking redress for crimes committed against them by IS members are turning to tribal justice as an alternative to state courts, which are both overburdened and widely perceived as corrupt and illegitimate.<sup>144</sup> According to Holt of the IRC, “Customary justice is often the first resort for Iraqis because it is free and often faster than state courts.”<sup>145</sup> In addition to dispute resolution, tribal authorities are involved in negotiating the terms under which IDPs displaced by IS-related violence and individuals affiliated with IS including family members may or may not be allowed to return to their former communities.

Some NGOs have argued that tribes – rather than undermining state authority – are important partners in the Iraqi government's efforts to restore stability and social cohesion in areas recaptured from IS. For example, the U.S. Institute of Peace and Sanad, an Iraqi peacebuilding NGO, have been working to facilitate dialogues between tribal leaders and government officials – dialogues that they believe have prevented revenge killings and facilitated the return of IDPs.<sup>146</sup> In Hawija, one such dialogue resulted in a pledge to forgo tribal justice mechanisms in dealing with IS affiliates and instead “embrace Iraq's formal legal system.”<sup>147</sup> In another promising example of the positive role that tribes can play in post-IS reconciliation efforts, the leader of a powerful tribe in the northern Iraqi town of al-Shura held meetings with residents who had been victimised by IS in order to secure a promise that they would allow relatives of IS members to reintegrate into the community peacefully.<sup>148</sup>

However, in other cases, tribal justice has been a barrier to reconciliation. In some areas, tribes have been unwilling to cooperate with state authorities and have insisted on enforcing their own legal doctrines including those requiring paying of “blood money” or banishment, and many Iraqis feel that these methods of conflict resolution are a threat to rule of law. Ahlam Allami, President of the Iraqi Bar Association, said she fears that empowering the tribes “will weaken the sovereignty of the state.”<sup>149</sup> In some areas retaken from IS, tribes have engaged in acts of extra-judicial violence that appear to be at odds with the constitutional right to a fair trial.<sup>150</sup> These actions include executing individuals accused of joining IS, banishing them from the community, or destroying their homes.<sup>151</sup> In the village of Qayyarah in Ninewa, family members of victims of IS – acting with the backing of local tribal leaders – drew up a list of names and visited the houses of these individuals to demand that they sign next to their names promising to leave the community or else face consequences.<sup>152</sup>

Additionally, some Iraqis fear that tribal governance has the potential to undermine the constitutional principle of equal rights among Iraqi citizens.<sup>153</sup> For example, one tribe may force women to marry members of another tribe “as a means of resolving a dispute between the two groups”<sup>154</sup> – a practice that is prohibited by Iraq's Personal Status Law.<sup>155</sup> Tribal law and politics are highly patriarchal. Women cannot serve in tribal leadership roles nor can they represent themselves in disputes adjudicated by tribal sheikhs. According to Holt, “Custom-

ary justice is completely inaccessible to women; they need to be represented by a husband, brother, or other male guardian.”<sup>156</sup> In addition, tribal law is inconsistent with the principle of “individual liability” that is integral to Iraq’s Penal Code.<sup>157</sup> Unlike state law, tribal law allows for the attribution of collective guilt to the family or tribe of the perpetrator, such that the relatives of an IS member can be held vicariously responsible for crimes that he or she committed individually.<sup>158</sup> According to Khalid Obaide, an Iraqi law professor, “The idea that family members of a criminal can be held vicariously liable for his crimes is a violation of the Iraqi legal system’s principle of individual responsibility.”<sup>159</sup>

A tribal reconciliation session in Baghdad in December 2017 that was attended by representatives of dozens of tribes from Anbar Province illustrated some of the benefits and drawbacks of tribal involvement in post-IS accountability and reintegration processes. The goal of the meeting was to discuss issues associated with the recapture of territory from IS including: the need for compensation of victims of IS-related violence; the return and reintegration of IDPs; and mechanisms for detaining and prosecuting individuals associated with IS. On the one hand, there was broad consensus on the need for cooperation and coordination with the Iraqi legal system and security forces on matters concerning the detention and prosecution of suspected IS members. But on the other hand, some of the participating sheikhs made statements in favour of the collective punishment and social exclusion of individuals solely on the basis of their family ties to IS. One tribal leader said, “Even if a criminal is dead, his father or other family members must bear responsibility for his crimes.”<sup>160</sup> One of the “solutions” generated by the participants was to banish families with one or more members who had joined IS from returning to the community according to the tribal law doctrine of *bara’ah* (“disavowal”).<sup>161</sup> Similar tribal agreements demanding the forced eviction of families affiliated with IS and the redistribution of their property to victims of the group have been documented in other areas of Iraq including Ninewa, where tribal leaders claimed that the seizure and redistribution of these assets would help to prevent other forms of retribution and serve as “mental therapy” for those harmed by IS.<sup>162</sup>

In all of these examples, there is a concerning lack of due process for individuals accused of association with IS. When tribes publish the names of individuals deemed to be affiliated with IS and therefore banned from the community, it is unclear what standards were used to determine their guilt, and whether they have an opportunity to challenge their accusers or appeal the decision.

## Coercive Rehabilitation

Rehabilitation programs are being established in Iraq to facilitate the reintegration of individuals formerly associated with IS including family members. In some cases, these programs are being imposed coercively without the consent of the affected populations. Some Iraqi officials have advocated for the quarantining of family members of IS members in camps where they can be closely supervised by security forces while undergoing rehabilitation. Mohamed Salman al-Saadi, Chairman of the National Reconciliation Council – a body established in 2007 to oversee the vetting of Ba’ath Party personnel that is now primarily focused on IS-related reintegration challenges<sup>163</sup> – said that he is in favour of the isolation of IS-affiliated families in special camps for three reasons: first, “to protect them from revenge attacks”; second, “to prevent them from communicating with Daesh [IS]; and third, “to re-educate and rehabilitate them in order to reverse the effects of three years of brainwashing.”<sup>164</sup> Local government officials have also endorsed the creation of such camps. For example, a decree issued by the Mosul district council in June 2017 ordered the expulsion of all families of IS members and proposed the creation of “special camps where they can be rehabilitated psychologically and

ideologically.” The decree said that these families would only be permitted to return to Mosul “after confirming their responsiveness to rehabilitation.”<sup>165</sup>

The Iraqi government has constructed several facilities that it calls “isolation camps” – functionally equivalent to internment camps – to house IS-affiliated families for the purported purpose of “protecting them from revenge killings,” according to Dr. Hisham al-Hashimi, a counter-terrorism expert who advises the Iraqi government.<sup>166</sup> In June 2017, Iraqi authorities forcibly relocated at least 170 “IS families” to a closed rehabilitation camp east of Mosul – which they are not allowed to leave – after the city’s district council issued a directive ordering such families “to receive psychological and ideological rehabilitation, after which they will be reintegrated into society if they prove responsive to the rehabilitation program.”<sup>167</sup> Although this camp was closed – after Human Rights Watch reported that at least 10 women and children had died traveling to or at the camp<sup>168</sup> – al-Hashimi said that five similar facilities are still operating: Tel Kayf Camp, Hamam al-Alil Camp, Leilan Camp south of Kirkuk, Kilo 18 Camp in west Anbar, and al-Taji Camp north of Baghdad. At least 10,000 families – between 60,000 and 10,000 individuals – are currently living in these camps,<sup>169</sup> which they are not free to leave unless they receive a “green light” from all of the different security agencies and their respective databases.<sup>170</sup>

According to al-Hashimi, suspects who lack identification – a common problem in areas where IS systematically destroyed government-issued documents – or cannot prove that they are unaffiliated with IS are being detained indefinitely in these de facto internment camps.<sup>171</sup> Contrary to a bedrock principle of most justice systems – that the state bears the burden of proving a suspect’s guilt – many Iraqi IDPs bear the burden of proving their innocence.

## Dysfunctional Compensation Processes

IS expropriated a vast amount of property and other assets from Iraqi civilians – particularly non-Sunni religious minorities – for redistribution to the group’s supporters and for sale or rent to residents of IS-controlled territory.<sup>172</sup> Now that the former owners of expropriated land and real estate are trying to return home, there is an urgent need for a compensation process to adjudicate claims. Iraqi courts have begun to review claims for compensation under a 2009 law that provides remedies for victims of “terrorism and military errors.”<sup>173</sup> However, the process is slow, taking two years on average.<sup>174</sup> In Fallujah and Ramadi, where more than 12,000 claims for the reconstruction of homes have been filed, not a single payment had been issued as of August 2017.<sup>175</sup> According to an appeals judge in Mosul who is involved in the compensation process there, the court has received nearly one million claims related to the battle for Mosul – concerning deaths, injuries, and property destruction – but no payments had been issued as of December 2017.<sup>176</sup>

An important barrier to compensation is that many claimants lack the documents that are necessary to prove ownership of damaged properties for reasons noted earlier in this report. Eighty-eight percent of Iraq’s three million IDPs cite missing documents as one of their major concerns. IS systematically destroyed property deeds in Mosul<sup>177</sup> and other Iraqi cities.<sup>178</sup> Although the group created its own real estate department that issued “statements of ownership,”<sup>179</sup> these documents – like all IS-issued documents – are not recognised as valid by the Iraqi government.

In addition to IS’s expropriation and redistribution of property, there is some evidence that Iraqi security forces involved in the battle for Mosul have illegally occupied some properties in the city. 24 percent of respondents in a survey of 1,409 residents of Mosul said that they have personally witnessed or heard about cases in which Iraqi Federal Police or the PMF had

stolen property or money from civilians in the aftermath of the battle. A humanitarian worker involved in reconstruction efforts in Mosul reported several cases in which the Iraqi military forces appeared to have illegally occupied houses recently abandoned by IS members.<sup>180</sup> In other cases, military forces have gifted abandoned properties to civilians with *wāsta* (influence) whose houses were destroyed during the battle. According to the humanitarian worker, “There are no formal rules or procedures for distributing these abandoned properties. They are being divvied up according to the discretion of individual commanders.”<sup>181</sup> Holt of the IRC was also aware of cases in which Iraqi security forces have occupied civilian properties and said that “these property disputes have the potential to generate further conflict if they are not resolved promptly.”<sup>182</sup>

As a result of these unofficial property transfers and the absence of legally valid deeds, disputes over the ownership of real estate and land in areas retaken from IS are widespread. An important obstacle to the resolution of these disputes is that many Iraqis have lost their government-issued ID cards in the chaos caused by the conflict and – in the case of children born in IS-controlled areas – may never have been issued essential document such as birth certificates in the first place. Not only are identification documents necessary to rent or own property but they are also the basis for Iraqi citizenship.<sup>183</sup> Although IS issued its own ID cards, birth certificates,<sup>184</sup> and marriage contracts,<sup>185</sup> none of these documents are valid in the eyes of the federal Iraqi or KRG governments. 88 percent of Iraq’s three million IDPs cite missing documents as one of their major concerns.<sup>186</sup> Some “mobile courts” have been set up in IDP camps to issue valid documents, sometimes based on converted IS documents, but the demand for the services of these courts exceeds their capacity.<sup>187</sup>

Another concern is that existing compensation processes are perceived as sectarian. The “Martyrs’ Foundation,” which was established by the Iraqi government in 2006 to provide compensation to the families of Iraqis who lost their lives for opposing the government of Saddam Hussein,<sup>188</sup> is now working to investigate and document crimes committed by IS including through DNA analysis of bodies recovered from mass graves.<sup>189</sup> In addition, the government has created a fund to reward fighters (and their families) who fought against IS with property and land distributions. However, these programs are perceived as benefiting primarily Shia.<sup>190</sup>

There is also a danger that compensation processes, if administered by tribal leaders, could devolve into patronage schemes. This appears to already be happening in Salah ad-Din, where the government paid 1 billion Iraqi dinars to Shia tribal leaders – as compensation for harms perpetrated by IS – for them to distribute to their members.<sup>191</sup> Tribal leaders distributed the funds preferentially to their supporters and family members, prompting accusations of corruption.<sup>192</sup> Another reason for the ineffectiveness of existing compensation processes is that the Iraqi government’s financial crisis has imposed severe constraints on the amount of funding available for distribution to claimants.<sup>193</sup>

## The Risk of an “IS 2.0”

The Iraqi state’s current approach to individuals associated with IS is widely perceived among Sunnis as collectively punishing Sunni civilians for simply living in areas controlled and governed by IS. Although it is important that IS members be identified and held accountable, it is equally important that punishment be proportionate. Several lawyers interviewed for this report expressed the concern that excessively harsh punishments may backfire and increase the likelihood for recidivism by convicted IS members. Furthermore, the wrongful conviction of innocent people generates grievances that could contribute to a future insurgency against the Iraqi government. Nifal al-Tai, the director of the Iraqi Bar Association’s Ninewa Branch,

expressed concern over the large number of juvenile IS suspects being detained alongside dangerous adults: “Children under the age of 14 are being held in the same cells as real terrorists. If these children are not already terrorists, they will certainly become terrorists by learning from their fellow inmates.”<sup>194</sup> Furthermore, many of those who have been convicted are innocent and should never have been punished in the first place, according to al-Tai: “Many innocent people have been unjustly imprisoned. If they remain in prison with terrorists for years and years, by the time they are eventually released, they will become the next generation of Daesh [IS].”<sup>195</sup> As Dr. Zyad Saeed, an Iraqi lawyer, noted, “Daesh [IS] was born in prisons in the 2000s, including the American-run Camp Bucca where Abu Bakr al-Baghdadi [IS’s leader] himself was detained. Bucca became a terrorist university where criminals could learn from extremists and vice versa.”<sup>196</sup> Numerous analysts have pointed out that IS has a long history in Iraq dating back to the early 2000s and will likely re-emerge again as an “IS 2.0” if the underlying political and economic grievances that fuelled its rise to power are not addressed or even exacerbated by excessively punitive responses.<sup>197</sup>

## 5. Policy Implications

**Leveraging Opportunities for Forgiveness:** Public pressure appears to significantly influence policy and judicial approaches, as even a judge interviewed for this report admitted that “judges can be very harsh, sometimes as harsh as Daesh [IS]” because of social and political pressure to show no mercy to IS and because the counter-terrorism law does not allow them sufficient flexibility in sentencing. Yet, the evidence presented in this report suggests that many Iraqis are open to more restorative and forgiving approaches to accountability than the highly punitive model that is currently being implemented by the Iraqi government. For example, many residents of Mosul surveyed for this report said that they would be willing to accept a lenient punishment – community service – or no punishment at all for individuals who were affiliated with IS in non-combat roles. For example, although 31 percent of respondents believed that a hypothetical woman married to an IS fighter should be sentenced to death, 17 percent believed that she did not deserve to be punished at all, while another 17 percent believed that she should perform six months of community service (Table 5). Thus, Iraqi authorities may be overestimating the public demand for a heavy-handed response to IS associates, and there may in fact be more political room for nuanced approaches that differentiate between combatants and those in diverse support roles than the current state approach allows for.

**Building Trust in the Iraqi Legal System and Security Forces:** A common theme across the interviews conducted for this report was the need to strengthen the legitimacy of the Iraqi legal system and security forces particularly in the eyes of Sunnis. According to Khalid Obaide, a law professor, “Corruption contributed directly to the rise of Daesh [IS] and as long as corruption remains a problem in Iraq, extremist groups will continue to exploit grievances with bad governance and weak rule of law.”<sup>198</sup> In a national survey conducted in 2014, only 41 percent of Sunni respondents said that they trust the Iraqi police and only 37 percent said that they trust the Iraqi judiciary.<sup>199</sup> A consequence of widespread distrust in the state legal system is that many Iraqis believe that justice can only be achieved through extra-judicial violence. As one Mosul resident said of individuals currently awaiting trial on IS-related charges, “We don’t want them to go to jail because they will be let out. It’s better for them to be killed.”<sup>200</sup> One lawyer working in Mosul claims to have witnessed cases in which judges offered to alter witness statements in exchange for bribes.<sup>201</sup> Three lawyers interviewed for this report expressed the concern that the most senior IS leaders are escaping accountability – either by fleeing to Syria or by paying bribes, for instance to get out of detention.<sup>202</sup> The perception that IS fighters can easily bribe their way out of justice has been cited by Iraqi security forces and militias as a justification for extra-judicial killings of prisoners.<sup>203</sup>

Iraq will also need to make headway toward correcting procedural flaws, namely by: reducing the arbitrariness of arrests by improving the maintenance of wanted lists; limiting the military’s involvement in pre-trial investigations; eliminating or at least reducing reliance on the testimony of secret informants; and providing individuals accused of IS association with competent public defence lawyers, and protecting all lawyers who defend individuals accused of IS association. Furthermore, the Iraqi government should also consider dispatching judges from Baghdad or other areas of Iraq who have not been personally affected by IS to preside over IS-related trials in order to ensure that personal biases do not interfere with the administration of justice.



**Accountability for All:** It is important to recognise that IS was not the only perpetrator of crimes and human rights violations during the recent conflict. Iraqi security forces and state-affiliated militias (notably the PMF) have also committed crimes including torture, extra-judicial killings, and unlawful expropriation of property. Accountability and compensation measures that focus exclusively on IS risk alienating Sunni Muslims who feel that they are being singled out for punishment.

Some Iraqi security forces – notably the PMF – have engaged in revenge killings and torture of Sunni civilians from areas recaptured from IS in addition to looting and preventing Sunni IDPs from returning to their homes.<sup>204</sup> Although the Prime Minister’s office has established a committee to investigate allegations of abuses by security forces during and after the battle to retake Mosul,<sup>205</sup> and some of the officers implicated have been arrested and are facing trial, Iraqi authorities have been criticised for turning a blind eye to human rights violations perpetrated under the pretense of combating terrorism.<sup>206</sup>

Iraqi authorities should take steps to ensure the compliance of all security forces with the laws of war and should thoroughly investigate and hold accountable those who violate them. Iraqi authorities should also consider providing additional training aimed at preventing future abuses. The NGO Geneva Call has successfully conducted a training workshop with a PMF brigade that stressed the right of IDPs to return to their homes without interference by armed actors.<sup>207</sup> Iraqi authorities should consider replicating and scaling up such workshops to facilitate the peaceful return and reintegration of the many thousands of civilians who remain displaced.

**Looking Beyond the False Victim–Perpetrator Dichotomy:** Another deficit of the Iraqi government’s current approach to accountability is its reliance on a false dichotomy between victims and perpetrators. According to Anne Hagood, “From the government’s perspective, people are either fully innocent or fully guilty. They see these categories as black and white, without recognising that many people are in a gray area.”<sup>208</sup> As the experiences of wives and children of IS members illustrate, the same person can be both a victim and a perpetrator or somewhere on a continuum between these two identities and therefore difficult to classify as either. Khalid Obeide, a law professor, said, “Children who were recruited and brainwashed by IS need to be viewed as victims rather than as criminals, regardless of whether or not they carried weapons, because they had no awareness of what they were doing.”<sup>209</sup> Iraqi authorities should attempt to look beyond simplistic binaries and recognise that IS’s coercive control over territory and harsh treatment of dissidents resulted in near-universal collaboration. Many people who appear to be “collaborators” were acting under conditions of extreme duress and may have experienced violence or other crimes at the hands of IS.

**Prosecutorial Prioritisation:** There appears to be no effort by the Iraqi government to prioritize the prosecution of more serious crimes over lesser offenses. The sheer number of individuals currently detained in connection with IS – more than 19,000<sup>210</sup> – exceeds the capacity of the Iraqi justice system to investigate and prosecute in a timely manner. According to Ahlam Allami, President of the Iraqi Bar Association, “The process will take years and is already imposing huge strain on the court system and prisons.”<sup>211</sup> According to Khalid Obeide, a law professor, investigating judges – who are responsible for pre-trial investigations and fact-finding – often review as many as 40 cases in a day.<sup>212</sup> The burden on the Iraqi judiciary could be reduced by prioritising more serious crimes over lesser offenses and by attempting to differentiate between those who aided IS voluntarily and those who merely cooperated with the group under conditions of extreme coercion and duress. In addition to conserving the limited resources of the justice system, adopting a strategy of prosecutorial prioritisation would reduce the likelihood that innocent people will be convicted while those who are actually guilty escape justice, according to a United Nations report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.<sup>213</sup>

**Legislative and Procedural Reforms:** In addition to prioritising more serious crimes over lesser offenses, the Iraqi and KRG governments should consider legislative reforms to reduce the currently vast scope of counter-terrorism prosecutions and to selectively allow amnesty for low-level IS members who did not commit any serious crimes while affiliated with the group. Iraq is in the process of revising the 2005 Counter-Terrorism Law – a draft was reviewed by the United Nations Office on Drugs and Crime in October 2016<sup>214</sup> – presenting an opportunity to correct some of the flaws identified in this report. Iraqi lawmakers should consider revising the law to require a criminal act in addition to membership in a terrorist group for prosecution.

Iraq's Amnesty Law should be re-amended to permit pardons for low-level IS members who did not commit any serious crimes while affiliated with the group – as a previous version of the law had allowed – while closing loopholes that allowed release of dangerous criminals and terrorists. The KRG, which does not have any Amnesty Law, should consider adopting one along these lines.

As a procedural matter, Iraqi and KRG authorities should clarify and publicise detailed guidelines for the screening, detention, and sentencing of individuals accused of association with IS. Greater transparency about the types of conduct that warrant punitive measures is necessary to ensure a consistent and principled approach to accountability. Iraqi and KRG authorities should also explore ways of improving their coordination and communication on IS-related security and legal matters including the maintenance of wanted lists, which currently suffer from inconsistent and out-of-date information.

**Facilitate an Inclusive National Dialogue:** Finally, criminal justice proceedings alone cannot adequately address the physical, economic, and psychological harms caused by the conflict with IS. In cases where suspected low-level IS members – for example, unarmed civilian employees such as janitors and cooks – do not appear to pose a threat to society, alternatives to prosecution such as counselling and education may be appropriate. Some Iraqi officials have been reluctant to consider lessons from transitional justice in other historical and regional contexts because they view Iraq's current challenges as unique and highly context-specific.<sup>215</sup> As the chairman of the National Reconciliation Committee said, “We are aware of the experiences of other countries, but we believe that each country is unique. No model I have seen anywhere else in the world is replicable in Iraq because of the specificity and complexity of Iraqi society and history.”

Yet, other post-conflict and transitional settings have exhibited some comparable challenges to those faced by Iraq, and might offer transferable lessons. Specifically, national dialogues have proven useful in post-conflict peacebuilding and reconciliation, including in some countries that experienced transitions after the Arab Spring.<sup>216</sup> Dialogues offer space for debates beyond elite decision-makers who may be out of touch with the needs and aspirations of citizens.<sup>217</sup> If adapted to local realities, an inclusive national dialogue in Iraq could allow all key interest groups to express their past grievances and aspirations for the future. The evidence presented in this report suggests many Iraqis are open to more restorative and forgiving approaches to accountability than the highly punitive model that is currently being implemented by the Iraqi government. A national dialogue could help to incorporate public opinion into the policy-making process in ways that would be beneficial for peacebuilding and the prevention of future insurgencies. A well-designed dialogue would include all major social, religious, ethnic, tribal, and regional groups. As noted earlier in this report, tribes have already emerged as powerful brokers of agreements governing the return and reintegration of individuals affiliated with IS. However, the absence of women from tribal dialogues is problematic and limits the representativeness and inclusivity of any resulting agreements. Given the diversity of Iraqi society, it is important that any national dialogue process give a voice to all interest groups.

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# The Limits of Punishment

*Transitional Justice and Violent Extremism*

**NIGERIA CASE STUDY**



Vanda Felbab-Brown

May, 2018

“In Nigeria,  
We Don’t  
Want Them  
Back”

*Amnesty, Defectors’ Programs,  
Leniency Measures, Informal Reconciliation,  
and Punitive Responses to Boko Haram*

## About the Author

Dr. VANDA FELBAB-BROWN is a senior fellow in the Foreign Policy program at the Brookings Institution in Washington, DC. She is an expert on international and internal conflicts and nontraditional security threats, including insurgency, organized crime, urban violence, and illicit economies. Her fieldwork and research have covered, among others, Afghanistan, South and Southeast Asia, the Andean region, Mexico, Morocco, and Eastern and Western Africa. Dr. Felbab-Brown is the author of *The Extinction Market: Wildlife Trafficking and How to Counter It* (Hurst-Oxford 2017); *Narco Noir: Mexico's Cartels, Cops, and Corruption* (Brookings Institution Press, 2019, forthcoming); *Aspiration and Ambivalence: Strategies and Realities of Counterinsurgency and State-Building in Afghanistan* (Brookings Institution Press, 2012) and *Shooting Up: Counterinsurgency and the War on Drugs* (Brookings Institution Press, 2010) and co-author with Harold Trinkunas and Shadi Hamid of *Militants, Criminals, and Warlords: The Challenge of Local Governance in an Age of Disorder* (Brookings Institution Press, 2017). A frequent commentator in US and international media, she is also the author of numerous policy reports, academic articles, and opinion pieces and regularly provides US congressional testimony.

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## COVER IMAGE

NIGERIA. 2017. A girl who was forcibly married to a man who later became affiliated with Boko Haram. She fled to safety in a border town that hosts many people internally displaced by the conflict. © Paolo Pellegrin/Magnum Photos.

*This material has been supported by UK aid from the UK government; the views expressed are those of the authors.*

## Introduction

The *Jama'tu Ahlis Sunna Lidda'awati wal-Jihad* (People Committed to the Propagation of the Prophet's Teachings and Jihad) insurgency, popularly known as Boko Haram, based in poor and arid north-eastern Nigeria (but also active in Niger, Cameroon, and Chad), has caused an estimated 20,000 to 30,000 deaths and displaced over 2.3 million people since 2009.<sup>1</sup> Between 2009 and 2015, the group took control of extensive territories in north-eastern Nigeria, including major cities such as Maiduguri; devastated lives of millions; and constituted a significant threat to the Nigerian state. Overall, some 15 million people have been adversely affected by the insurgency and counterinsurgency (COIN) efforts. Boko Haram fighters have slaughtered civilians in villages and towns, abducted thousands of people, forcibly marrying off women and girls to their fighters, and conducted mass-casualty terrorist attacks against mosques, markets, and camps for internally displaced persons (IDPs). Yet the response of the Nigerian state until 2015 oscillated between neglect of the problem and counterproductive heavy-handed counterinsurgency measures that exhibit little distinction between Boko Haram fighters and populations who have had to endure its rule. Between 2015 and 2017, the effectiveness of the military campaign improved, and the Nigerian government managed to retake territories from Boko Haram, pushing the group to more marginal areas. Yet the Nigerian military has struggled to effectively hold retaken territories. Lower-scale Boko Haram attacks persist, and steadily expose the questionable claims of the Nigerian government that Boko Haram has been technically defeated.

This report analyses the limitations, human rights violations, and counterproductive effects of the heavy-handed Nigerian military response to Boko Haram. It also looks at the multiple attempts at negotiating with Boko Haram, discussions of a possible amnesty, and the design and effects of leniency measures the Nigerian government has adopted, including a defectors program for "repentant" low-risk male combatants (known as Operation Safe Corridor) and a rehabilitation program for "low-risk" women, such as those married to Boko Haram fighters. Both the discussions of amnesty and the existing leniency programs have emerged out of a recognition that the counterinsurgency campaign has struggled and frequently conflated perpetrators with victims.

The defectors program and the rehabilitation process for low-risk women are new efforts. But despite the Nigerian state's historical emphasis on a highly repressive military response to profound security and political challenges, issues of amnesty and negotiations are not new. Nigeria has at various times drawn on such leniency approaches to mitigate conflict when repression has failed. The most prominent case was the amnesty for militants in Nigeria's Niger Delta in 2009. In this case and others, leniency approaches have been accompanied by persistent military and civilian elite unwillingness to: improve governance; extend inclusion to broader segments of society; devote adequate resources to urgent problems; and address underlying issues of severe socio-economic inequality and political marginalisation. Previous leniency approaches have also amounted to narrow and unpopular political and financial buyoffs. Seen as promoting impunity and moral hazard, such deals have also soured much of Nigerian society, including human rights advocates and non-governmental organisations (NGOs), to the idea of amnesty deals for other groups, including Boko Haram. Despite the increasing visibility of the problems surrounding the Niger Delta amnesty, the Nigerian government has attempted many times to negotiate a peace deal with Boko Haram that includes various unspecified forms of amnesty, both to incentivise a top-level deal and to encourage defections among rank-and-file fighters. Nonetheless, these political negotiations have collapsed every time; in each attempt

there lacked a credible level of effort, with premature declarations of success by the Nigerian government causing significant embarrassment. Moreover, in each attempt, Boko Haram also refused to end violent conflict and rejected any form of amnesty. These failures have left the government with a political egg on its face and discredited such processes.

Compounding the contentious atmosphere around negotiations as well as any kind of leniency is the deep and widespread suspicion among Nigerian society, including in the northeast, of anyone associated with Boko Haram. This suspicion translates into rejection, including of Boko Haram's victims and those who had to endure their brutal, predatory, and rapacious rule. In the three-dimensional balance needed for peace – the protection of communities, the reintegration and reconciliation of defectors, and the human rights of anyone associated with Boko Haram, including its abductees – even human rights advocates often put community protection first and human rights for Boko Haram associates last. To the extent that communities are at all willing to consider accepting back those associated with Boko Haram – a category they consider to include populations who merely lived under its rule<sup>2</sup> – they tend to insist that all violent conflict in their area will first need to have ceased and their properties and livelihoods restored. Yet both are distant prospects. The extensive presence of anti-Boko Haram militias called the Civilian Joint Task Force (CJTF) in Nigeria's north-east is a further complicating factor. These militias, instrumental in the fight against Boko Haram, are increasingly unruly, frustrated, and mobilising forces that challenge various forms of authority.

Although a negotiated deal and group-level amnesty remain elusive, a defectors program for “repentant” low-risk Boko Haram combatants has operated since 2015. The program however, is riddled with problems and challenges, detailed and analysed in this report, including: highly opaque and unclear criteria as to who constitutes “low-risk” and “high-risk”, that in practice leave any potential defector unable to judge what category or fate he will be assigned if he does indeed defect; overly narrow eligibility criteria that exclude men who had to endure Boko Haram rule when their villages were taken over, but did not have an opportunity to “defect,” i.e., to run away; programming that is too heavily skewed toward religious re-education and underprovides vocational training and psycho-social therapy; and, crucially, extensive problems with reinsertion and reintegration. Nonetheless, the defectors program known as Operation Safe Corridor provides the only mechanism for Boko Haram fighters to leave the battlefield. Similarly, the separate rehabilitation program for low-risk women and children is often the only mechanism for them to escape from arbitrary, lengthy, and abusive military detention. While in need of significant improvements – including in terms of court proceeding and trials for defectors judged high risk or for men who were not able to defect – both programs are crucial and should be expanded.

Among the many badly-needed improvements are greater transparency around the two programs and enhanced clarity and detail in communications about them. Currently the Nigerian government and military shroud these programs in secrecy and non-disclosure. The government's wariness with regards to transparency undermines the potential for those who have gone through deradicalisation programs – that is, Operation Safe Corridor, the rehabilitation program for low-risk women and children, or planned deradicalisation programs in prisons – to be reinserted and reintegrated back into their communities. Nonetheless, despite being ostracised and threatened with rejection, some 1,800 women and children have returned to their communities through this process. By contrast, as of the writing of this report in February 2018, none of the 96 men who had completed the deradicalisation and rehabilitation process entailed in Operation Safe Corridor have left its Gombe camp facility. This is because of reasonable fears that they may face violent retribution from militias and communities upon reinsertion. This suggests the government needs to invest more in open and comprehensive discussions with society about rehabilitation, reintegration, leniency, and victims' rights,

including socio-economic reconstruction and psycho-social therapy – not just for Boko Haram associates, but also victims and communities.

However, even such badly needed leniency measures are insufficient unless the Nigerian military and the anti-Boko Haram militias cease being sources of abuse and victimisation themselves. Their abuses generate new grievances and potentially encourage new sources of violence. The Nigerian military regularly rounds up *en masse* anyone, including women and children, from villages it “liberates” from Boko Haram. It keeps them in abusive detention conditions for indefinite periods, conducts extrajudicial killings, and relies on militias for intelligence on who is Boko Haram, including for the purposes of arrest and prosecution. These practices are illegal and alienate the military’s victims from the Nigerian state. Yet Nigerian society has, by and large, not demanded badly-needed accountability measures for the military and anti-Boko Haram militias.

As Boko Haram has been pushed out of territory in recent years, the Nigerian government and military have a chance to finally start overcoming the deep-seated legacy of an abusive and neglectful state. To do so, however, they will need to radically change counterinsurgency practices, bringing them in line with human rights and best practice. They will also need to improve and expand leniency measures, and effectively rehabilitate and reintegrate individuals formerly associated with Boko Haram. Nigeria has a chance to become an exemplar of disarmament, deradicalisation, rehabilitation, and reintegration processes even before the conflict has fully ended. The international community should support and encourage Nigeria in such efforts, including by demanding accountability for egregious human rights violations by the Nigerian military, militias and Boko Haram.

This report proceeds as follows: The Context section provides an overview of the military conflict in Nigeria, Boko Haram’s rule and its treatment of populations under its control, societal perceptions toward individuals associated with Boko Haram, including victims whom the Nigerian public and government also frequently see as having an association with Boko Haram, and the challenge of militias. The next Overview section examines the military response and its problems, and reviews attempts at negotiations with Boko Haram and discussions of amnesty for the group, drawing on lessons from the 2009 Niger Delta amnesty. It then details the two leniency measures that have emerged – the defectors program (Operation Safe Corridor) and rehabilitation for low-risk women and children. It analyses their policy and legal framework, design and implementation, and contrasts them with the criminal justice path. This section also sketches reintegration and reconciliation efforts by NGOs. It further explores the possibility of accountability of Nigerian government forces and militias and of victim’s rights, such as to truth. The following Assessment section provides an overall assessment of the current approaches to amnesty, the defectors program, and military efforts, drawing out key takeaways, including: the counterproductive nature of existing military tactics; the problematic lack of transparency regarding the screening defectors and detainees; the lack of legal certainty for defectors; and reintegration challenges. The report concludes by offering a detailed set of policy recommendations.

In addition to reviewing existing background literature and reports on: Nigeria’s amnesties; defectors program; disarmament, demobilisation, and reintegration (DDR)-like efforts; traditional and transitional justice approaches; and security and political developments, this report is based on my field trip to Nigeria in January 2018, during which Abuja, Maiduguri, and Ibadan were visited. I interviewed 69 interlocutors, including former and current Nigerian government officials, military, intelligence, and police officers; members and commanders of CJTF; members of various committees formed to negotiate with Boko Haram; officials from various branches of the United Nations in Nigeria; officials of Western embassies in Nigeria; international support partners, such as for Operation Safe Corridor and the rehabilitation



facility for low-risk women and children and for reconstruction; women and children who have exited from the rehabilitation facility; men, women, and children who spent time in detention for alleged association with Boko Haram and were released and relatives of others who were detained by the Nigerian government or CJTF; representatives of Nigerian NGOs and international NGOs operating in Nigeria; Nigerian lawyers and human rights advocates; victims' groups' representatives; representatives of Nigeria's business community; and Nigerian journalists, academics, and researchers. Since I could not obtain permit to access IDP camps, interviews of IDPs were conducted on my behalf by two Nigerian researchers.

Drawing its supporters mostly from the Kanuri ethnic group, the Boko Haram insurgency emerged in Nigeria's Borno State in the early 2000s when a charismatic Islamic scholar Mohammad Yusuf started preaching against the underdevelopment, poverty, and corruption of Nigeria's north-east. Denouncing the state as the source of political, social, and spiritual corruption and decay of the polity, Yusuf also blamed Western values, secularism, and democracy for poor governance and policy failures. He professed that an Islamic governance and administrative state, rooted in "back to the source" Salafi doctrine, as practiced by Prophet Mohammed, would provide justice and equality for all and eliminate corruption.

Given miserable socio-economic conditions in the north-east, and a lack of government presence beyond Borno's capital, Maiduguri, Yusuf's teachings resonated widely. Although Nigeria's gross domestic product is among Africa's largest, income distribution is highly skewed, with the vast majority living in poverty. Decades of systematic usurpation of public resources for personal gain, and clientelistic distribution within the bounds of ethnic or patronage cliques, have left institutions weak, hollowed out, and often unable to implement policies and deliver services. The north-east, long ignored by the central government in Abuja, often performs significantly worse on socio-economic, human development, and governance capacity indices as compared to other regions, except at times the north-west.<sup>3</sup>

## Conflict Overview

In July 2009, the Nigerian military violently cracked down on Boko Haram, leaving perhaps as many as 1,000 alleged members dead. Yusuf himself was killed while in the custody of the Nigerian police. Within months of the crackdown, Boko Haram had unleashed a full-blown insurgency under the new leadership of Abubakar Shekau. The response from the Nigerian government and military was not only very heavy-handed but also sporadic and ineffective, at times bordering on ignoring the problem. The counterinsurgency campaign exacerbated corruption within the Nigerian military, with military funds intended for the fight against Boko Haram quickly siphoned off. The inadequacy of the campaign left towns, villages, and hundreds of thousands of people at the mercy of Boko Haram.

The corrupt and neglectful state-led response stimulated the proliferation of anti-Boko Haram militias. Sometimes supported by the Nigerian military, many of these militias coalesced under the umbrella grouping of the Civilian Joint Task Force (CJTF). Meanwhile, Boko Haram's increasing military raids and attacks in territories of Nigeria's neighbours led to the formation of the joint neighbourhood military response force in early 2015: the Military Joint Task Force (MJTF). Supported by the United States, France, and Britain through the provision of training, advice, and intelligence, the MJTF came to include the military forces of Chad, Niger, Cameroon, and Benin, in addition to those of Nigeria, and was able to beat back Boko Haram. After the 2015 election of Nigeria's former military dictator Muhammadu Buhari as president, the effectiveness of the counterinsurgency campaign improved. The size of the Nigerian military deployment grew to its current three brigades, comprising 15,000.<sup>4</sup> Boko Haram lost much of

its territory and is now hunkering down in more isolated areas, such as the Sambisa Forest. President Buhari and the Nigerian government have announced that Boko Haram has been “technically defeated” and “degraded,” calling the war largely won. Even so, in August 2017, the United States sold half a billion dollars’ worth of military equipment to the Nigerian military to fight Boko Haram, indicating that the war is far from over.

Indeed, while Boko Haram has lost significant territory and no longer holds major cities, the insurgency continues to kill thousands of people a year.<sup>5</sup> The Nigerian military still struggles to establish effective control in retaken areas. In major cities and towns in the northeast, including Maiduguri, there is widespread belief that Boko Haram informants are everywhere.<sup>6</sup> Boko Haram also continues to forcibly recruit boys and men to its ranks. The group also abducts girls, whom are either forced to marry Boko Haram fighters or become suicide bombers. In February 2018, more than 100 girls were kidnapped by Boko Haram in one such raid. Although most of the girls have since been released, allegedly after a ransom was paid by the Nigerian government, such incidents further discredit claims by the government that Boko Haram has been technically defeated.<sup>7</sup>

Boko Haram has fragmented internally over the past several years, but splintering has not eviscerated its operational capacity. In 2012, the first faction – Ansaru – split off. In 2016, Boko Haram fractured further when struggles over leadership, connections to the Islamic State (IS) in the Middle East, and tensions over the killings of Muslim civilians led to the formation of two other factions: one remaining allied with Shekau and a new one around Abu Musab al-Barnawi, a Nigerian militant claiming to be the new leader of Boko Haram and to have the blessing of IS in Iraq and Syria.

Massive humanitarian problems persist. Most of those displaced by the fighting have been afraid to return to their destroyed home areas. The Nigerian military itself admits that it is not possible to estimate when IDPs can return home, due to Boko Haram’s persisting attacks and the state’s inability to effectively hold vast rural areas and protect local populations.<sup>8</sup> Earlier in northern Adamawa State, Nigerian authorities, including the National Emergency Management Agency (MENA) persuaded some IDPs to return to their villages. But no protection was provided to the returnees. The following day, Boko Haram killed them.<sup>9</sup> Still, in Borno State, Governor Shettima was reluctant to see the growth of IDP camps, yet eager to see the return of IDPs to their home areas.

Until November 2016, the Nigerian military provided the bulk of assistance in IDP camps. However, it was frequently accused of corruption, incompetence, racketeering, and abuse of civilian victims of conflict while handling this aid.<sup>10</sup> Officially, local administrations have returned to most local government areas (the term used for the lowest administrative levels) in retaken territories. Yet, their capacity remains very low and they are vulnerable to attacks by Boko Haram. Further, due to crops being destroyed in the fighting, and the inability to plant new ones for several years in a row due to insecurity and government prohibitions, extreme food insecurity has plagued north-eastern Nigeria for over two years, affecting millions.<sup>11</sup>

Bilateral donors have often led reconstruction financing for retaken areas. The United States, for example, signed a \$2.3 billion five-year agreement with Nigeria in September 2015 for humanitarian aid, including IDP assistance, longer-term development, such as electrification, education, and agriculture, and transitional programs. The latter provided funding for efforts such as deradicalisation and reintegration of former Boko Haram associates.<sup>12</sup> In 2016 and 2017, the reconstruction programming has revolved predominantly around redressing extreme food insecurity and other emergency life-saving measures.

Integration of local communities’ preferences also remains a significant challenge. Due to persistent insecurity, reconstruction remains highly constrained, creating sentiments among

IDPs and other communities that this is no time for any kind of amnesty or reconciliation.<sup>13</sup> The reconstruction and humanitarian programming underway also generates tensions between those who have received aid and those who have not.<sup>14</sup>

## Governance by Boko Haram

Complicating societal reconciliation and reintegration of people associated with Boko Haram is the nature of Boko Haram's rule. Unlike the cases of other militant groups, such as the Afghan Taliban or IS in Iraq, Boko Haram since 2009 has centred its rule almost solely on brutality and predation, providing few to no services to populations in areas it controls.

Boko Haram taxes numerous economic activities, from fishing to farming. It has issued death threats to farmers who refuse to pay 10 percent of their harvest to the group, and demanded similar taxes or payments in kind from herders and livestock breeders. It has also penetrated transportation and smuggling networks connecting Nigeria, Cameroon, Chad, Niger, and Burkina Faso. It charges smugglers and traders of pharmaceuticals, stolen cards, tramadol (a widely abused drug), weapons, and watered-down fuel known as *zoua-zoua*. It has provided loans to traders, such as in Cameroon's far north, expecting a percentage of their returns.<sup>15</sup> It has also recruited fishermen as logisticians.

Under the leadership of Abubakar Shekau, Boko Haram's rule turned exceedingly brutal, with widespread killings, executions, rapes, torture, burning of villages, and the forced recruitment of thousands of men and boys as soldiers, and of women and girls as slaves or brides for Boko Haram fighters. It has imposed a backward and doctrinaire version of *sharia* that has included cutting off the limbs of thieves and demanding that Christian families pay extra taxes, such as *jizya*, a protection tax for non-Muslims who have been conquered. Meanwhile, Boko Haram has provided almost no social services and public goods to populations in areas it controls.<sup>16</sup> Its rule has been essentially one of wanton destruction and plunder. Boko Haram has targeted any alternative sources of authority and rule, by either co-opting or often executing village elders, such as *bulamas* and *lawans*, or imams who condemn its rule. Killing local authorities has often been among its first acts in a newly conquered locale.<sup>17</sup> In some places, however, such as northern Cameroon, Boko Haram has also spent large sums buying the support of traditional chiefs, and bribing security forces while recruiting fighters and informants.<sup>18</sup>

Boko Haram does not allow freedom of movement of people within the areas it controls, leaving those under its occupation in a de facto state of imprisonment. Yet many other Nigerians, including IDPs, see locals who lived under Boko Haram as sympathisers of and collaborators with Boko Haram. This view persists despite the fact that running away from Boko Haram areas poses tremendous security risks. Boko Haram punishes, including by death, individuals who are merely rumoured or alleged to be contemplating escape.<sup>19</sup>

Nonetheless, in some villages, Boko Haram has actively distributed food to local people. Some women abducted by the group have reported being fed better than in their home villages, perhaps even preferring to stay with Boko Haram despite their imprisonment there. Some liberated girls have returned to Boko Haram areas, both due to better economic conditions and because they face multiple forms of societal rejection in their home communities.<sup>20</sup>

## Societal Perceptions of those Associated with Boko Haram and Distrust toward Government

Strikingly, in comparison with other countries at war with Islamist insurgents such as Afghanistan or Somalia, there is near uniform condemnation and distrust among Nigerian society toward local populations who lived under Boko Haram rule. The fact that individuals who refuse to comply with Boko Haram's orders risk severe punishment generates little sympathy among Nigerians. Many Nigerians in the northeast make little distinction between populations who had to endure Boko Haram rule and actual Boko Haram members. IDPs, for example, deeply resent and distrust those who did not run away like them, but remained and lived under the control of Boko Haram. Although many of those who stayed behind had little choice, those who left accuse them of being collaborators, "spoiled," and even thieves of property that had belonged to those who ran away.<sup>21</sup>

Thus, community members from areas where Boko Haram has operated and some journalists openly say that they do not want to accept back either Boko Haram members or those who lived under Boko Haram rule. The consistency of rejection of those associated with Boko Haram in any way and the extreme distrust of returnees appears in many surveys and focus group studies.<sup>22</sup> A typical view is that those who lived under Boko Haram rule, even if they had been abducted by the group, must have been brainwashed. Community members even frequently use derogatory words, labelling such people as "bastardised". Yet, community members have no credible way of ascertaining who was or became a Boko Haram member, how people acted during their captivity, or whether they were resisting victims or willing collaborators.

Some community members suggest that poverty makes it easy to re-radicalise people. They suggest that Boko Haram members or those who lived under Boko Haram rule should not return to their communities, but rather be sent elsewhere. But of course, other communities in Nigeria may be highly reluctant to accept them as well.<sup>23</sup> Little mercy is accorded even to children who had been abducted and forced to work for or marry Boko Haram members. Such victims face systematic and prevalent ostracism, rejection, and persecution.<sup>24</sup> One reason is Boko Haram's use of abducted women and children as suicide bombers and attackers. Since 2011, female suicide bombers were used in at least 244 of the 338 attacks in which the bomber's gender could be determined, with 80 women sent to their death in 2017 alone.<sup>25</sup> Girls and women impregnated by Boko Haram fighters continue to face systematic rejection by their communities and ostracism in IDP camps for "carrying the next generation of Boko Haram" and are perceived as spies.<sup>26</sup> In some instances, even community representatives trained by Western and Nigerian NGOs in reconciliation, early warning, and conflict prevention have declared they themselves would kill any returning Boko Haram associates, including children.<sup>27</sup> Stigma is also attached to relatives of Boko Haram or even people who provided assistance to widows or orphans of Boko Haram fighters.

Perceptions of unequal access to benefits run deep among victims and displaced communities. Community members resent the rehabilitation, reintegration, and deradicalisation programming on offer to some of those formerly associated with Boko Haram. They repeatedly raised questions such as, "Why are you rehabilitating former Boko Haram members when thousands of young men did not join the group? Those who did not join should be receiving assistance. They and we lack basic necessities and opportunities."<sup>28</sup> Interlocutors also brought up the issue of moral hazard, stressing that if former Boko Haram members get training and assistance through defectors' and rehabilitation programs, others would be conditioned to think that they can simply join Boko Haram and if they do not like their experience, easily surrender and get a job.<sup>29</sup>

Local community members, such as business and NGO representatives and journalists, however, also broadly distrust the Nigerian government. This distrust extends toward government-led efforts to provide alternatives to punishment, such as for low-risk women and children associated with Boko Haram (including those who lived under its rule), and for low-risk “repentant” male defectors under the Operation Safe Corridor program (detailed below). Although the program is meant for low-risk men and consists of mandatory deradicalisation and rehabilitation, it is widely perceived as a blanket amnesty. Because the government has kept the program shrouded in secrecy, it has few opportunities to correct such perceptions. Seen as dangerous, top-down, insincere and non-transparent, the program is deeply resented and often rejected by community members from the north-east and elsewhere. Like other leniency measures in Nigeria, critics view it as a policy of co-opting militants and dangerous individuals. They also see it as a way for the government to deflect its responsibility to protect communities and provide for their needs. It is perceived as dangerous to communities and unfair to those who resisted or were displaced.<sup>30</sup>

The prevalent problem of low trust in the government also complicates reconciliation efforts between IDPs and people who lived under Boko Haram’s rule. IDPs often want to go home, but are afraid the government will fail to protect them from further Boko Haram abuses. Yet some IDPs also believe that the government does not allow them to leave the camps, meaning they overlap with detention.<sup>31</sup>

There is widespread sentiment that the time is not right for any leniency toward and reintegration of former Boko Haram members and associates. Many articulate that the victims who ran away, IDPs, and those who resisted should be cared for first, such as by being permanently resettled and provided with reconstruction and trauma benefits, and compensation. Former Boko Haram members and people who lived under Boko Haram rule are fearful of retaliation by local communities, the CJTF, and Boko Haram, particularly if they return home.<sup>32</sup>

In interviews with the author, community members identified a fairly consistent vision of how people associated with Boko Haram *could* be brought back to their communities. First, they argue people who were displaced must return and see their lives, houses, and livelihoods rebuilt. Then, social workers and psychologists should be sent to communities to heal trauma. Following this, traditional leaders and religious ones, such as *bulamas* and imams, should be engaged to prepare the community for the arrival of those formerly associated with Boko Haram. Only later in the process should former Boko Haram members and those who lived under the group’s rule be brought back.

Despite this overwhelmingly consistent narrative of extreme rejection of those associated with Boko Haram – including victims who had no choice but to live under Boko Haram rule and in Boko Haram slavery – some 1,800 women and children, and uncounted others, have returned to their communities. They have done so via the formal rehabilitation process for low-risk associates and informally, as detailed below.

## The Challenge of the CJTF

Anti-Boko Haram militias, such as the CJTF, remain an enormous challenge in the north-east. Controlling, disarming, and dismantling the militias will affect the success and failure of any future amnesty deal, conditional or otherwise, for Boko Haram and its breakaway groups. The CJTF already has a crucial impact on the effectiveness of the existing defectors program (Operation Safe Corridor) and the rehabilitation and reintegration of people who lived under Boko Haram rule. Many locals in Boko Haram-affected areas still see the CJTF as “heroes”, “saviours,”<sup>33</sup>

and the only actors providing some protection against Boko Haram. Yet the militias have also become a source of insecurity, and the multifaceted threats they pose are likely to increase.

The CJTF estimates its numbers between 25,000 and 27,000 members.<sup>34</sup> It has now become stratified into three layers. One group of around 2,000 CJTF militiamen were trained and armed by the Nigerian military and are paid 20,000 naira per month (approximately \$56) by the government of Borno State. This group is now referred to as the Borno Youth Empowerment Programmes (BOYES). A second layer, numbering in the low thousands and called the Borno State Youth Vanguard, has been armed by the military but not trained, nor are they being paid. The remaining majority of the militias have not received arms or training from the state, nor are they being formally paid. Members of the two lower layers are growing resentful, feeling left out and ignored by the state. They seek to get on the government's payroll.<sup>35</sup>

At the same time, the Nigerian federal or state governments simply do not have enough resources – financial, training, or otherwise – to put all these militias on its payroll. Some militia units already resort to predation, extortion, and criminality, such as cattle rustling, robberies, and the selling and consuming of drugs.<sup>36</sup>

Although the Borno State attorney general nominally supervises the militias, few controls over the CJTF are in place. There is no formal leader of the entire CJTF, which is divided into geographic sectors with opaque leadership. Nominally, a village elder is supposed to approve any new CJTF member; but when one such village elder was questioned about the process, he said he had never rejected any candidate nor heard of rejections in other villages. The village elders themselves may be highly vulnerable to the CJTF's power of arms and influence, or susceptible to political and economic deals with them. In some places, CJTF members have started to gain power and influence, openly questioning the authority of traditional leaders.<sup>37</sup> Increasingly, the CJTF has taken it upon itself to enforce all kinds of social infractions, such as family code by flogging people, and to act against some forms of petty crime, such as the passing of fake bills. It has even held "trials" of violators.<sup>38</sup>

Ominously, local politicians appear interested in appropriating CJTF units for political purposes, handing out money, goods, and drugs to its members.<sup>39</sup> As the 2019 general elections for president and parliament approach, the political usefulness of the CJTF in securing votes and donations for candidates, including in IDP camps, will only grow. A worrisome precedent took place during the 2015 presidential elections, when a strategy to disarm and demobilise the militias was shelved. It has not been resurrected since.<sup>40</sup>

## 2. Overview of Current Approaches to Boko Haram

Although Nigeria's response to Boko Haram has been predominately a military one, the country is no stranger to the use of amnesties, political co-optation and financial buyoffs to attempt to reduce violence. When military repression produces incomplete results, or when political opposition mobilises against it, the Nigerian state at both the federal and sub-federal level has been quite willing to explore amnesties. Often they have been designed as very broad amnesties, accompanied by little accountability, enforcement, or restorative justice for victims. Such amnesties have failed to sustainably deliver even very narrow objectives for ending violence, let alone deeper goals such as healing, reconciliation, and the addressing of root causes.

This section details the military response, including the use of detention. It then reviews precedents and discussions of amnesty, the resulting policy framework and its legal context, and the criminal justice path. Subsequently, it analyses leniency measures, specifically, the defectors' program for low-risk repentant male combatants known as Operation Safe Corridor, and a rehabilitation program for low-risk women and children. Finally, it considers the broader accountability and victims' rights context.

### The Military Response

The counterinsurgency policy of the Nigerian military and police have themselves been sources of insecurity, dislocation, suffering, and severe and widespread human rights abuses. Particularly before 2015, much of the counterinsurgency strategy involved collective punishment of entire villages suspected of harbouring Boko Haram militants or having fallen under Boko Haram rule. In the so-called clearing operations, which often amounted to violent reprisals by the Nigerian military, villagers who did not manage to flee to the bush were randomly killed on suspicion of being Boko Haram members. Others, including women and children, were dragged off to detention *en masse*.<sup>41</sup> Cases of extrajudicial killings and torture by Nigerian military and police forces are also widespread. Between 2013 and 2014, the Nigerian forces extrajudicially executed more than 1,000 people, sometimes up to hundreds per day.<sup>42</sup> As a result of Boko Haram attacks and the Nigerian military's counterattacks and clearing operations, entire communities have been wiped out, with people being kidnapped, detained, displaced, or killed. Those who were not detained in clearing operations have often been forcibly evicted from their homes by the military, without prior notice or an opportunity to take their belongings. The burning of houses, shops, cars, and other private property in villages and towns has been common, particularly before 2015. Many areas formerly controlled by Boko Haram remain decimated, emptied of residents. Land is often taken over by other actors, which prevents the return of the displaced or any reinsertion of people associated with Boko Haram. In cities, most government operations have involved the aggressive cordoning off and searching of houses, with young men frequently shot by the military during such operations.<sup>43</sup> Even those merely hanging around suspected Boko Haram members could be summarily killed by the Nigerian military or detained.<sup>44</sup>

Since 2015, however, the level of the brutality from the Nigerian military seems to have decreased. This is for several reasons. One is the exposure of the violations by international human rights groups and local civil society NGOs. Another is that as territory has been retaken and clearing operations have decreased, the military has had fewer opportunities to commit violations.

The Nigerian military and police have come to rely on CJTF for intelligence, including as the basis for detention, even though this information carries enormous risks of arbitrariness, social cleansing, and economic self-interest. CJTF tip-offs are often motivated by a desire for further financial payments or revenge for previous perceived grievances against personal local rivals. CJTF denouncements of Boko Haram associates can also be motivated by a desire to take over the businesses or properties of the individuals being denounced. Yet, unverified CJTF claims are often the dominant, if not the sole, basis for raids and arrests.<sup>45</sup>

Although signal intelligence from equipment provided by international military partners now also supplements information flows, acquisition of credible local human intelligence continues to be constrained by the fact that Nigeria does not permit the establishment of non-federal (local or state-level) military or police forces. However, while problematic, reprehensible, and in need of urgent revision, this process of tipoffs and signal intelligence does result in the military conducting fewer wide sweeps and kicking down of doors to apprehend Boko Haram as compared to before 2015. Indeed, many community members in Maiduguri contend that the Nigerian military was far more brutal before 2015 when “it didn’t have good intelligence.”<sup>46</sup> CJTF units are also allegedly very active in IDP camps, the access to which is tightly controlled by the Nigerian military. The military reportedly employs CJTF units as spies to identify Boko Haram associates within the IDP camps.<sup>47</sup>

The CJTF also conducts operations independently, setting up checkpoints, patrolling streets, checking suspicious cars, and interrogating people.<sup>48</sup> As with arrests by formal Nigerian security forces, such interrogations may involve duress, torture, and human rights abuses. Those who do not satisfy CJTF questioning are then handed over to either the military or the police.<sup>49</sup> The CJTF keep no record of who they detain and hand over, or of the reasons why. Allegations of rape by the CJTF have emerged. And CJTF units themselves have killed people – during clearing operations, arrests, or fighting with Boko Haram – once again without any disclosure, reporting, or investigation into such deaths.<sup>50</sup> Yet, because of the lack of accountability of the CJTF and its close relations with the military and the police, many locals are afraid to report CJTF abuses and crimes to authorities. They fear they would be subsequently arrested on the basis of being Boko Haram members or detained and mistreated by the CJTF, who would receive information from the government authorities.<sup>51</sup>

## Detention Practices

Those who survive but are rounded up in clearance operations most often find themselves in detention. There, they languish for months and often years, sometimes being interrogated, including under severe duress. In other cases, they are simply incarcerated without any evidence of a crime or prospect of a trial. According to Amnesty International, between 2009 and 2015, Nigerian military forces have arbitrarily arrested at least 20,000 people, including children as young as nine.<sup>52</sup> Torture and extrajudicial killings of detainees have been widely documented.

In retaliation for a Boko Haram attack on the Giwa Barracks in Maiduguri - one of the largest detention centres - during which Boko Haram managed to liberate some detainees, the Nigerian military, in March, 2014, executed some 640 boys and men, most of them recaptured detainees.<sup>53</sup> No formal and centralised records appear to have been kept as to who has been arrested, detained or killed in detention.

Conditions in detention are poor, plagued by cell overcrowding, inadequate sanitary conditions, a lack of food and water supplies (sometimes reflecting a policy of deliberate starvation), and acts of pervasive torture, including beatings, shootings, nail and teeth extractions, rape and sexual violence.<sup>54</sup> Although the Nigerian military restricts access to detention centres, some of



which are alleged to be at secret locations, some details of conditions on the inside have come to light. Former detainees have reported to human rights groups that many detainees have died as a result of starvation, dehydration, torture, lack of medical care, and execution.<sup>55</sup> Between 2011 and 2015, Amnesty International documented the deaths of more than 7,000 men and boys in detention – their deaths were almost never officially recorded or investigated. In June 2013 alone, more than 1,400 corpses were delivered from Giwa Barracks to one of Maiduguri's mortuaries.<sup>56</sup> Many detainees are not informed of reasons for their detention, nor allowed access to lawyers, family, or the outside world.

No separate detention facility exists for children accused of Boko Haram association or who lived under Boko Haram rule in Nigeria. As a result, boys are locked up in the same detention facilities as adult Boko Haram combatants and other men associated with or alleged to be associated with Boko Haram. Girls are kept in women's sections of detention camps. The Nigerian military has long resisted engaging with UNICEF on the issue of minors associated with Boko Haram. The military has refused UNICEF requests that it comply with international treaties and obligations by handing over minors to UNICEF within 72 hours of encounter. Instead, the position of the military has been that this handover period is insufficient due to logistical challenges and inadequate time to screen, profile, and interrogate the minors. The military wants the period to be six months, and argues that approval from the Nigerian president for such transfers is legally necessary.<sup>57</sup> Although those children judged low risk are eventually supposed to be sent to the Bulunkutu Centre in Maiduguri, a rehabilitation facility for low-risk women and children, adequately addressing the needs of children has been particularly challenging as they are often highly stigmatised by local communities and perceived with great suspicion by the military.

Since 2015, Nigerian forces have continued to detain local populations *en masse* in new areas retaken from Boko Haram. However, as retaken areas are increasingly in more distant rural spaces, such operations are less visible. Moreover, other counterinsurgency policies undermine human security. In the community of Bazza, for example, the Nigerian military confiscated all weapons, including kitchen knives, to disarm Boko Haram. As a result, locals could not go about their daily essential-survival tasks, such as slaughtering animals, cooking, or farming. In various parts of north-eastern Nigeria, the military has prohibited planting tall crops to deny Boko Haram hiding opportunities. But in doing so, the military severely compounded food insecurity and famine. Curfews have similarly hampered access to food and subsistence related economic activities.<sup>58</sup>

## The Elusiveness of a Negotiated Deal

In the context of a brutal and often struggling counterinsurgency campaign, both the administrations of Goodluck Jonathan and Muhammadu Buhari repeatedly sought to negotiate a peace deal with Boko Haram, publicly offering unspecified amnesty as an incentive. The Jonathan administration in particular invested significant political capital in negotiations. Nevertheless, the approach to the negotiations has been *ad hoc*, reactive, frequently secretive, and highly controversial. And it has produced no tangible outcomes, despite repeated efforts.

During each of the at least five negotiating attempts during the Jonathan administration, Boko Haram immediately or eventually rejected the negotiations. It often responded to offers of amnesty and negotiations with mass attacks, slaughtering many. The group has repeatedly stated it rejects the Nigerian constitution and government, and that it would not stop fighting until an Islamic emirate was established in Nigeria.<sup>59</sup> It has also maintained that it does not need an amnesty, as it has done no wrong.<sup>60</sup> Rather the group maintains that it is the Nigerian government that should be pleading for amnesty and be held accountable for its crimes.

Complicating negotiations is a lack of clarity as to who leads Boko Haram. There have been repeated announcements that Shekau has been killed, only to be followed by undated videos of his declarations. Still, negotiations could be attempted with various sub-commanders, and perhaps some factional leaders could be incentivised to defect. A participant on several of the negotiation teams, and herself a frequent interlocutor with Boko Haram, maintains that the government of Nigeria gravely errs in prematurely announcing a deal, without its seriousness being ascertained or details worked out, and before either side has a chance to prepare its side to negotiate the deal.<sup>61</sup> She also alleges that many members of the presidential negotiating teams have been interested mostly in the political and economic advantages accrued from being on such teams, rather than in striking a deal.<sup>62</sup>

In fact, the limited deals that have had any degree of success so far have been purely transactional arrangements. Although the government of Nigeria and other involved mediators, such as the International Committee of the Red Cross, have repeatedly denied it, there is a widespread belief in Nigeria that hostage release negotiations – including for the Chibok girls – have been facilitated by substantial financial payments to Boko Haram.<sup>63</sup> Boko Haram commanders themselves have tried to deny that their hostage-taking strategy is linked to a desire for ransom. One factional leader even insisted that the release of French hostages in 2013 constituted “a good-faith gesture in the interest of the amnesty process.”<sup>64</sup> However, such statements are not really believed in Nigeria – a country where kidnapping for ransom by many criminal and militant groups is prevalent and where prior amnesties and peace deals have been based around financial payments to leaders of militant and criminal groups. Moreover, such statements add confusion as to Boko Haram’s views on negotiation, given other commanders’ rejection of any amnesty.

### Buying Peace? The Niger Delta MEND Deal and Other Amnesties in Nigeria

“Money for peace”<sup>65</sup> is the nickname given to the 2009 amnesty deal with two insurgencies in Nigeria’s Niger Delta. Understanding its details and problematic outcomes is crucial since it profoundly shapes Nigerians’ views toward amnesty for Boko Haram.

Rich in oil, the Niger Delta has experienced multiple insurrections and insurgencies since Nigeria’s independence, as local minorities sought political empowerment and greater access to and more equitable distribution of the region’s resource wealth. Oil companies such as Mobil, Shell, and Chevron were accused of making vast profits, while contributing minimally to the region’s socio-economic development and poverty alleviation, also causing vast environmental degradation.<sup>66</sup> Powerful local politicians and federal elites in Abuja usurped revenues.<sup>67</sup> In the 1990s, two militant groups emerged – the Niger Delta Volunteer Force (NDVF), led by Asari Dokubo and The Movement for the Emancipation of the Niger Delta (MEND), led by Henry Okah. These groups repeatedly attacked oil facilities, kidnapped hostages, and bunkered oil.<sup>68</sup>

Referring to Section 175 of Nigeria’s 1999 constitution, the government of Umaru Musa Yar’Adua declared an amnesty and unconditional pardon for the Delta militants in June 2009, following a debate over whether the Nigerian military should merely crush the militancy. This marked the first time since the Biafra Civil War that the government was willing to contemplate and adopt a non-repressive solution at a systematic level (i.e., going beyond mere individual buyoffs and co-option). As such, it was hailed as a major breakthrough in the political development of Nigeria’s post-military dictatorship.<sup>69</sup>

Effective for a period of 60 days between June and October 2009, the Delta pardon demanded that militants surrender weapons and ammunition and publicly denounce violence. In exchange, they received extensive cash payments and a range of economic and educational benefits. Top leaders, including Dokubo and Okah, particularly benefited from the deal, enabling them to attain PhDs from prestigious Western schools. Former MEND leaders amassed vast riches, became multimillionaires, and joined the region's political elite, holding top offices.<sup>70</sup> They also strongly supported the 2015 re-election campaign of President Jonathan. His campaign was widely criticised for utilising the muscle of former MEND combatants and criminal groups to deliver contributions and votes for Jonathan.<sup>71</sup>

At first, the amnesty deal was described in glowing terms both in Nigeria and internationally. Militant attacks decreased significantly between 2009 and 2012.<sup>72</sup> Oil production previously suppressed by the militants also rose from 700,000 barrels per day to between 2.4 million and 2.6 million per day.<sup>73</sup>

Yet within a few years, public perceptions of the deal soured. Wide suspicions arose that the militants did not surrender many of their weapons<sup>74</sup> and used their remaining armed capacity to dominate local criminal rackets and undertake violent mobilisation for the benefit of Delta politicians. A significant rise in piracy in the Gulf of Guinea, the theft of oil and the kidnapping of sailors from ships was also linked to the former militants. From 2013 on, oil bunkering and pipeline attacks again increased, with about 20 percent of oil production stolen.<sup>75</sup>

Moreover, the amnesty deal did not produce any significant socio-economic improvements in the lives of the Delta inhabitants who were not militants, but on whose behalf the militants had claimed to act. The presidential amnesty committee had recommended a range of socio-economic interventions for the region beyond the militants. Yet the Niger Delta Development Commission, the agency formed to deliver the benefits, was accused by many human rights advocates and legal experts of being a platform for corruption;<sup>76</sup> the Commission had a budget of \$450 million in 2012 alone.<sup>77</sup> Over time, the amnesty committee's wide-ranging recommendations were shrunk to mere buy-offs to the militants.<sup>78</sup> Beyond failing to benefit local populations in the Delta, the narrow implementation of the deal failed to address the root causes of the conflict.<sup>79</sup> Critics pointed out that the minimum civil service wage was less than what former low-level militants were receiving, resulting in moral hazard and communicating the idea that it was better to be a militant than a law-abiding civil servant.<sup>80</sup>

In addition to being too militant-centred and neglecting the rights of victims, the amnesty deal has been criticised for lacking accountability in its drafting and implementation.<sup>81</sup> Legal experts have pointed out that, while consistent with the Nigerian constitution, the amnesty was illegal under international law in that it failed to investigate and prosecute gross human rights violations, undermined rule of law, and violated the norms of justice, truth, judicial protection, reparations, access to court, and other rights of victims.<sup>82</sup>

Moreover, not just criminality – but also formalised militancy – continues to plague the region. Groups and leaders who did not benefit from the financial payoffs have continued to attack oil installations and other targets. New groups, such as the Delta Avengers, have emerged. Tens of small militant groups are now believed to operate in the Niger Delta. The increase in militant activity picked up particularly after 2015, when the Nigerian government of the Muslim northerner Buhari discontinued the payments. The government argued that the 2009 amnesty specified payments only for five years, and that term had expired. The former and not-so-former militants alleged ethnic and religious discrimination. Yet the perception among Nigeria's human rights groups was that the amnesty deal failed. Thus, when the Buhari government subsequently contemplated restoring the financial payments to quell unrest, human rights activists in Abuja opposed it.<sup>83</sup>

## Discussions of Amnesty for Boko Haram

Proposals of amnesty for Boko Haram have been made to produce two effects: to incentivise negotiations with the group's leadership, and to induce defections among lower-ranking members. The main proponents of amnesty for Boko Haram have included some northern politicians, religious leaders, and youth groups, who are sceptical of the possibility of a full military defeat of Boko Haram. These proponents, who sometimes refer to the Delta amnesty as a precedent, include: Kashim Shettima, governor of Borno State, Alhaj iSa'ad Abubakar; the Sultan of Sokoto and spiritual leader of the Muslim community in Nigeria; and the Arewa Consultative Forum.<sup>84</sup> In 2013, for instance, the Sultan of Sokoto called for a "total and unconditional" amnesty for the group, and argued that a presidential offer of amnesty to just one member of Boko Haram could encourage defections.<sup>85</sup> Others have suggested that an amnesty would be morally appropriate for low-ranking individuals who only committed minor crimes.<sup>86</sup> Similarly, the Coalition for Women Advancement in Africa has argued those who joined Boko Haram involuntarily should be amnestied. Other Nigerian policymakers have supported amnesty, claiming that "prosecutions (including for alleged war crimes committed by the military) could be a waste of resources and that politically-charged trials could further destabilise the fragile democratic state."<sup>87</sup>

On the other side of the debate, human rights' and victims' groups have argued that broad amnesties and deals based on financial co-optation will not bring peace, but rather encourage moral hazard and impunity.<sup>88</sup> For example, an anti-corruption NGO decried calls for amnesty as self-serving for northern politicians who have ties to Boko Haram, including those who have financed the group. They fear that these politicians will seek to exploit any amnesty as a way to appropriate the group's members for their own political muscle, and any financial transfers for their pockets.<sup>89</sup> Human rights advocates maintain that amnesties that include financial payoffs and lack accountability measures may: "foster resentments, making receiving communities more reluctant to reintegrate ex-combatants, and [that] they may also threaten post-conflict stability."<sup>90</sup> As the political analyst Atta Barkindo put it: "there are fears that a social principle is being established in Nigeria, [whereby] victims of violence are neglected while perpetrators are rewarded, like the declaration of 'amnesty for kidnapper'."<sup>91</sup> These sentiments appear to be shared by broader Nigerian society. An online poll conducted in 2013 by the Nigerian news site, *Premium Times*, showed that 70 percent of Nigerians rejected an amnesty, with 40% calling for the prosecution of Boko Haram members for their crimes, and 20% arguing the government should put money intended for amnesty toward compensating victims instead.<sup>92</sup> Many Christian groups also expressed doubts and rejections of an amnesty as ignoring victims' rights and needs, and encouraging impunity.<sup>93</sup> Some even called it "an act of wickedness."<sup>94</sup> The abduction of the Chibok girls also hardened some opposition to amnesty.<sup>95</sup> Some northern politicians, Islamic leaders, and community members have also opposed amnesty proposals, seeing such proposals as tantamount to the federal government reneging on its responsibility to protect Muslims in the north.<sup>96</sup>

President Jonathan established a presidential committee in April 2013 to explore the idea of an amnesty, named "The Committee on Dialogue and Peaceful Resolution of Security Challenges in the North." The committee was established in an *ad hoc* manner, after rounds of scattered and failing attempts at negotiations and in the context of Boko Haram's expanding power.<sup>97</sup> The 26-member committee, which comprised political and military leaders, scholars and lawyers, assessed whether and how an amnesty process could induce the disarmament of Boko Haram's members.<sup>98</sup> The committee was given a three-month mandate to "constructively engage key members of Boko Haram and define a comprehensive and workable framework for resolving the crisis of insecurity in the country."<sup>99</sup> Beyond developing a framework for amnesty and disarmament, it was tasked with coming up with a victims' support program, and mechanisms

to address the root causes of the insurgency.<sup>100</sup> In practice, the mandate was interpreted as giving the committee three months to persuade Boko Haram to lay down arms in exchange for a state pardon and social reintegration.<sup>101</sup> Yet, many were sceptical about the timeframe.<sup>102</sup>

Within days of the committee's establishment, Boko Haram's leadership rejected the amnesty concept and burned down 13 villages, killing 53 people. It later conducted other large-scale attacks.<sup>103</sup> Yet in July 2013, the Committee chair announced that Boko Haram had agreed to a ceasefire. Boko Haram immediately denied this, with Shekau stating in a video: "We will not enter into any agreement with non-believers or the Nigerian government."<sup>104</sup> Once again, the Nigerian government looked weak, with its amnesty and negotiation attempts discredited.

Failing to succeed in brokering either a deal or sustained negotiations with Boko Haram, the committee ultimately submitted the following recommendations: continuing talks with Boko Haram through an advisory committee; creating a victims' fund;<sup>105</sup> granting amnesty to members of Boko Haram and Ansaru who renounce violence and agree to disarm and reintegrate; granting amnesty to those for whom evidence of crimes is lacking; and rehabilitating the CJTF and other vigilante groups to prevent their transformation into new security threats.<sup>106</sup>

## The Resulting Policy Framework

Perhaps the most significant tangible outcome of the 2013 Boko Haram amnesty debate was the establishment of an office of deradicalisation, rehabilitation, and reintegration for individual defectors, located within the office of the National Security Advisor (NSA). Headed by the widely respected Dr. Fatima Akilu, the office set out to design a comprehensive "counter-radicalisation and deradicalisation program."<sup>107</sup> This program, called the National Security Corridor, aimed to counter Boko Haram's mobilisation and recruitment, and facilitate defections. It employed many aspects of traditional disarmament, demobilisation, and reintegration (DDR) processes. A program to reintegrate IDPs under the President's Initiative for the North East (PINE) complemented this effort. Overall, these programs had three objectives: to halt Boko Haram recruitment, which in 2012 had reached large-scale proportions; to establish deradicalisation programs throughout Nigerian prisons, with a pilot project in the Kojie prison; and to "thin the ranks of Boko Haram through a defectors program."<sup>108</sup>

The National Security Program envisioned three categories of defectors: low-risk defectors would go to one camp, while medium-risk to another. High-risk defectors would be subject to court trials, but promised some yet-to-be-determined leniency for handing themselves in. Those captured in active combat would, unlike defectors, not be eligible for leniency, and would face regular trials and imprisonment. The National Security Program did not define exit criteria from the defectors' facilities, nor set a time limit on a defector's stay. Instead, "the defectors would have to be assessed [as] very low-risk for a very long time before they could be let go."<sup>109</sup> Weighing up the program's responsibilities to protect society, facilitate social healing and reconciliation, and protect the human rights of those who gave themselves up, emphasis was given to protecting society. This held true even for "defectors" who had not fought as members of Boko Haram, but had merely lived under Boko Haram.

After initially putting the effort on ice, the Buhari administration in August 2017 adopted the Policy Framework and National Action Plan for Preventing and Countering Violent Extremism (Policy Framework),<sup>110</sup> and restarted the defectors program under the name Operation Safe Corridor (OSC). It did away with the medium-risk category, sorting individuals only as high- and low-risk. The Policy Framework provides overarching policy guidelines for the defectors program, as well as the Nigerian Prison De-radicalisation Programme. The document specifies that combatants captured in battle should be treated in accordance with the law – that is,

promptly prosecuted, with the Ministry of Justice in the lead. However, it also emphasises the need to “desig[n] and implemen[t] transitional justice programmes for reconciling victims and repentant perpetrators.” Yet this document has no statutory power. As is often the case in Nigeria, it is aspirational, rather than binding. Implementation remains a significant challenge, often with significant lags between formal policy rollouts and changes on the ground. A key challenge is the lack of coordination among Nigeria’s many security agencies and across federal-state-local levels, despite the declared recognition of the need for such coordination. In practice, this means that various agencies often work in secrecy and do not share information or work cross-purposes, sometimes deliberately.

## The Legal Context

Nigeria’s domestic counterterrorism framework centres on the 2011 Terrorism Prevention Act,<sup>111</sup> the 2013 Terrorism Prevention (Amendment) Act,<sup>112</sup> and the 2004 Economic and Financial Crimes Commission (Establishment) Act.<sup>113</sup> Under the 2011 Act, any person who commits, attempts to, threatens to, or assists in an act of terrorism commits a terrorist offence and is subject to a maximum penalty of life imprisonment. Any death resulting from terrorism triggers a mandatory life imprisonment. The expansive definition of terrorism and of material and non-violent support have been criticised by Nigerian legal experts.<sup>114</sup> Crucially, mere membership in a terrorist group is criminalised, regardless of specific offences. Along with the problematic ways in which “membership” is determined in practice, such as on the basis of CJTF allegations or of having paid taxes to Boko Haram while living under the group’s control, this expansive criminalisation of terrorism significantly complicates how the state deals with defectors. Potentially, all who lived under Boko Haram rule could be found criminally liable in some way.

So far, no laws have been created in Nigeria for the defectors program to rectify this legal disjunction. Nor has an amnesty law been passed. Moreover, while it is generally accepted by lawyers in Nigeria that the president can pardon individuals convicted of crimes, some lawyers question whether he can provide amnesty to someone prior to court conviction.<sup>115</sup> Nigerian courts have not annulled the 2009 Delta amnesty, but some Nigerian lawyers suggest that is only because the courts never explored it. If a court were to find that the president cannot declare amnesties prior to trials, that would significantly complicate the existing defectors program and potential amnesty-based peace negotiations.

At the same time, a set of international legal instruments exist pertaining to the response to Boko Haram members and the group as a whole. In November 2013, the US Department of State designated Boko Haram as a Foreign Terrorist Organization and a Specially Designated Global Terrorist, despite intense lobbying of the Nigerian government to the contrary. Subsequently, the US Department of Treasury also listed various Boko Haram leaders under Executive Order 13224 targeting terrorist leaders and those providing support to them. In May 2014, after Shekau proclaimed allegiance to Al-Qaida (before switching to the Islamic State), the United Nations Security Council followed suit. The Council’s Al-Qaida Sanctions Committee added Boko Haram to its sanctions list, as per Resolution 2083.<sup>116</sup> That decision subjects the group to a travel ban, asset freeze, and arms embargo, and makes any individual or entity who provides material support to Boko Haram eligible to be added to the sanctions list. Subsequently, the European Union imposed its own sanctions. At the end of March 2017, the U.N. Security Council also adopted Resolution 2349,<sup>117</sup> urging the Lake Chad Basin governments to promote defections from Boko Haram and deradicalise and reintegrate defectors, but to ensure no impunity for those responsible for terrorist attacks. That Resolution is consistent

with arguments of human rights and victims' groups and among others in Nigeria who oppose a broad, MEND-like amnesty for Boko Haram.

The broader lack of accountability in Nigeria's conflict with Boko Haram remains a major problem. Nigeria's 1999 constitution recognises a wide range of human and political rights, and the country has ratified an extensive range of global and regional human rights treaties. However, as Nigeria takes a dualist approach to international law, several key international treaty obligations have not yet been translated into domestic law, and as such, not implementable by Nigerian courts.

The International Criminal Court (ICC) – the Rome Statute of which Nigeria is a state party to – opened in 2010 a preliminary investigation into possible war crimes and crimes against humanity perpetrated by Boko Haram and the Nigerian military. This investigation may become a powerful mechanism for holding Nigerian military officers accountable for gross human rights violations. In December 2017, the ICC's investigation produced preliminary findings which could lead to the prosecution of some military officials.<sup>118</sup> In the absence of such prosecutions by the Nigerian government, the ICC may offer the only way to start chipping away at Nigeria's culture of impunity. However, its investigation into Boko Haram's egregious atrocities could also significantly complicate any broad amnesty and amnesty-based negotiations with Boko Haram that do not result in the prosecution of – and at least some form of punishment for – the most egregious violators, such as top leaders.

### Screening for Criminal Justice Path or Leniency Measures

In the absence of a group-level amnesty and peace deal, two policy tracks now exist for those associated with Boko Haram: a criminal justice path for high-risk individuals who are detained and will eventually be sent to trial, and a leniency path that has two components: the first is a deradicalisation and reintegration program, called Operation Safe Corridor, for “low-risk repentant male defectors.” Although this program is intended for male *combatants*, it does not *in practice* clearly distinguish among fighters and those who lived under Boko Haram rule. The second is a rehabilitation program in Maiduguri for low-risk women and children, that does not *in practice* distinguish between defectors and detainees. Although these leniency programs are not true individual-level amnesties, as they do not provide legal, explicit, and enforced guarantees against future prosecution, the Nigerian government, press, and public often call them “amnesty.”<sup>119</sup>

The screening and interrogation of those arrested in clearing operations is conducted by police, military officials, or the CJTF, often under duress. The vetting of male defectors for admission into Operation Safe Corridor is conducted by a joint presidential investigation commission headed by Nigeria's Defence Intelligence Agency, that includes other agencies and non-governmental representatives. The process remains opaque, with no independent oversight, records, nor public specification of the screening criteria. As a Western consultant involved with the defectors program put it, “The most difficult thing to understand is how the military sorts who is kept in detention, who gets sent to trial, and who is sent to Gombe [where Operation Safe Corridor programming takes place].”<sup>120</sup> International donors and organisations are engaging with the Nigerian government to improve the vetting process, increase predictability, consistency and speed of assessment, and to ensure adherence to human rights.<sup>121</sup>

In an interview with a member of the investigation and screening team, the following criteria were listed for categorising people: reasons for joining Boko Haram; having a stable family; having radical beliefs; the area from which the person came; and the activities performed for Boko Haram (such as being married to a Boko Haram fighter, farming, being a guard,

fundraising or proselytising, or being a fighter). It is not clear how the answers are aggregated and produce “three categories of people: those who were engaged deeply with Boko Haram”; “those who were peripheral” and “those who were not involved at all.”<sup>122</sup> The “peripheral” group is defined as individuals who did not voluntarily join Boko Haram, but were coerced to perform some activity for the group: “They did not participate in the killings, but did work for [Boko Haram]. For example, a woman who was forced to marry a Boko Haram fighter, but also ended up doing activity for Boko Haram.”<sup>123</sup> Nor it is clear how these categories translate into the official two categories of high-risk and low-risk. Presumably, those who were not involved at all would be classified as low-risk. Even so, the interviewee explained that such a person would not simply be released, because if “they were under Boko Haram for a long time, they could be a risk. So they need to go to rehabilitation, either in the Gombe centre [for men] or in Maiduguri [for women and children].”<sup>124</sup>

This interviewee, like some other Nigerian officials, also lamented that the Operation Safe Corridor leniency option is only open to men who defect: “We are told over and over during the interrogations that some detainees did not have an opportunity to surrender, because they could never manage to run away from Boko Haram and they lived in Boko Haram slavery. They should be eligible for Operation Safe Corridor. But right now, that program is only for ‘defectors.’”<sup>125</sup> Paradoxically, a strict adherence to the concept of a “low-risk male fighter defector” would mean that men who merely lived under Boko Haram rule without being fighters – for example, only paid taxes to Boko Haram under duress, or who did not have a chance to defect – would not be eligible for leniency. These individuals are either sent to trial, or informally released. Because of the lack of clarity and consistency in screening processes, a potential defector has no way of predicting whether he will be judged low- or high-risk. Thus, he must risk his life twice to defect, to escape Boko Haram and risk their retaliation and from the Nigerian military and courts if he is classified as high-risk.

Paradoxically, there is no facility and program for female Boko Haram *defectors*, though there are hopes for one in the future. Instead, low-risk women and children who were detained get released from detention either into the Bulunkutu rehabilitation centre in Maiduguri or are eventually let go without any formal rehabilitation process. But interviews conducted with women who went through the rehabilitation centre found at least one instance of a woman escaping from Boko Haram with her daughter and running for protection to the Nigerian military – which in the case of men, would be defined as “defecting.” She was arrested, spent 13 months in detention in Giwa Barracks, and then handed to Bulunkutu rehabilitation facility.<sup>126</sup>

## Criminal Justice Path: Trials and Prisons

Those who lived under Boko Haram rule or were allegedly associated with the group, but who do not qualify for leniency paths, are often rounded up *en masse* and thrown into detention facilities or prisons for years. A key challenge is that there is no prosecutable evidence for many detainees, as witnesses are often killed, confessions obtained through torture, and allegations based on CJTF denunciations. Even in cases in which evidence is lacking, Nigerian authorities believe detainees are dangerous and should not be released.<sup>127</sup> The weakness, dysfunctionality, and corruption of Nigeria’s judicial system compounds the problems,<sup>128</sup> with some bribing their way out of the detention centres, prisons, and police facilities. As a Western consultant for Nigeria’s police and correction systems put it: “Those who cannot bribe, they die in detention or are stuck in prison, subject to radicalising effects there or radicalising others.”<sup>129</sup>

Trials of Boko Haram members have been prolonged and shrouded in secrecy. Between December 2010 and 2015, only 24 Boko-Haram-related cases were concluded, involving less than 110



people. The results of the trials were not publicly announced. In October 2017, the Nigerian government announced mass trials of some 2,540 Boko Haram suspects. The first to be tried were 1,669 suspects held at Wawa Barracks in the city of Kainji in Niger State. The government assigned high-level civilian judges to the facility, while the Legal Aid Council provided defence attorneys.<sup>130</sup> In some cases, the Department of State Security appears to have brought the charges, instead of the Office of the Attorney General. This is because of widespread fear that if many detainees were to have even moderately competent lawyers, they would be released since the military likely mistreated them during detention and did not gather admissible and adequate evidence.<sup>131</sup>

In their preliminary findings in judicial preparations for trials, the judges noted several problems, including: the prevalence of poorly investigated case files; overreliance on confession-based evidence; lack of forensic evidence; absence of cooperation between investigators and prosecutors; scarcity of trained forensic personnel; inadequate security for lawyers; and difficulties in converting military intelligence into admissible evidence.<sup>132</sup> Indeed, some 220 Wawa detainees were to be released due to lack of evidence for any successful prosecution.<sup>133</sup> However, before their release, the court stated that they must undertake a deradicalisation program. Although there are plans for such deradicalisation and rehabilitation facilities for detainees, they do not yet exist. The Gombe centre, detailed below, is solely meant for low-risk defectors, not for Boko Haram detainees who did not voluntarily surrender. It is not clear what has happened to those the court ordered to be released.

The preparatory judicial processes for trials established three other categories of detainees: 1) suspects whose case files were recommended for further investigation, or who had no investigation conducted on them at all and hence no opinion by the judges could be formed; 2) those who may have been willing to plead guilty to lesser offenses; and 3) those deserving a full trial.

Since October 2017, the trials have been held in secret. Forty-five Boko Haram suspects were reportedly convicted of criminal offenses in the same month and sentenced to between three and 31 years imprisonment, but without disclosure of their offenses.<sup>134</sup> After the initial 1,669 suspects, the Nigerian government announced that another 5,000 would be tried in judicial proceedings that are expected to continue over years.<sup>135</sup> Trials were to begin in Maiduguri in February 2018, but their details remain unclear.

Nigeria's prison system is not equipped to hold the current numbers of detainees, nor dangerous high-risk militants harbouring extremist ideologies. As a result, the system continues to keep people who should be treated as civilians in military detention facilities. Even without Boko Haram detainees, in 2014, Nigeria had a prison population 56,785, with 38,743 awaiting trials, sometimes for ten or 15 years.<sup>136</sup> Nigerian criminologists and law enforcement experts have long pointed to prisons as places that foster crime.<sup>137</sup> This is due to very poor conditions, which include a lack of food and medical care, widespread human rights abuses, inadequate security, and the absence of rehabilitation opportunities.<sup>138</sup> Many also believe that mixing Boko Haram detainees with the general prison population risks turning prisons into recruiting grounds for terrorism.<sup>139</sup> The fact that Boko Haram has in the past successfully attacked prisons, liberating their fellow fighters, reinforces beliefs that prisons do not have adequate security to hold Boko Haram members and associates.<sup>140</sup>

Both the Jonathan and Buhari administrations have envisioned providing deradicalisation and rehabilitation programs in prison. Between October 2014 and April 2016, a pilot program supported by the European Union Technical Assistance for Nigeria provided deradicalisation programming to 45 low-level male Boko Haram detainees and defectors in Kuje prison. Only one of these detainees had been previously tried and convicted. Some detainees had been

accused of raising funds or recruiting for Boko Haram; others had been accused of providing accommodation to Boko Haram, or operating as communications or logistical experts.<sup>141</sup>

The Office of the National Security Advisor defined the goals of the program as not only changing the behaviour of beneficiaries, but also their beliefs, including the renunciation of violence and rejection of extremist ideologies.<sup>142</sup> A housing block separate from the general prison population was created within the Kuje prison for detainees undergoing deradicalisation. It was equipped with a mosque, teaching rooms, and sports facilities. Programming included: religious re-education by imams; education in English, Arabic, and literacy; vocational training, such as basic electrical work, carpentry, and bead-making; art therapy, and psycho-social therapy. Early results under the Jonathan administration seemed positive, and the administration of Buhari, in office since 2015, embraced the same model in principle.<sup>143</sup>

Addressing the needs of detained children has been vexing, in light of the variety of roles that many have performed for Boko Haram.<sup>144</sup> While some may have committed serious offenses, they cannot (and should not) be sent to normal courts and tried there. However, family courts that would normally be handling issues of children do not have jurisdiction over terrorism issues.<sup>145</sup> The Nigerian government is still in the process of deciding on the appropriate legal procedures to be devised for them. Moreover, in Borno State, as the state legislature is yet to pass it, the Child Rights Act is not in operation.

## Leniency Path: Defectors Program and Rehabilitation for Low-Risk Women and Children

### Operation Safe Corridor: Low-Risk “Repentant” Male “Fighters” Who Defect

Much secrecy surrounds Operation Safe Corridor for low-risk “repentant” male defectors in the state of Gombe. This secrecy stimulates fears, resentments, and rejection of the program within local communities. Ninety-six male defectors have been at the Gombe camp for many months, with Nigerian officials at various times announcing their graduation, before pulling back. The pull-back is usually owed to the defectors’ home communities and IDP camps not being ready to receive them and/or threatening to kill them. Alternatively, the reason may be due to their home communities being wiped out by the fighting.<sup>146</sup> Nigerian authorities have privately stated that another 240 defectors could be admitted to the Gombe facility, which has a 500-person capacity.<sup>147</sup> In April 2016, the Nigerian military also announced that 800 Boko Haram militants had surrendered, shown remorse, and would subsequently be rehabilitated and reintegrated into society.<sup>148</sup> It is not clear what happened to them, or how many of them were deemed low-risk.

Operation Safe Corridor has been advertised on the radio, as part of a promotional effort judged by at least some defectors to be useful. As one defector said: “There are many people abducted from their home towns who don’t know the way back to their places of origin. They [Boko Haram leaders] preach to such people not to leave, as if it was divine for them to be there.”<sup>149</sup> Boko Haram leaders, for their part, have apparently sought to undermine the defector’s program by saying: “the promise of amnesty for any escapee was a ruse.”<sup>150</sup> Thus achieving credibility for the program is crucial in its efforts to induce defections and prevail against Boko Haram’s counter-messaging.

The beneficiaries of the program are screened and profiled upon arrival, with detailed information about them and their families recorded in databases. In theory, they are allowed controlled visits from their relatives during their stay. However, implementing partners believe there is a need to improve databases, and to better integrate families into the rehabilitation process.<sup>151</sup>

During their stay, defectors are supposed to receive vocational training, basic education, psycho-social therapy, and religious re-education. Depending on the interests of the defector, the vocational training opportunities may include carpentry, farming, plumbing, shoe-making, and perhaps other skills. Sports and recreation facilities are also supposed to be provided. In practice, however, most of the programming seems to be heavily skewed toward religious re-education, which seems easiest for Nigerian authorities to implement. Discussions are now under way to strengthen other aspects of the programming.<sup>152</sup>

The maximum stay at the facility is supposed to be twelve weeks.<sup>153</sup> Some Nigerian military officials privately express disquiet about this, arguing that no one can be deradicalised in such a short stay, instead preferring an open-ended design.<sup>154</sup> The lack of clarity about exit policies compounds the risk that deradicalisation and rehabilitation centres will overlap with detention. Unlike in the case of the Niger Delta collective amnesty, Boko Haram defectors do not, under this program, receive extensive and long-lasting financial payments. They may however, receive a small amount of exit money.

Reinsertion and reintegration remain the most significant challenges. Little dialogue has taken place with communities about how to define justice and forgiveness, who should be sent to prison, and who should be granted leniency. Neither has there been much dialogue with local communities about how the defectors program is constructed, and how the reintegration phase should be designed, such as whether to include apologies and truth-telling. Nigerian and international support partners agree that involving traditional community elders and leaders, such as *bulamas*, *nawans*, *ajas*, and *amirs*, as well as local imams and Christian priests, is crucial for persuading communities to accept back defectors and those who lived under Boko Haram rule.

However, there is considerable disagreement as to the extent to which even these local authorities can convince communities to accept returning individuals. In some places, local authority structures remain very powerful. In others, many local authorities have been killed or victimised by Boko Haram, they themselves refusing to accept back Boko Haram associates.<sup>155</sup> Other local authorities may have been displaced from their homes and lost ties to their former communities. Sometimes, such elites view leniency and conciliatory efforts in transactional terms – that is, they ask what material benefits, authority and power would be in it for them.

In some cases, CJTF militias have been challenging the authority of traditional village elders. This can severely undermine efforts relying on traditional authorities to persuade communities to accept back those who lived under Boko Haram rule and Boko Haram members. CJTF members themselves vary in their willingness to accept these individuals back. Some absolutely reject such a return, brandishing defectors as spies. A repeated belief was that those who defected did not do so out of genuine “repentance,” but merely because “they were hungry in the bush” – a condition inadequate, in their view, for obtaining leniency.<sup>156</sup> Others, however, maintained that those who were taken by force by Boko Haram and were enslaved by Boko Haram should be allowed to return and should not be harassed.<sup>157</sup>

In interviews, both CJTF and community members insisted that it was *too early* to accept Boko Haram associates, including those who lived under Boko Haram rule and in Boko Haram slavery. A frequently expressed position was that fighting would need to cease before such acceptance could be feasible, and that the houses and livelihoods of community members who fled would have to be rebuilt first. When told that peace may never materialise unless some leniency, forgiveness, and reconciliation measures start taking place, they insisted that at least their material conditions had to first be significantly improved.<sup>158</sup> Such material improvements would likely need to entail a more robust program than simply giving handouts to reinsertion communities, as some Borno officials and implementing partners seemed to assume would be sufficient.<sup>159</sup>

### Low-Risk Women and Children Detainees and Defectors

The Bulunkutu Transit Centre in Maiduguri, Borno (until recently called the Bulunkutu Rehabilitation Centre) is meant to provide deradicalisation and rehabilitation support for low-risk women and children who have been detained by the Nigerian military for some association with Boko Haram. In practice, association with Boko Haram could mean merely having lived under the group's rule. The Centre is administered by the government of Borno, specifically the Ministry of Women's Affairs, and is supported by international and bilateral partners, such as UNICEF and the International Red Cross.

The Centre does not formally cater to female "defectors." However, some of the women who end up there have undergone the same exit process out of Boko Haram areas that would have, if they were male, classified them as low-risk defectors. In practice, the Centre receives the women and children from the military, mixing those who were detained by the military when their areas were retaken, with those who were detained when they voluntarily surrendered. Some women at the Centre had been wives of Boko Haram fighters. Moreover, although the 600-person capacity Centre is today meant for women and children only, in practice it houses young and elderly men as well. The presence of young men was witnessed when the author visited the Centre in January 2018, at a time when 244 people were reported housed there. The young men are housed in separate quarters but can mix with the women and children in the common courtyard areas. Some service providers employed by the Centre to provide psycho-social counselling, educational services, or deliver humanitarian aid, also alleged that a few of the women they interacted with at the Centre struck them as fairly radical, raising doubts in their mind about their classification as low-risk.<sup>160</sup> Some interviewed women who had gone through the Centre said that they were victims of Boko Haram and of the military.

In April 2017, a formal protocol of entry and exit procedures, and programming inside the rehabilitation facility was established. It has been updated periodically. The protocol specifies that individuals should stay a minimum of 8 weeks in the Centre and a maximum of 12 weeks.<sup>161</sup> In some cases, however, people stay for months. This can happen in cases of unaccompanied children, children rejected by their communities, people with difficult medical conditions, foreign nationals (e.g. from Cameroon), or men with mental health problems without a family.

Immediately upon arrival, incoming residents are supposed to be told that they can arrange for relatives to visit them while social workers are present. They are also temporarily given cell phones to make phone calls to relatives, also in the presence of social workers in order to prevent communication with Boko Haram (even though they were deemed low-risk to start with).<sup>162</sup> Yet these procedures do not seem to have been adhered to consistently.<sup>163</sup> In the case of beneficiaries who do not seek to interact with their families, the staff at the Centre are still supposed to locate their families and interact with them. Handing the beneficiary over to some family members is a crucial element of exit from the Centre. If no family members can be located because they were displaced, killed, or still live under Boko Haram, elders from the person's community are contacted. They are asked to receive the beneficiaries in their original communities or in the IDP camps, which are organised according to village origin.

Programming inside the Centre is conducted by specialised NGOs and contracted implementing partners. For children, it includes some literacy, numeracy, and other schooling. For men and women, there is vocational training, such as soap-making, sewing, bead-work, shoe-making, and preparing drinks and snacks that can be sold in local markets. Religious re-education is considered a vital part of the programming since Centre staff do not know "how hardened in their ideology"<sup>164</sup> the beneficiaries are, even though they were assessed as low-risk. The Centre is also supposed to provide psychosocial support.

The voluntary nature of entry into and exit from the program is questionable. Many of those detained by the military likely had little choice as to whether they wanted to go to the facility.<sup>165</sup> Nor does it appear to be an option for beneficiaries to quit the program. After beneficiaries complete twelve weeks at the Centre, the governor of Borno State is informed by staff that they have completed their program, and their families or village elders are traced for handover. This process is said to respond to a Nigerian law that specifies that only the Nigerian president can “release” people. Yet, it contradicts the Centre’s own terminology that beneficiaries are “not released,” but instead “exit”, since they had already been cleared and released from detention by the Nigerian military.<sup>166</sup> Even if necessary to satisfy existing Nigerian laws, requiring the governor’s approval raises uncomfortable questions about the clarity and voluntariness of exiting the Centre. What would happen if one day, a governor refused to release those who completed their twelve-week program? What kinds of appeal and recourse would be available to them?

Still, the governor is apparently yet to reject anyone’s release. Five hundred and sixty-six people exited the Centre through the above-described process in September 2016; 482 in April 2017; and 755 in October 2017<sup>167</sup> (the gaps between release dates suggest stays longer than twelve weeks, at least for some). In practice, the exit procedures have varied. Especially in the fall of 2017, the Borno governor released groups of beneficiaries earlier than normal, due to pressure and lobbying by relatives or community leaders.<sup>168</sup> In some cases, the military also released women and children directly from detention, without first placing them into the rehabilitation Centre.<sup>169</sup> Yet some support partners of the Bulunkutu Centre have objected to direct releases of women and children. They argue that such individuals should first receive support at Bulunkutu, such as for medical and psychological problems, to receive vocational training and deradicalisation programming, to maintain their traceability, and for consistency of treatment.<sup>170</sup>

Upon exit, women and children are given some money by the governor’s office to cover immediate needs, with the amount varying according to the number of children. Bilateral programming and financial support for these individuals remains highly constrained by US laws and international declarations against terrorism financing and material support for terrorists. This is the case even though the beneficiaries of the program were often innocent victims of Boko Haram enslavement and Nigerian military detention, were assessed as low-risk prior to entering the Centre, and have, once in the Centre, completed deradicalisation and rehabilitation programming. United States government agencies, for example, have assessed they cannot provide any kind of support that beneficiaries could take out of the Centre.<sup>171</sup> At the same time, the United States has been at the forefront of efforts to encourage the development of deradicalisation and reintegration in Nigeria, including Operation Safe Corridor and its previous incarnation, the National Security Corridor.

As in the case of male defectors, reinsertion and reintegration remains a critical weakness of the rehabilitation process for women and children. There have been documented cases of severe ostracism and rejection of returning children and women by their home communities. They have reportedly been denied access to food and shelter (including their previous homes). Several weeks after returning home, many have reportedly left their communities and relocated to Maiduguri or other towns, sometimes because they were told to do so.<sup>172</sup> There is no clear idea of how many children have been rejected in this way. Other children have overcome an initial period of ostracism, and then been accepted back to their communities. There have also been multiple cases of people being released from the Centre and subsequently re-arrested by CJTF and handed back to the military, again having to spend prolonged time in detention.<sup>173</sup> Cases of lynching of those released from detention have also been reported.<sup>174</sup>

Further, there is systematic buck-passing of responsibility between the federal government and Borno State officials, and between military and civilian leadership, regarding the preparation and sensitisation of communities that will be receiving released and rehabilitated individuals.<sup>175</sup> This applies both to the reinsertion of low-risk women and children, and of repentant male defectors.

The secrecy in which the Nigerian government cloaks the Centre fuels rumours, such as that the CJTF has disappeared beneficiaries.<sup>176</sup> Even prominent local Maiduguri journalists could not fully distinguish between the Bulunkutu Rehabilitation Centre and the detention facility in Giwa Barracks, nor did they understand differences between the two in terms of purpose, programming, and selection of people.<sup>177</sup> The secrecy around the Centre, and the resulting fact that many CJTF and local community members believe it is a detention centre and failing to understand it houses only those judged low-risk, also compounds the physical risks to those who exit. These include risks of CJTF re-arrest or community retaliation. These risks of physical persecution and re-arrest are compounded by the absence of a certificate of rehabilitation being issued to those who exit. In the absence of a clarified and explicit legal framework for the leniency measures they may also be vulnerable to future prosecution.

### Nigerian NGO Reintegration, Reconciliation, and Peace-Building Efforts

Some Nigerian NGOs have managed to overcome the overwhelming fear and rejection of individuals who lived under Boko Haram rule and provide a model for how reinsertion and reintegration could be designed. One example is a Maiduguri school for children whose fathers (or both parents) died in Boko Haram-related fighting. The school has won numerous international and Nigerian awards. Run by Barrister Zannah Bukar Mustapha, in 2017 the school was supporting 500 children, including those whose fathers were Boko Haram or CJTF members, and those who are partial or full orphans in affected communities. The school teaches these children Islam and other basic subjects, and provides food.

At night, the school offers vocational training to mothers of the children, including widows of CJTF and Boko Haram members, widows from affected communities who were not associated with either, and internally displaced women. This initiative, which takes place under the umbrella of The Future Prowess Cooperative Association, has provided programming to more than 600 women, with 110 having “graduated.”<sup>178</sup> The death or disappearance of a husband, regardless of political affiliation, generally results in a sharp loss of income for widows, who find it very hard to survive economically. The Future Prowess Cooperative Association thus seeks to provide them with some livelihood training. The women meet once a month, are given a small stipend of 200 naira (US\$0.56) and are taught skills such as tailoring, bead-making, soap- and perfume- making, beautician skills, and computer use. School officials report that due to joint vocational training, Boko Haram widows who were rejected by their communities two years ago have now been accepted. Still, the women face other challenges. Some had their houses demolished, while others their properties seized, sometimes by their relatives. Barrister Zana has successfully advocated in court to have at least some of their properties restored to them. The expropriation and theft of properties of those who had lived under Boko Haram rule underscores the possibility that community rejection can at times be motivated by economic opportunism and desire for extra-legal economic advantages.

Since 2015, other NGO efforts in the northeast have focused on creating community response networks and early warning systems. These response networks involve traditional elders, opinion leaders, imams, and prominent women within local communities, such as wives of *bulamas* and *lawans*. They are intended to develop capacities to communicate with local and

state government officials, including line ministry representatives, as well as the CJTF, the police and the military.<sup>179</sup> Such structures, if they take off, could also become platforms of community engagement with Boko Haram returnees.

## Accountability for All and Justice for Victims

Although the Nigerian military and not only Boko Haram, has violated key human rights principles, no military commanders have faced Nigerian civilian courts. Nigerian elites, and society more broadly, have long given the military and government officials an almost free pass for severe human rights violations related to the Boko Haram counterinsurgency. This remained the case even as a bill to punish perpetrators of war crimes, crimes against humanity, and genocide was making its way through the Nigerian parliament in 2017; that bill had not yet been passed as of the writing of this report.<sup>180</sup>

In August 2017, then-acting President Yemi Osinbajo (in office while President Buhari was ill) established a Judicial Commission to Review Compliance of Armed Forces with Human Rights Obligations and Rules of Engagement. While meeting with Nigerian military officials, the committee was shown rosters of at least a hundred soldiers whom the military had supposedly court marshalled for alleged human rights crimes in the context of the Boko Haram counterinsurgency. Some had been sentenced to death and supposedly executed, while others had been retired or demoted. However, the Nigerian military has not been willing to make the indictments and court marshals public, or even acknowledge their existence, so as not to undermine morale.<sup>181</sup> That rationale, however, not only contradicts the imperative of delivering justice to victims, but also fails to create adequate deterrence against future gross human rights violations by soldiers. Nor is it clear that any of the soldiers prosecuted thus far were of sufficiently high rank to be the officers most responsible for ordering or permitting violations. Like military forces, police in Nigeria have also long been guilty of and not held accountable for “arbitrariness, ruthlessness, brutality, vandalism, incivility, low accountability to the public, and corruption.”<sup>182</sup>

Victims’ rights groups however, are starting to mobilise, demanding accountability for the military’s and CJTF’s crimes, such as extrajudicial killings, rapes, and poor detention conditions.<sup>183</sup> They also call for family reunification, truth telling and compensation. Such demands for justice for victims – of both Boko Haram and Nigerian forces – are fundamental for the legitimacy of Operation Safe Corridor and any future group-level amnesty or peace deal. Yet Nigeria’s criminal justice system is focused on offenders and geared toward penal approaches. It does not, for instance, recognise the right of victims to reparations.<sup>184</sup>

In a first step toward rectifying shortcomings with respect to reparations, in September 2016, the Nigerian government set up the Foundation for the Support of Victims of Terrorism (Victims Support Fund). By December 2016, the Fund was said to have attracted more than \$47.5 million in pledges from the private sector.<sup>185</sup> However, despite this effort, many victims still languish in displacement, living in unsatisfactory conditions, without any reparations.

Furthermore, Nigeria has a poor track record with regards to truth-telling. Since the country’s return to democracy in 1999, multiple attempts have been mounted to deliver justice for past crimes, facilitate reconciliation, and address grievances for severe human rights violations during the military dictatorships era. For example, former President Obasanjo set up the Human Rights Violations Investigations Commission, known as the Oputa Panel, tasked with investigating the causes of gross human rights violations committed between January 15, 1966 and May 28, 1999, identifying perpetrators and making recommendations. Running between June 1999 and May 2002, the Commission received over 10,000 submissions, but openly

heard only 200 cases. Its report argued that “[m]ilitary rule has left, in its wake, a sad legacy of human rights violations, stunted national growth, a corporatist and static state, increased corruption, destroying its own internal cohesion in the process of governing, and posing the greatest threat to democracy and international integration.”<sup>186</sup> Yet, the final report was never officially released, as a result of Nigeria’s Supreme Court decision in *Fawehinmi vs. Babangida*.<sup>187</sup> This decision held that, under the 1999 Constitution, the federal government of Nigeria has no power to set up a tribunal of inquiry, and that only individual states can do so. The ruling was widely perceived as seeking to obfuscate the truth and minimise the chance of accountability of government and military officials.<sup>188</sup> This ruling complicates the potential for designing an amnesty for Boko Haram which include truth-telling and other conditions that could help enhance its legitimacy among victims.



### 3. Overall Assessment of the Current Approaches to Counterinsurgency and Leniency Approaches

Nigeria's anti-Boko Haram counterinsurgency efforts have failed to achieve significant progress since at least 2017, with Boko Haram continuing to conduct attacks, kidnap hostages, and sometimes even retake previously cleared territories. Large-scale areas remain unsafe for civilian populations. Worse still, the Nigerian counterinsurgency campaign itself has been the source of severe and prevalent human rights violations, dislocation, victimisation, and stigmatisation of people. This is primarily due to the policy of rounding up *en masse* men, women, and children during clearing operations who lived under Boko Haram rule, and subsequently consigning them to lengthy detention. This approach further victimises those who have already suffered tremendous hardships, exacerbating societal suspicion and rejection of them.

Moreover, the process of detention is not only arbitrary, opaque, and frequently unjust, but is also potentially dangerous. The detention centres mix perpetrators with significant bloodshed and gross human rights violations on their hands with people they have enslaved. The poor treatment and overcrowding in detention may not only create intense grievances, but also willingness in individuals with no prior history of violence to engage in retaliatory violence. That risk rises when detainees are brutalised by Nigerian forces or the CJTF during arrest and detention. Despite these risks, as the member of the interrogation and screening team put it: "The detention facilities are badly overstretched. Yet we keep arresting more and more people. And then they are stuck in detention for however long."<sup>189</sup>

The defectors program for low-risk "repentant" male fighters (Operation Safe Corridor), and deradicalisation and rehabilitation program for low-risk women and children, are crucial programs. The latter is currently the only mechanism by which at least some people who had lived under Boko Haram rule can get out of detention and perhaps also reduce the stigmatisation that surrounds them. The defectors program is currently the only mechanism by which low-risk fighters can disengage from the battlefield and abandon armed struggle. These programs thus play important roles in reducing the intensity of conflict and paving the way for eventual peace and reconciliation.

However, they are too narrowly conceived, and major problems pervade their design and implementation. They operate within an existing legal framework that too broadly defines material support for terrorists and criminalises membership of Boko Haram. This framework does not make exceptions for minimal cooperation under survival-driven or other conditions of duress, despite the threat of execution by Boko Haram as a result of non-compliance.

The eligibility criteria are also too restrictive. For example, restricting eligibility to low-risk male "defectors" who are "repentant" and who are "fighters" excludes men who had to live under Boko Haram rule and did not have the chance to escape (or were not willing to take the risk), or who were not complicit in any crimes beyond, for example, paying taxes. These individuals are victimised twice – first by Boko Haram, and then by the Nigerian state – and potentially three times, by local communities and the CJTF, who distrust and reject them. Meanwhile, they are triply excluded by the existing leniency criteria: by not having "defected," by not being "fighters," and by not being "repentant," as they have nothing to be repentant for. They were victims. Conversely, lack of clarity on the aggregation of screening questions and other definitional deficiencies raise the question of how anyone who was a fighter could ever be classified as "low risk". The opaqueness of the screening process further exacerbates problems of arbitrariness.

The lack of clarity and consistency in screening processes also means that a potential male escapee or defector has little way to predict whether he will be classified as low-risk or high-risk if he turns himself in. As a former official of a Western embassy in Abuja put it, “a potential defector still has a 99% chance that he will end up dead or in endless detention.”<sup>190</sup> A 99% chance of such an outcome is perhaps too high, but certainly the risks are substantial. This potentially undermines the effectiveness of the defectors’ program, as it can generate fears among potential defectors that defecting entails risking their lives twice – first, by running away from Boko Haram and risking its violent retaliation, and second, as a result of mistreatment by the Nigerian military. The lack of an amnesty law, and hence the possibility of future arrest and prosecution, creates a third risk. Some low-risk women and children who have gone through the rehabilitation program have already experienced this third risk, having been re-arrested by the CJTF and/or police, and handed over to military detention all over again.<sup>191</sup>

Underdeveloped reinsertion and reintegration programming creates a fourth risk for those who have completed the low-risk defectors and rehabilitation programs. In the case of defectors, exit from the program is unpredictable, with the first group of participants having languished for months beyond the stated length of the program for fear that reinsertion communities would lynch them. At worst, those who do end up exiting these programs face violent retaliation from the CJTF and local communities. Problems with societal ostracism have emerged in the case of low-risk women and children, although their only “crime” may have been their inability to run away from Boko Haram when it gained control of their localities. As for the state, it will need to do more than merely give communities handouts for accepting those who have completed defectors’ or rehabilitation programming. The material compensation packages will need to be far more robust, and include not only effective utilisation of community leaders, but also psychosocial therapy for reinsertion communities.

The lack of separate rehabilitation programs for women and men who merely lived under Boko Haram rule perpetuates the already intense societal stigmatisation of such individuals. Moreover, both for defectors and those who merely lived under Boko Haram rule, as well as for those sentenced to prison, support and rehabilitation programming will be of limited effectiveness if it is too heavily skewed toward religious re-education. It will also need to provide meaningful education, vocational training, and psychosocial therapy.

Eventually, the existing leniency programs may pave the way toward broader negotiated peace deals, perhaps after a more effective and discriminating military campaign has further degraded the still-potent military capacity of Boko Haram, Ansaru and the Islamic State. Prospects for such peace deals remain distant, and premature announcements of success can be extremely costly for the government. The inevitable disappointment from inflated expectations, often as the result of Boko Haram attacks, discredit negotiations and create social resistance to the leniency approach. Poorly designed amnesties with other armed groups and criminal actors that set harmful precedents also undermine broad confidence in such processes.

It remains to be seen if and when reconciliation and a deeper peace can be achieved, even if a top-level political deal based around some conceptualisation of leniency and amnesty is eventually struck. This uncertainty will be all the greater if the Nigerian military and anti-Boko Haram militias remain outside of a framework of accountability, continue to perpetuate severe human rights violations, and, in the case of the CJTF, become politicised.

## 4. Conclusions and Policy Recommendations

Leniency options that are well-balanced with victims' rights, that do not perpetuate impunity or encourage moral hazard, can improve prospects for eventual peace, reconciliation and justice. Their design will need to be carefully considered to ensure legitimacy and effectiveness. By significantly improving its existing defectors program and rehabilitation programs for low-risk and victimised individuals, and correcting its deeply-flawed counterinsurgency strategy toward Boko Haram, Nigeria has a chance to move toward reconciliation and durable peace. It also has the chance to become a leader in undertaking demobilisation, deradicalisation, and rehabilitation during and after conflict. To that effect, this report recommends that the following strategies and policy measures be adopted:

**Organise a Broad-Based Societal Conversation about Justice and Reconciliation:** Such dialogues should discuss how to balance reconciliation with justice, victims' rights, and societal protection. They should also consider the potential role of judicial and non-judicial forms of accountability, such as truth-telling, with the aim of understanding the range of mechanisms most acceptable to Nigerian society, while complying with the country's international obligations. The dialogues should include Nigerian government officials, elders and religious authorities, victims, women, minorities, civil society members, and rehabilitated individuals formerly associated with Boko Haram. Outreach into Boko Haram-dominated areas should be built into the dialogues. Further, Nigerian authorities should stop shrouding the amnesty, defectors program, and rehabilitation measures in secrecy.

**Robustly Recognise and Address the Rights of Victims:** There is a need to acknowledge that the category of "victims" in this conflict encompasses a wide range of individuals, including those who may have developed some association with Boko Haram, committed minor offenses (such as paying taxes) out of the need to survive, or those victims to more than one group (such as the CJTF and Boko Haram). Recognising their rights will require reparations, through the form of robust socio-economic packages and psycho-social therapy. Giving a community or an IDP camp a small handout as compensation for accepting back individuals formerly associated with Boko Haram will not be adequate. (Re)construction efforts in towns and villages destroyed by the fighting need to focus attention on infrastructure, clinics, housing, and schools. Victims of the CJTF and military and police abuse need to be equally recognised and robustly protected. If no new legislation is passed to overcome the federal government's inability to initiate tribunals of inquiry and truth-and-reconciliation commissions, then the federal government must work diligently with civil society and state governments to set up such commissions. The rights of victims to truth should not be denied.

**Stop Mass Arrests and Detentions, Move Screening to Liberated Villages, Improve COIN:** Nigerian security forces need to stop being the source of human rights violations and grievances. The tactics of mass arrests and detention should be stopped. The objective needs to be emptying the detention camps, not to enlarging them. To that effect, screening should move to liberated villages and take place within 72 hours. Only those assessed to be high-risk should be detained. Improving the capacity of the Nigerian military and police to hold cleared areas is key. Legally-binding and publicly available rules of engagement for COIN and counter-terrorism operations and actors need to be developed, and violations systematically punished.

**Improve Evidentiary Bases of Detention, Screening, and Trials:** Relying solely on hearsay, such as from the CJTF (let alone from torture during interrogation) to determine Boko Haram association should no longer be permitted. In retaken areas and in detention facilities, teams

of screeners, including military, intelligence, and police officials trained in the gathering of evidence, as well as human rights experts, should be deployed in sufficient numbers. Improving the evidentiary basis for arrests, and developing prosecutable evidence, is vital for ensuring trials of detainees adhere to human rights and legal norms. High-risk detainees should be kept in facilities or quarters separate from low-risk detainees.

**Pass an Amnesty Law for those who Participated in Non-Violent Boko Haram Activities under Duress:** Women and men who had to endure Boko Haram rule and who undertook non-violent support roles under duress or survival-driven conditions (such as paying taxes or cooking) should be legally pardoned. Such legal and policy action should be accompanied by robust information campaigns explaining to Nigerian society that these individuals are victims – not “bad victims” or offenders, as they are widely perceived – because they could not run away. They should also be accompanied by proactive measures to protect them from mob lynching or other forms of retaliation.

**Expand Eligibility of Existing Leniency Programs:** Until such a law is passed, a program should be developed for low-risk detainee men who did not have the chance to defect and who did not commit terrorism crimes beyond the unavoidable ones, such as paying taxes. It should be analogous to the rehabilitation program for low-risk women and children, which currently does not distinguish between detainees and defectors.

**Develop Separate Programs and Housing Facilities for those Who Had to Live Under Boko Haram Rules and for Low-Risk Offenders:** Leniency programs should move away from conflating men and women who lived under Boko Haram rule and whose only offenses were minimal nonviolent support, from those who more actively supported Boko Haram. Separate housing facilities – with different names – should be developed for them. Rehabilitation programming for those who complied with Boko Haram demands under duress, but who did not engage in violence, should be made strictly voluntary. Rather than being brought to centres, such as the rehabilitation centre in Maiduguri for women and children, they should be given a choice as to whether to participate. The benefits, such as medical support and vocational training, should be explained to them, but they should be allowed to quit at any point.

**Improve Transparency and Predictability of Reception and Screening:** Eligibility and screening criteria for all categories need to be made consistent, predictable, and transparent. Appeals processes and external oversight mechanisms need to be developed. Systematic records of those who give themselves up or those detained must be kept and made available to external auditors, including a combination of judicial authorities, human rights representatives, and perhaps international monitors. Potential defectors and those eligible for leniency measures must be better informed as to what will make them low-risk or high-risk – judgements that profoundly affect their fate.

**Children and Women:** Children in detention need to be kept with their mothers (if they were also detained) or in facilities separate from men. They need to be handed over to UNICEF in a much shorter period than six months and ideally as close to the internationally-accepted 72-hour period as possible.

**Expand International Legal Tools for Supporting Conditional Amnesties, Transitional Justice, and Defectors Programs:** New additions and amendments, along with increased flexibility need to be developed to ensure that international counter-terrorism laws, such as those against material support for terrorists, do not prevent crucial programming for: rehabilitation of ex-combatants and populations who lived under the control of groups such as Boko Haram; peace-building and reconciliation; and countering and preventing violent extremism. The international community must also work with national governments and provide guidance to

ensure that over-expansive counter-terrorism laws do not perversely generate discrimination and new grievances.

**Expand Reinsertion, Reintegration, and Reconciliation Programming:** Psycho-social therapy and healing processes should not be provided solely to defectors and other beneficiaries of leniency measures, but also to the communities to which they return. The efforts of Nigerian NGOs described in this report can provide lessons for such programming. Informed by societal dialogues, reinsertion needs to come with an informational campaign among the receiving communities to help them understand who they are accepting back, how, and why. Disclosure and truth-telling processes may have a role in facilitating reinsertion. Traditional leaders and women should be mobilised as important vectors of reconciliation and peacebuilding, with support from government and NGOs. Vocational training and job-creation opportunities also need to be rolled out among receiving communities to mitigate resentment. Such resentment will grow if those who became associated with Boko Haram receive education, training, and jobs, while those who resisted Boko Haram or were displaced when the group arrived continue to live in dire conditions. Creating jobs in far-flung communities may be extremely difficult, however, some public works or vocational training, such as in agriculture, can almost always be delivered in such communities. Economic empowerment initiatives that purposefully bring together and mix women associated with Boko Haram, the CJTF and security forces, as well as displaced women, to foster cooperation and reconciliation should be developed. These initiatives could teach leadership and entrepreneurial skills, provide a basic livelihood and facilitate reconciliation. Traditional development actors need to become more systematically and deeply involved in the reinsertion processes.

**Provide Systematic and Robust Rehabilitation and Deradicalisation Support for High-Risk Defectors and Detainees Awaiting Trial or Sentenced to Imprisonment:** If such support is not provided, defectors and detainees may radicalise others whilst in detention or prison, or become a source of danger after release. Avoiding these negative developments requires extensive training of police personnel in deradicalisation and rehabilitation processes.

**Strengthen Post-Release Monitoring of Low-Risk Defectors Who Exit Rehabilitation Facilities and Released Prisoners:** It is crucial to expand and improve such monitoring. In cases of recidivism, it may be necessary to provide further rehabilitation assistance or undertake law enforcement measures. But dialogue with receiving communities is needed to inform how visible Nigerian intelligence, police, and military authorities should be in areas of reinsertion, so as not to create safety risks.

**Do Not Structure Any Future Peace Deal as an Unaccountable Excessively Broad Financial Payoffs-Based Amnesty:** Any negotiated deal must be cognisant of and pre-emptively counter the problems that arose with the Delta Amnesty. Any amnesty design must be careful not to encourage violence as a tool for extorting rents and financial payoffs. Indeed, no large financial payoffs should be part of the deal. Top-level leaders of Boko Haram should be subjected to some accountability for their crimes against humanity and other egregious human rights violations.

**Develop Disarmament, Demobilisation, Justice, Accountability, and Reconciliation Processes for Armed Actors beyond Boko Haram, including for CJTF:** Lessons learned from the existing individual-level leniency deals for Boko Haram and any future broader amnesty deals should be incorporated into strategies for dealing with groups such as the Islamic State, a long-term insidious threat, and Ansaru. Nigerian NGOs and bilateral and multilateral actors must expose and oppose tendencies of Nigerian politicians to appropriate the CJTF for their electoral and patronage purposes.

**Insist on Accountability for Nigerian Military and Police and CJTF:** Both international actors and Nigerian NGOs should demand that egregious violations of human rights, such as extrajudicial killings and rapes, need to be prosecuted, regardless of the perpetrator. Court marshals must be transparent and any amnesty for formal security actors or for militias should not violate victims' right to truth.

**Address Underlying Root Causes of Conflict, Such as Corruption and Lack of Accountability of Political Leaders and Underdevelopment of Nigeria's Northeast:** Such measures include: preventing corruption and abuse of existing humanitarian and reconstruction aid; improving the delivery of public services and education; and improving the availability and quality of dispute resolution and judicial processes. The motivating goals should be to reverse the abuse and neglect by the Nigerian state and government officials. The Nigerian government must be willing to address the legitimate grievances of those associated with Boko Haram, and not dismiss the phenomenon as merely one of distorted radical religion. Otherwise, the violence will be replicated, perhaps by an expanding Islamic State in Nigeria.

**Increase Transparency and Expand Monitoring and Evaluation of All of These Processes:** Programs for low-risk defectors or reinsertion efforts require diligent monitoring. So do programs to bring accountability to all of Nigeria's armed actors as well as reconstruction programs. Training Nigerian monitors and evaluators is useful so that Nigerians themselves can own, adapt, and improve such processes; a side benefit is that such an effort would create jobs.

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# The Limits of Punishment

*Transitional Justice and Violent Extremism*

**SOMALIA CASE STUDY**



Vanda Felbab-Brown

May, 2018

# The Hard, Hot, Dusty Road to Accountability, Reconciliation, and Peace in Somalia

*Amnesties, Defectors Programs,  
Traditional Justice, Informal Reconciliation Mechanisms,  
and Punitive Responses to Al Shabaab*

## About the Author

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## COVER IMAGE

SOMALIA. Ogaden. © Ferdinando Scianna/ Magnum Photos.

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## Introduction

The poster case of state failure, Somalia has been battered by undulating phases of a civil war playing out among the country's many fractious clans, larger entities aspiring to statehood, warlords, and Islamist groups since 1991. Somalia has experienced multiple iterations of jihadist groups gaining control over large territories amidst state collapse, as well as extensive international efforts to stabilise and build state institutions. The country is thus an illuminating case-study of how militants administer territories and deliver governance, and how anti-insurgency and stabilisation efforts react to the militants' rule and populations who lived under it. It is also a rich laboratory for examining both state-led punitive policies toward jihadist militants and populations associated with them, and for non-punitive approaches. This report focuses on military, punitive, and non-punitive approaches to the potent jihadist militant group Harakat al-Shabaab al-Mujahideen, commonly referred to as al Shabaab.

The government of Somalia and the international community have principally relied on defeating al Shabaab militarily and there are no immediate prospects for negotiations with the group. However, the Somali government has also repeatedly, in an ad hoc manner and without any policy specification or clear legal consequence, declared temporary amnesties for al Shabaab defectors. Similarly, it has struck ad hoc political deals with splinter groups and, with international support, maintains a disarmament, demobilisation, and reintegration (DDR)-like program for low-level al Shabaab defectors. The government has not yet undertaken any similar DDR-like efforts toward the myriad of clan and warlord militias that exist in Somalia. Efforts at reintegration of former combatants from al Shabaab and beyond, and at clan and community reconciliation, also take place through non-governmental programs and traditional justice mechanisms.

Two sets of Somali government-led non-punitive processes have been undertaken: 1) ad hoc political deals with so-called high-value defectors, who, in exchange for defecting along with their followers, receive protection and red-carpet treatment from the Somali government and face no accountability or scrutiny for their past behaviour; and 2) DDR-like rehabilitation programs for al Shabaab defectors who, according to Somali intelligence officials' assessments pose a low-risk of returning to violent terrorism, proselytising or providing logistical support for al Shabaab. Defectors who are assessed as high-risk as well as high-risk detainees are sent to military courts, which are widely perceived not to adhere to international human rights standards, and often issued the death penalty.

The reception and screening phases of detention and defection processes are non-transparent. Civilians who lived under al Shabaab rule and were forced to work for the group in performing non-violent tasks, such as cooking and washing or paying, risk getting caught up in the screening process, and judged as low-risk defectors at best. Despite the development of draft standard operating procedures for screening, the risk of arbitrariness in determining who is low-risk and who is high-risk persists. Thus, even civilians who were only tangentially associated with al Shabaab risk being deemed high-risk and then facing the death penalty. Yet Somalis, particularly those who experienced al Shabaab's terrorist attacks, often applaud such extremely punitive measures.

The government-led effort that has received the most support from the international community is the program for low-risk defectors. It has registered the greatest improvements and progress in its operations over time, for example in terms of separating children from adults and improving exit procedures. But major challenges persist, including the role and presence

of Somali intelligence services at the rehabilitation facilities; little harmonisation across the centres; lack of any rehabilitation facilities for female defectors, detainees, and women who lived under al Shabaab rule and then came to be perceived as al Shabaab associates; the under-development of reinsertion and rehabilitation programming for receiving communities and the communities' reconciliation with former al Shabaab associates and among rival, subordinate and dominant clans; and the lack of job opportunities for former al Shabaab combatants and associates amidst overall extensive unemployment.

Beyond the challenges of the low-risk defector programs, several large problems loom over the amnesty declarations and government-led programs: the lack of a legal framework and the absence of certainty for potential defectors regarding what fate they can expect if they risk their lives to escape from al Shabaab; high corruption and lack of adherence to international human rights laws by Somali government institutions; the lack of a parallel effort to disarm and transform clan and warlord militias; persisting clan conflict and discrimination; and the country's prevalent politics of exclusion and marginalisation. These problems also permeate traditional justice mechanisms that are informally used to reintegrate al Shabaab defectors. In addition, their biased treatment of women and discrimination against minority clans perpetuates grievances. Yet efforts at trauma healing, forgiveness, and reconciliation among former combatants, local communities, and clans have been led by Somali non-governmental organisations (NGOs) for several years.

This report explores the balance and tensions between the need for forgiveness and healing and the desire for accountability and justice. While al Shabaab often provides the order that some communities prefer over chaos, clan discrimination, or rule of pro-government warlords, there is also significant resentment among Somali communities against al Shabaab brutality and crimes. Perceptions that high-value al Shabaab defectors receive a red-carpet treatment from the Somali government and that low-level defectors receive support such as literacy, numeracy, and vocational training, in addition to religious de-radicalisation, augment the resentments. There is also a deep belief among many Somali civil society representatives that the root cause of Somalia's multifaceted problems is the profound and pervasive impunity of the powerful. They fear that non-punitive approaches, such as the high-value and even the low-risk defectors programs, only exacerbate this sense of impunity.

Clearly, non-punitive approaches directed at former low-risk al Shabaab combatants, clans aligned with al Shabaab because of prior discrimination, and populations who lived under al Shabaab rule, are badly needed. They are needed in order to prevent new injustices, achieve sustainable peace, and avoid endless cycles of violence, discrimination and counter-revenge. However, emphasising accountability, including in creative ways beyond imprisonment, as an essential part of non-punitive approaches, as well as in just punitive approaches is equally essential for a comprehensive peace.

This report proceeds as follows: The Context Section discusses the Somali military, political context, developments in recent years, the quality of governance by formal state institutions and al Shabaab, and societal attitudes toward those associated with the group. The next section reviews the design and programmatic content of current approaches to leniency, amnesty, and accountability – of government-led processes, traditional justice mechanisms, and informal reconciliation processes led by Somali NGOs. It describes the existing policy framework, the lack of an adequate legal framework, and the role of the amnesty and defectors program in the government's overall strategy toward al Shabaab. It then details the leniency policies toward high-value, high-risk, and low-risk defectors and evaluates their accomplishments and challenges, such as regarding women. Finally, the section details and assesses traditional justice and clan reconciliation mechanisms, such as *xeer*, as well as Somali NGO-led reconciliation processes.

The following section provides an overall assessment of current approaches in Somalia to amnesty, defectors programs, and high-value defector co-optation deals. It highlights, *inter alia*: the lack of transparency and consistency regarding the reception of defectors and the high-value co-optation deals, as well as screening challenges; the lack of legal certainty for defectors; and reintegration challenges. The section also emphasises the need to integrate into programmatic treatment for low-risk defectors the motivations of those who join al Shabaab or become associated with it, while recognising the role of grievances, exclusion, social and economic marginalisation, and corruption. It also raises the issue of foreign fighters among al Shabaab, a topic currently off the radar screen of existing government processes. The report concludes by offering a detailed set of policy recommendations.

In addition to reviewing existing background literature and reports on Somalia's amnesties, defectors programs, DDR-like efforts, traditional and transitional justice approaches, and security and political developments, this report is based on my field trip to Mogadishu, Somalia and Nairobi, Kenya in December 2017. I had previously conducted similar research on DDR-like processes in Somalia in March 2015, at the time visiting the facilities for defectors in Baidoa and Kismayo. During this December 2017 fieldwork, I interviewed 36 interlocutors, including officials from various branches of the UN Mission Assistance Mission to Somalia (UNSOM), United Nations Political Office for Somalia (UNPOS), officers of the African Union Mission in Somalia (AMISOM) and their international support partners, officials of the UK Embassy in Somalia, Somali government and intelligence officials and military officers, international DDR contractors, Somali DDR contractors, representatives of Somali NGOs and international NGOs operating in Mogadishu, representatives of the Somali business community, and Somali journalists and researchers.

# 1. The Context

Since 1991, after the collapse of the Siad Barre dictatorship, Somalia has been caught up in undulating phases of a civil war played out among various clans, larger entities aspiring to statehood, warlords, and Islamist groups amidst a profound meltdown of state institutions, including the national military and police forces. Despite extensive and repeated international efforts over three decades to stabilise the country and rebuild national state institutions capable of delivering order and public services, oftentimes the most effective stabilising actors have been Islamist groups.<sup>1</sup> Mogadishu-based national governments sponsored by various and often competing actors of the international community have for the most part proved unstable, prone to incessant political and clan squabbles, and unable to deliver even a modicum of acceptable governance while facing potent military opponents.<sup>2</sup> Conversely, while Islamist groups repeatedly succeeded in projecting their power throughout much larger parts of Somalia's territory, their hardline rule and version of sharia, as well as their often anti-Western and provocative regional agendas, repeatedly generated international pushback, including direct and indirect military interventions.

## Conflict Overview

Al Shabaab has since the early 2000s sought to overthrow the government of Somalia, and between 2009 and 2011 it succeeded in its objective. The group represents merely the latest, though among the most radical, incarnations of such groups in Somalia. Declaring allegiance to al Qaeda and participating in terrorism abroad, al Shabaab espouses a doctrinaire version of sharia that is often considered extreme even by Somali standards.<sup>3</sup> However, like its other Islamist predecessors, al Shabaab has also succeeded in providing order through brutality after years of civil war and foreign interventions.

Al Shabaab's rule emphasised backward aspects of sharia, with beheadings, stoning, amputations, and repression against women being both prevalent and visible. However, despite its enormous brutality, deep administrative deficiencies and the lack of a modern state that could deliver socio-economic progress in the world's poorest country, al Shabaab's rule also allowed city-level administrations to function. Its brutal but predictable rule was often better for business and basic economic functioning than constant contestation among rival clans and warlords.<sup>4</sup> The group also took credit for the 2009-10 bumper crop of food, the best in seven years in desperately poor Somalia, before the onset of the 2010 drought. And although often drawing on Hawiye membership, it managed to portray itself as having a pan-clan identity. Al Shabaab nonetheless committed many governance mistakes; most crucially, it hampered the access of international humanitarian groups to Somalia during the 2010 drought and famine. The resulting deaths of over a quarter million people during the 2010-12 famine sapped much of al Shabaab's legitimacy.

However, al Shabaab is not the only militant actor in Somalia. More than 60 warring parties are present in the country, from clan and warlord militias to various other militant groups, such as the Sufi al Sunna and the Islamic State, a splinter group from al Shabaab located primarily in Puntland.<sup>5</sup>

## Military Response to Al Shabaab

In 2012, a combination of African Union Mission in Somalia (AMISOM) forces from Ethiopia, Kenya, Uganda, Burundi, and Djibouti, clan militias, and the vestiges of Somali national forces (SNF), including the Somali National Army (SNA) and Somali National Police – supported by the United States, United Kingdom, European Union, Qatar, United Arab Emirates, Turkey, and private contractors – began wresting control of Somalia from al Shabaab, but the group remains deeply entrenched.

Between 2012 and 2015, AMISOM's 22,000 soldiers<sup>6</sup> – SNF, and clan militias, supported by the aforementioned international actors – have progressively pushed al Shabaab into smaller parts of the country. But since 2015, these efforts have stalled and both AMISOM and the Somalia national forces have struggled to hold cleared territories.<sup>7</sup> Somali national forces remain notoriously undertrained and underequipped as well as corrupt, and continue to lack both offensive and holding capacity.<sup>8</sup> Al Shabaab still controls tracts of rural central, southern, and western Somalia and major roads throughout the country. It regularly takes over major towns, particularly as some AMISOM forces, such as those from Ethiopia, have started to withdraw. To the extent that new offensive operations against al Shabaab are mounted by ground forces, they are mostly conducted by clan militias and local warlords and their forces. These operations sometimes receive assistance from the local or state police forces known as darawish (these are mostly more institutionalised militias). AMISOM, like the SNA, relies on and uses clan militias, though these actors subscribe to no international standards of conduct, face no accountability for human rights violations, and engage in land and theft, extortion of local communities, clan discrimination and often use child soldiers.<sup>9</sup> Although numbering in the tens of thousands,<sup>10</sup> there is currently no defectors program or any other demobilisation program for militias. Eventually, some militia forces may be integrated into regular police or military forces, but many will not because of their high numbers, involvement in human rights violations, and lack of training. Human rights violations are also perpetrated by the Somali military, police, and intelligence services as well as AMISOM, again without any accountability mechanisms in place.<sup>11</sup>

The AMISOM military mission is set to end in 2020. However, the absence of shared planning significantly hampers an effective transition to SNA control, should the SNA rapidly develop its capacity. The unannounced withdrawals of several Ethiopian military contingents in Somalia left behind significant power vacuums, which in turn were rapidly filled by al Shabaab. This has left local civilian populations vulnerable to al Shabaab retaliation.

Al Shabaab's current strength is estimated to be between 2,000 and 3,000 active combatants, though in 2017 it seemed to engage in intensified recruitment among Somalia's many unemployed young men. The group has also increasingly resorted to forcible abductions of children.<sup>12</sup> And while the frequency and number of security-related incidents fluctuated during 2017, the severity of attacks, from bloody terrorist incidents in Mogadishu to the takeover of towns, increased.

But these numbers belie al Shabaab's actual power. Although it is strongest in the lower parts of Somalia, such as the lower Juba and lower Shabelle areas, it is not geographically confined. It also retains operational military capacity in the northern sub-federal states of Puntland and Somaliland. South of Puntland some form of its presence is widespread. Al Shabaab also regularly conducts bomb attacks and assassinations in Mogadishu, as well as terrorist attacks abroad. Even major towns firmly held by anti-al Shabaab forces, such as Kismayo, where Ahmed Madobe's militias and the Kenyan Defence Forces rule, can be surrounded by territories held by al Shabaab.

Anti-al Shabaab actors, including AMISOM and the Somali national forces, thus rely on US air strikes and assistance from a US special operations ground presence to limit al Shabaab's often successful attacks against their installations. Yet, the intensified US air campaign has suffered the same limitations as AMISOM offensives: in the absence of holding military forces on the ground, the airstrikes merely disperse al Shabaab to other areas, including to Mogadishu.

The political context in Somalia remains as fraught and fractured as the military battlefield. Although sub-federal state formation has been under way in Somalia since 2015 – a positive development – the process is tense with inter-state and state-federal government rivalries over territories, control of armed forces, resource-sharing, and power-delegation. Clan discriminations and rivalries continue to prevail and debilitate governance, producing hung governments that are unable to generate laws and policy at the federal level and are fraught with incessant political infighting and discrimination against minorities at the sub-federal level.<sup>13</sup> The legal formalisation of four out of Somalia's existing six states is yet to take place. Some emerging state-level authorities and other powerbrokers in the state formation process also question whether Mogadishu should remain the country's capital. Recent efforts have been made to create pan-clan political parties as a result of new electoral legislation, change the rules of impeachment to limit this frequent tool of political and financial extortion, and strengthen the capacity of the federal government to provide revenues to sub-federal entities. Such efforts are a beacon of hope that the political and clan infighting could diminish in the future.

However, many human-development assessments still consider Somalia to be the poorest, least developed, and most unstable and corrupt country in the world. It is also critically dependent on foreign aid. Thus, it is not surprising that the capacities of the federal and sub-federal governments remain very limited and are often constrained to the national or state capital. Formal taxing capacity also remains constrained.

## The Politics, Governance, and Persistence of Al Shabaab

In the context of persisting clan and political infighting, al Shabaab finds a constant lease on life. It continues to adroitly insert itself into clan rivalries. The rapacious and predatory abuse of power by official ruling entities, including land theft, enables it to obtain local support or at least acceptance. It tends to offer its protection to minority clans against dominant clans, mitigating clan conflict, while also appearing to be pan-clan. In fact, after al Shabaab is displaced from an area, there is often a noticeable rise in clan conflict, and associated land and resource theft often explodes. Though containing significant numbers of Hawiyes, the membership itself is pan-clan.<sup>14</sup>

As an entity, al Shabaab is not isolated from Somalia's people or its powerbrokers. Some al Shabaab members tend to go in and out of the movement and they sometimes interact with their home communities. However, the extent of such fluidity depends on specific areas and the role of the individual within al Shabaab. Within a family, there may well be members in al Shabaab as well as in the state forces, often in communication with each other. Crucially, both political powerbrokers and powerful businessmen often rely on al Shabaab to maintain the security, exclusivity, and hegemony of their economic interests in particular areas, in exchange for paying al Shabaab zakat. Many powerful economic actors, engaged in exclusionary monopolistic deals and violence against rivals, thus see little benefit from an end to fighting in Somalia.

Moreover, al Shabaab is significantly better able to provide security for the movements of vehicles and individuals on the roads it controls than are other actors. Militias, police and SNA units often charge varying, multiple, and high fees along their segments of the road; and

cargo and people are still subject to ambushes, robberies, and rapes. In contrast, checkpoints manned by al Shabaab charge one uniform fee, whereby entering vehicles receive a receipt and people and cargo are allowed to proceed safely.<sup>15</sup>

Al Shabaab also outcompetes other actors in Somalia in its capacity to deliver justice and dispute resolution. It retains a reputation for delivering swift, effective, and, crucially, non-corrupt and fair rulings to disputes based on sharia. Thus, even people from government-held territories, and by some anecdotal accounts occasionally even policemen, go to al Shabaab for dispute resolution.<sup>16</sup> In contrast, the formal judiciary is perceived as overwhelmingly corrupt, dominated by certain clans, and operating on the basis of outdated 1960s statutes, thus delivering dispute outcomes based on bribes and clan standing.<sup>17</sup>

The other main alternative for dispute resolution – and for the reintegration of al Shabaab members and of those who lived under al Shabaab rule – is traditional justice, such as *xeer*. *Xeer* is a form of justice to which most Somalis have exposure. But traditional justice mechanisms are neither uniform, nor static: they vary across time and territory. Furthermore, they are primarily focused on reconciliation among families and clans and deliver little accountability for individuals, thus perpetuating impunity.<sup>18</sup> To address rape, for example, the perpetrator's family or clan will pay a fine to the victim's family, which may or may not share it with the actual victim and may even ostracise the victim. Moreover, *xeer* is not a neutral concept, it is a form of power which elders exercise to maintain control of their communities and discriminate against others.

With some simplification, al Shabaab recruitment messaging for international audiences (including the Somali diaspora) tends to centre on a sense of belonging, global jihad, and the protection of Somalia against infidel invaders. By contrast, recruitment messaging toward local youth tends to emphasise injustice and power abuse issues. It often exposes very specific local misgovernance, corruption, and grievances, such as: the usurpation of public resources private gain; the corruption of Somali courts and politics; and the view that the Somali elite-centric system is perpetuates economic, political, and social injustice.<sup>19</sup> Some two-thirds of members join al Shabaab for economic reasons due to a lack of legitimate economic opportunities, or as a result of grievances against clan discrimination or abuses and corruption of local authorities.<sup>20</sup> Of course, recruitment is a complex process that also varies according to the place, the individual, and the needs of al Shabaab at a particular time. Forcible recruitment and clan-negotiated recruitment also play an important role.

However, al Shabaab also overreaches in the brutality and the tightness of control it imposes. Beyond brutal sharia punishment, such as stoning or cutting of limbs, which are hardly readily acceptable to most Somalis, the group also overreaches in other exercises of its power. For example, most Somalis, even in Mogadishu, have to pay *zakat* to al Shabaab or else risk punishment, such as in the forms of forced displacement or even death. Thus, many people, including those in Mogadishu and not only those who lived under direct al Shabaab rule, could in theory be held liable for financing a terrorist group if the government chose to prosecute them. Moreover, since 2016, these taxes dramatically increased, causing significant economic hardship.<sup>21</sup>

## Views toward Individuals Associated with Al Shabaab

Perceptions toward individuals associated with al Shabaab vary enormously, ranging from acceptance to extreme ostracisation.<sup>22</sup> Views are often based on whether a community, clan or family's experience with al Shabaab has predominantly been marked by brutality or the delivery of justice and protection services. The broader standing of a clan within Somalia's

power distribution also determines preferences between highly punitive or lenient approaches to individuals accused of al Shabaab association. Many local communities indicate they are afraid of ex-al Shabaab members returning to their areas. In some cases, the return of ex-al Shabaab members or people associated with the group produced initial euphoria that quickly gave way to pent-up resentments. UN officials dealing with DDR processes in Somalia and with providing services to al Shabaab defectors, for example, reported clan elders telling them: “Al Shabaab are our sons; but don’t leave us alone to deal with them.”<sup>23</sup>

Pro-government forces and local militias have in many instances perpetrated acts of retribution against communities or clans that previously associated with al Shabaab or were ruled by al Shabaab. Such retribution has included extrajudicial killings as well as forced displacement. Displacement causes individuals to lose clan protection, which makes them further vulnerable to pro-government forces and local militias. Women who worked for al Shabaab or who were labelled al Shabaab “wives” have faced acute challenges in returning to their communities with their children. They are often seen by families and communities as disgraced; they cannot be married off again; and sometimes they are accused of being al Shabaab spies (since the group has in fact used women for such purposes). In some cases, they are expelled from the community.<sup>24</sup> Women who come from minority clans and/or are displaced face the highest risk of marginalisation.

Representatives of women’s NGOs in Mogadishu tend to support punitive approaches toward al Shabaab members and associates. In interviews, some representatives insisted on the need for lengthy prison terms, even in cases in which al Shabaab soldiers had grown up under the group’s rule and had only been exposed to the group’s ideology and portrayal of others as enemies. Neither did they support leniency for al Shabaab members who had been forcibly abducted by the group, even in the cases of children or women.<sup>25</sup> Women representatives expressed fierce opposition to broad amnesties that did not include prison terms for the gravest violations, let alone truth telling or apology requirements. Women’s NGOs in general want to see beneficiaries of defectors programs subjected to some forms of accountability. This is not surprising, as women are deeply vulnerable to abuse and mistreatment within and beyond the dynamics of the conflict. Overall, women continue to be highly subjugated in Somalia both in traditional clan structures and in their formal political role. The formal role of women in politics continues to be contested, with women still significantly under-represented in government positions. Although under Somalia’s provisional constitution, thirty percent of the seats were reserved for women, Somali elders objected to that quota until the last minute.

Demands among women’s NGOs for accountability and their opposition to broad amnesties, resonate to an extent with a wider sentiment among Somali civil society and human rights activists that the root cause of Somalia’s problems is pervasive impunity of powerbrokers – politicians, businessmen, or militant actors. Many Somali civil society members interviewed for this report expressed deep scepticism and outright opposition to amnesty or alternative justice processes that seem to perpetuate the lack of individual accountability. This includes clan justice – *xeer* – which is seen as helping to resolve disputes, but also exacerbating individual impunity since individual crimes are settled through payments by families and clans, with no punishment necessarily assigned to the perpetrator. These civil society representatives call for the need to enforce human rights, demand the punishment of those individuals who commit crimes, and urge the international community to press for accountability from the Somali government.

This desire for punitive custodial punishments, not merely restorative justice and reconciliation, is also embedded in long-standing practices in Somalia, such as informally sending those who deviate from social norms to prison. For example, communities and families bribe judges



to sentence their young family members to prison for socially misbehaving for a few weeks or months at a time or directly bribe prison officials for temporarily accepting them there as punishment. This informal practice is meant to contribute to “rehabilitation.”<sup>26</sup>

## 2. Overview of Current Approaches to Amnesty, Leniency and Accountability

Despite significant challenges faced by counterinsurgency and counterterrorism efforts in Somalia, the overall objective of the Somali government and the international community remains to destroy and weaken as much as possible of al Shabaab's military capacity on the battlefield. Currently, no formal process of negotiation with al Shabaab exists and the formal position of the international community, such as the United Nations as well as individual countries, is that it does not negotiate with al Shabaab.<sup>27</sup> Some European and Middle Eastern countries involved in Somalia are more willing to explore such a conflict-ending mechanism; others, such as the United States, are concerned that the group would not adhere to any negotiated deal and instead use negotiation to strengthen itself militarily, particularly on the cusp of AMISOM's departure.<sup>28</sup>

Moreover, it is not clear that peace negotiations with al Shabaab are an attainable prospect at this stage. President Mohamed's early post-inauguration announcement that he was open to a dialogue with al Shabaab generated some enthusiasm within Somalia; however, it was rapidly eclipsed by al Shabaab's terrorist attacks, including in Mogadishu.<sup>29</sup> Certainly, the group itself has not responded positively to any overtures for negotiations, because it believes that with AMISOM's planned departure, time is on its side. Initial efforts several years ago, including those by the Gulf countries to initiate some negotiations with al Shabaab and its precursor, the Islamic Courts Union (ICU), rapidly collapsed due to disagreements and a lack of interest among international actors, Somali authorities, and the militant groups themselves.

Despite the lack of consensus and the challenges inherent in, the formal peace negotiation process with al Shabaab, both the international community and Somalis have, informally, become more open to acknowledging that it may not be possible to fully defeat al Shabaab on the battlefield. Somalia has thus in recent years experimented with a range of leniency measures aimed at inducing defections from the group. These include ad hoc presidential declarations of amnesty for those who turn themselves in, and a range of processes for handling al Shabaab defectors, detainees, and others associated with the group.

These processes include: Somali government deals with high-value al Shabaab defectors; formal justice processes for high-risk detainees and defectors; DDR-like processes for those assessed to be low-risk defectors or detainees; and traditional clan-based justice mechanisms (xeer). The Somali government expects the high-value defectors to deliver the greatest security and intelligence rewards, either by actively fighting al Shabaab or inducing further large-scale defections by members of their clans or network. The Somali government makes deals with high-value defectors on an ad hoc basis and the recipients of such deals, including top-level al Shabaab commanders, can expect to be granted nearly complete impunity and awards of economic and political privileges. High-risk defectors and detainees, by contrast, will face judicial prosecution and frequently receive the death penalty. Low-risk defectors who go through the DDR-like processes experience the most formalised demobilisation, de-radicalisation, and reinsertion programs and have the highest chance of successfully reintegrating into Somali society. All processes are analysed in detail below.

Defectors programs are still primarily seen as a mechanism to complement and strengthen counterterrorism and counterinsurgency efforts, not as a predominant goal in itself.<sup>30</sup> That is, they are meant to entice the less committed members of al Shabaab to leave in order to

weaken the group militarily. International and Somali security actors in Mogadishu also see these measures as crucial to obtaining sources of intelligence for further military operations to disrupt al Shabaab.<sup>31</sup> However, there is also increasing recognition among Somali government officials and international partners that rehabilitation and reintegration are important goals in of themselves, though such objectives remain contested.

Some Somali government officials, such as Abdirahman Osman, the former Minister of Information and later the mayor of Mogadishu, reverse the end of the conflict equation. These individuals see military pressure as a means toward encouraging defections and eventually coming to negotiations: “Those [defectors] who have been rehabilitated can be ambassadors back to their communities. ... We know military pressure helps, but it is not the end game.”<sup>32</sup> Similarly, when former al Shabaab intelligence chief Zakariya Ismail Ahmed Hersi surrendered on December 27, 2014, the highest profile case during that period, and received amnesty, the Somali counter-terrorism advisor Hussein Sheikh Ali stated: “We cannot kill every member or put every member in prison. the plan is to offer them a chance to leave – to give them an exit route where they can change their mind. So we must persuade them that they must come to a normal life. We’re talking about senior levels – a very few at the decision-making level.”<sup>33</sup>

Because of a lack of transparency of the surrender process, particularly as to who and how many combatants and those living under al Shabaab control hand themselves in to either Somali authorities or AMISOM forces, no exact number of those who have surrendered can be ascertained. According to Somali government officials, some 2,000 al Shabaab combatants and people associated with al Shabaab have gone through various iterations of the program for low-risk defectors since 2012.<sup>34</sup> This number, however, does not include those recruited to become informants or even members of Somali intelligence services immediately upon surrender or those deemed high-risk and sent to detention and military courts.

## The Lack of a Legal Framework for Amnesties, Defections and Prosecutions

Somalia’s legal system remains outdated and underdeveloped. Many existing laws dating back to Somalia’s 1962 penal code are woefully out of synch with Somalia’s existing realities as well as international legal statutes. That makes complying with international human rights standards, including under the auspices of an amnesty program, difficult. For example, the prevailing 1962 penal code does not fully define the crime of rape, as there is no notion that sex should be consensual. Instead, the existing law only goes so far as to prohibit the use of violence in sex.<sup>35</sup> Further, the process of updating and redrafting Somalia’s new constitution remains incomplete.

As with other crucial pieces of legislation, such as concerning counterterrorism or anti-corruption, there is a major legal gap surrounding the efforts related to amnesty and defectors. Despite multiple entreaties from the international donor community, Somalia has not clarified the laws surrounding the use of amnesty declarations and defectors programs.

An amnesty law, the drafting of which first began in June 2016, remains unfinished due to political disagreements that have to do far more with clan rivalries and infighting than any substance of the law. Some Somali political and security analysts claim that the government prefers to keep the terms of presidentially-declared amnesties (discussed below) loose and undefined, though the lack of details creates multiple legal and other operational challenges.<sup>36</sup> Major legal questions also remain as to whether the president of Somalia does in fact have the right to grant amnesty to militants and terrorists. While the constitution does give the president the possibility to pardon, some Somali legal experts argue that such a pardon only pertains to

those sentenced under criminal law, for example a custodial sentence.<sup>37</sup> They argue that the Somali constitution only gives the power of amnesty to a truth and reconciliation commission, but no such entity has ever been formed in Somalia.

Further, Somalia has not yet passed a terrorism law, the goal of which is to enable civilian courts, instead of military courts, to try terrorism suspects such as al Shabaab members. With respect to prosecutions, in the absence of a terrorism law, the legal basis on which military courts sentence alleged members of al Shabaab is not always clear. Mostly, military courts resort to the 1960s criminal code, but even then it is not always clear why and how they issue the death penalty. Since the 1960s code predates al Shabaab, membership in the group is not legally criminalised.

The low-risk defectors program is embedded in the Somali national security architecture, which was the result of an agreement between the Somali government and international donors. However, it has yet to be approved by parliament. Overall, no legal statutes govern the defectors program. The absence of a legal framework raises questions of legality, legitimacy, and sustainability.

Moreover, other peace processes are taking place in Somalia outside of the formal legal frameworks, such as a recent peace deal with Ahlu Sunna Waljama'a, a paramilitary group consisting of moderate Sufis opposed to al Shabaab and other radical Sunni militant actors. Like the high-value al Shabaab defector efforts, these are political deals arranged on an ad hoc basis and mostly do not entail any accountability mechanisms for former militants. Nor do they entail much clarity as to the current or future legal status of combatants covered by the deals, including in terms of accountability for the crimes they have committed.

## The Use of Amnesties and Military Pressure to Induce Defections

The concept of amnesty is not new in Somalia. In the absence of an amnesty law, ad hoc presidential declarations have become the main vehicle for amnesty. Somalia's former president Abdullahi Yusuf Ahmed repeatedly granted amnesties for the ICU in the early 2000s. This practice was continued by subsequent presidents, who at various times have also granted amnesties to al Shabaab. However, these declarations have been characterised by a lack of specificity and credibility and most have been time-bound to a few weeks at a time, generating little traction among the militants whose economic needs and broader grievances were not clearly addressed. The relative success of some of these amnesties in producing defections appears to have had more to do with the acute military pressure on al Shabaab at the times the declarations were made, than with any particular features of the amnesty design.

Amnesty declarations have often been made for political consumption around major holidays, such as Ramadan, when clemency is popular, with little planning or details. Further, they have been followed by repeated government declarations of war on al Shabaab, particularly in response to major terrorist attacks perpetrated by the group. This confuses the Somali public about the seriousness of the military counterinsurgency effort and leniency measures, the specific parameters of the leniency measures, and the overall strategy against al Shabaab.<sup>38</sup> These amnesty announcements also suffer from the lack of political will to systematically design and implement them; as a result, they have been sabotaged by entities from within Somalia's security and political institutions.<sup>39</sup>

In 2011, President Sharif Sheikh Ahmad (himself previously a commander-in-chief of the ICU) announced a broad amnesty for any al Shabaab members who would renounce violence and turn themselves in.<sup>40</sup> Although the offer referred to al Shabaab fighters in Mogadishu,

due to mounting military pressure on the group in 2011, this amnesty declaration successfully brought out 200 people from Johar. This group of 200 was comprised of militia members of a subordinate clan that had joined al Shabaab for protection. However, they could not return to their home community, which was still under al Shabaab rule, for fear of retaliation by the group. The government did not simply let the militiamen go; they were kept in a detention centre and ended up working for the Somali national security forces. At times, they felt coerced into collaboration with the military in order to get out of detention.<sup>41</sup> Their fate stimulated conversation between international actors and the government of Somalia about the development of a defectors program, through which those who seek to disengage from the battlefield, whether in response to military pressure or periodic amnesty declarations, would be processed.

In September 2014, at a time when AMISOM and Somali national forces enjoyed the military upper-hand militarily as al Shabaab was steadily losing territory and exhibiting vulnerabilities, then-President Hassan Sheikh Mohamud announced a 45-day amnesty window for al Shabaab members to turn themselves in.<sup>42</sup> That amnesty appears to have been prompted by the government's sense of momentum, as it came just after a US air strike that killed the leader of al Shabaab, Ahmed Abdi Godane. Because of the coincident high military pressure on al Shabaab, this amnesty declaration proved relatively successful, with the Ministry of National Security reporting that some 30 combatants a day turned themselves in during the window.<sup>43</sup> Others who sought protection from government forces and AMISOM under the amnesty declaration were people who lived under al Shabaab rule and were perceived by Somali government officials and the wider public to have been supporting al Shabaab. These include women who lived under al Shabaab rule and were forced to cook and clean for the group, and men who sold their goods to al Shabaab.<sup>44</sup> Since then, reportedly “hundreds” of alleged al Shabaab affiliates have turned themselves in to the authorities.

Other amnesty offers followed in January and September 2015.<sup>45</sup> The January 2015 announcement ostensibly specified some conditions of the amnesty – though these were, in fact, only objectives – including: “Recognition of previous crimes, Rejection of violence and rejecting al Shabaab, Embracing a peaceful resolution of conflict, [and] A commitment to play an active part in re-joining a community and contributing to its welfare.”<sup>46</sup> That amnesty offer also outlined some disqualifying conditions, as President Hassan Sheikh Mohamud added in the declaration: “There are also some crimes which will not be subject to amnesty, and which will be subject to prosecution; crimes such as murder and rape. But even those who have committed such crimes could join the peace process after they have served their sentences.”<sup>47</sup> Nonetheless, this disqualification of some crimes has been repeatedly violated for so-called high-value al Shabaab commanders who defect, as is discussed further below. Such broad amnesties for al Shabaab commanders have been the most controversial ones among Somali politicians, civil society, and academics.

Over time, presidential announcements of amnesty have come to emphasise that defectors will be treated well and benefit from educational and employment opportunities. Such was the spring 2017 amnesty declaration by President Mohamed Abdullahi Farmajo.<sup>48</sup> The impact of such promises on stimulating defections beyond the effect of military pressure is unclear. However, presidential declarations of amnesty may serve as a communications tool, signalling the possibility of leniency for defectors.

Finally, it is important to note that responding to an amnesty window does not appear to be the only avenue toward entering a defection program. For instance, although the spring 2017 60-day amnesty deadline has expired, defectors continue to leave the battlefield and areas of al Shabaab control and are handed over for processing through the Defectors Rehabilitation Program for low-risk defectors.

## High-Value, High-Risk and Low-Risk Defectors

Those who defect are sorted into two programs: one for high-value defectors who individually negotiate their leniency terms with the Somalia government, a form of co-optation deal; and one for low-value individuals that further sorts them into high-risk defectors who face military courts where there is a high chance they will be issued the death penalty; and low-risk defectors who go to DDR-like facilities. This section will first assess the co-optation deals with high-value defectors; next, it will analyse screening processes for low-value defectors; and finally, it will assess the treatment of high-risk and low-risk defectors.

### High-Value Defectors

Although incidents of high-value defections had occurred earlier, the high-value defectors program was constructed as a policy in 2015 by Somalia's national security advisor and the director general of the National Intelligence and Security Agency (NISA).<sup>49</sup> The goals of the policy are to fragment and weaken the group, and ostensibly to facilitate long-term negotiations, though no elements of the latter have been specified.<sup>50</sup>

The government of Somalia has not established any formal or systematic way of assessing who qualifies as a "high-value defector." The common understanding is that these are al Shabaab commanders, or sometimes clan leaders and powerful warlords who aligned themselves with the group, who have the capacity to encourage many of those loyal to them to also leave al Shabaab, if they choose to make a deal with the government. There is no definition of what constitutes "many followers": in recent deals, the number has been in the tens.<sup>51</sup> Beyond the immediate number of fighters that concurrently defect with the leader, such high-value defectors are expected to encourage further splintering within and defections from al Shabaab. They do this by inducing other members of their clan to also abandon the group or by motivating other Shabaab leaders and their followers to leave the insurgency through the example of how well they are treated.<sup>52</sup> These defectors are also expected to provide valuable tactical intelligence for military strikes or strategic intelligence, such as on factions within the group or on its logistical chains, e.g., how explosives are smuggled into major cities for terrorist attacks.

Potential high-value defectors negotiate their co-optation deals with the government prior to defection on an individual basis. They thus have some degree of certainty before leaving al Shabaab that they can expect full impunity at least within Somalia at least if and when they defect, as evidenced by past practice with such high-value defectors. However, since the terms of the deal are kept secret from both the Somali society and international actors, it is difficult to ascertain what explicit, if any, guarantees against future prosecution they are given. Since the deals are secret and not codified by law, there is the possibility that future Somali governments or legislation may vacate them. Moreover, should any such defectors be listed under international terrorism sanctions, the bargain struck with the Somali government actors might not be respected by international actors. Despite the lack of such legal and political certainty, some twenty individuals designated as high-value have taken advantage of such deals and switched their allegiance from al Shabaab to the government. They may be motivated by the prospect of accessing immediate medical care, securing formal political power in the formation of sub-federal states, or escaping from al Shabaab retaliation if they had fallen out with the group. Since they oftentimes retain military capacity in the form of militias, they can reengage in fighting later if the deal collapses, is no longer advantageous, or another government reneges on the deal.

The deals are negotiated on an individual and ad hoc basis between the defecting commanders the president and prime minister of Somalia, and perhaps some influential clan leaders and politicians. There is no legal framework that dictates the way in which international donors

or partners, beyond international intelligence agencies, can be involved in the process. The terms of the deals are not announced publicly, nor are they shared with the Somali parliament. Further, they have not been accompanied by any truth-telling mechanisms, such as a demand that beneficiaries publicly or privately disclose what crimes they have committed.<sup>53</sup> In some cases, deals have been struck with former al Shabaab commanders who had previously been sentenced to death by execution by Somalia's military courts. However, since Somalia's military courts tend to sentence most al Shabaab fighters to death simply on the basis of the 1960s criminal code – in processes that are utterly opaque and not public – the sentence itself is not indicative of the acts that these individuals had committed.<sup>54</sup>

Mostly, it appears that the high-value commanders who have been able to strike such deals with the Somali government can enjoy the government's protection, a life of entitlement in Mogadishu or other major Somali cities, and formal or informal robust participation in Somalia's political and economic life.

Somali civil society representatives, human rights activists, and at least some businessmen indicate a substantial discomfort with such deals. They believe that the deals perpetuate Somalia's fundamental problem of elites, warlords, and powerbrokers having no accountability to the citizenry. This impunity in turn fosters fractious paralysing politicking, poor governance, and fuels conflicts and significant human rights abuses. The critics also point out that such advantageous terms perversely encourage warlords and powerbrokers to merely re-invent their political affiliations and re-label their ideological orientation, while perpetuating their pernicious behaviour – which may involve discrimination against particular clans or other marginalised groups, exploitative and exclusionary economic policies, or human rights abuses.<sup>55</sup>

The most prominent recent case of such “flipping” of a high-value al Shabaab commander took place in August 2017, when Mukhtar Robow, a former spokesman of al Shabaab and the group's deputy leader, defected. According to some, he did so because of his need to treat a serious illness. Although he has long been on the US capture-or-kill list,<sup>56</sup> since the deal, Robow has been leading a prominent political life in Mogadishu. In addition to receiving armed protection from the Somali government, he has been able to keep his personal militia of between sixty and three hundred fighters.<sup>57</sup> Like Robow, these fighters have not been subject to any judicial or other accountability processes – nor have they been required to disclose their actions while affiliated with al Shabaab. Robow's defection thus caused widespread consternation in Somalia. A Somali lawmaker, for example, argued: “It's as if bin Laden was suddenly named a minister or security chief. It's not a good thing when we give such credit to those who have killed innocent people.”<sup>58</sup>

The government of Somalia presumably expects that Robow will either fight al Shabaab or use his importance in the Rahaweyn clan to persuade other Rahaweyn al Shabaab fighters to disarm. Somali and international political analysts in Mogadishu are concerned, however, that Robow's militia will remain accountable only to him and could potentially grow as a result of further defections. They also fear that Robow could potentially use an enlarged militia to destabilise the Southwest State, including its capital Baidoa, where he has large political standing and which is dominated by the Rahaweyn clan.

Moreover, some political analysts point out that Robow was never affiliated with al Shabaab for a long period of time and had actually split off from the group a long time ago. In fact, al Shabaab has sought to assassinate him since the time of his defection. It was only due to his ability to maintain his personal militia that he had avoided execution at the hands of al Shabaab. Given his lack of credibility with the militants (despite his clan affinity), the analysts question whether he can in fact deliver on the government's expectation to induce other al Shabaab defections. They also question whether he can in fact provide valuable and actionable intelligence.<sup>59</sup>

Another example of a high-value defection that of Ahmed Madobe. Through close cooperation in anti-al-Shabaab operations with Kenyan Defence Forces operating in Kismayo and southern Somalia and US counterterrorism operations, he has actively fought al Shabaab in Juba State. In 2015, he arranged to be elected the president of Juba State, and prior to that in 2013, of the Jubaland region. Although he seems to have moderated his governance of the Juba State over the past three years, there were multiple early reports of his militia stealing land and other valuable resources from marginalised clans in southern Juba, thus pushing them into alliances with al Shabaab.<sup>60</sup> The Juba Intelligence and Security Agency (JISA) still reports solely to President Madobe and there is no visibility as to its operations, including its handling of high-risk and low-risk al Shabaab defectors, as explained below. Yet the Agency continues to be accused of human rights violations, harassment, and extortion.<sup>61</sup>

Red-carpet treatment and non-transparent deals for high-value defectors are widely resented by many Somalis for perpetuating impunity. As civil society leaders have warned, “There is a lot of anger festering against the crimes these so-called high-value defectors committed. Yet they are not even compelled to admit to them.”<sup>62</sup> Somali analysts have suggested that amnesty should not apply to high-level al Shabaab leaders: “These are high-level terrorists who have ordered or overseen the killing, torture and maiming of hundreds of thousands of Somali citizens. Immunity for those who commit grave atrocities would not only contradict international law, it would essentially amount to state sanction of war crimes.”<sup>63</sup> Nonetheless, such deals continue to be struck.

The impact of these deals on the battlefield have varied: Madobe has fought al Shabaab aggressively, though he also generates recruitment for al Shabaab because of clan discrimination and resource theft. As of the writing of this report, Robow has yet to deliver other defections. Critics also point out that the deals have failed to penetrate al Shabaab’s core, with many high-value defectors being individuals who had already fallen out of favour with Shabaab’s inner circle.<sup>64</sup>

### **The Screening of High-Risk and Low-Risk Defectors**

The process for handling low-risk and high-risk defectors and detainees falls under the National Program for the Handling and Treatment of Ex-Combatants and Youth at Risk, a component of which is the Defectors’ Rehabilitation Program for low-risk defectors. While there has been some nominal formalisation of the sorting criteria for distinguishing high- and low-risk defectors in recent years, the process is still handled exclusively by Somali federal and state intelligence authorities, or sometimes AMISOM. The sorting process lacks transparency, with most Somali and international actors, such as the United Nations, unclear on how many or which individuals are eligible for the program.

Somalia’s National Intelligence and Security Agency and subordinate state versions of it, such as Juba Intelligence and State Agency, decide who is high-risk and who is low-risk through interrogation of captured or defecting al Shabaab affiliates. Before 2017, the criteria for being considered low-risk versus high-risk lacked consistency and explicit definitions, which unsurprisingly often resulted in arbitrary decisions. Yet, the stakes were as high as they are now: low-risk defectors qualified for DDR-like programs, while high-risk ones were sent to trial.<sup>65</sup> Low-risk versus high-risk assessments were mostly based on the individual’s role in al Shabaab. Those who were believed to be amirs (i.e., commanders of some sort), who had engaged in the making of explosives, or who had killed someone were generally classified as high-risk. Those who had fundraised, preached jihad, or provided logistical support could be classified as either low-risk or high-risk.<sup>66</sup>

However, thanks to extensive input from international partners, the Ministry of Internal Security has since drafted standard operating procedures (SOPs) to guide intelligence agen-



cies involved in the screening process, with the goal of reducing the arbitrary nature of such judgments. At the time of writing this report, the SOPs have remained in draft form since July 2017. While intelligence officials reported that the SOPs are already being used to make assessments in the field, there was no way to verify whether and how frequently they are actually implemented.<sup>67</sup> Thus, a lack of transparency regarding the screening of defectors persists.

The SOPs<sup>68</sup> are an important step forward from the previous highly arbitrary judgements and non-standardised categories, particularly as they also clearly state the rights of those being screened, including access to medical care and family visits. They further establish a 72-hour time limit for the assessment. After that, defectors are either sent to rehabilitation facilities or to prisons and detention, depending on their risk evaluation.

A written record of their entry into the screening process and their evaluation is supposed to be kept. But in practice, such a systematic record of entry available for Somali and international oversight does not exist. The international community has little oversight as to what happens outside of Mogadishu.

Other significant problems remain with the draft SOPs. The stated goal of the assessment is to evaluate “the likelihood that disengaged al Shabab combatants will engage in any of the following activities:”<sup>69</sup> direct participation in violent extremist activity; training and/or recruitment of civilians; the provision of operational, organisational, or logistical support to al Shabaab; and the radicalisation of civilians. In other words, the goal is to assess whether the individuals will conduct such activities in the future. Yet, the assessment questions are heavily based on past behaviour and activities with al Shabaab. The SOPs assess 19 risk factors through: four questions about the individual’s personal history; three about motivations and context; five about previous engagement with al Shabaab; three about training and capacity, such as education; and four about the individual’s current attitudes, including religious fervour and views on democracy. Other information gained during the interviews is included in the overall judgements.

Beyond debating the validity of some of these questions (e.g. the individual’s support for or rejection of democracy) as predictors of violent behaviour, a bigger problem concerns the aggregation of the answers. Answers are given numerical values from 0 to 2. For example, if an individual was arrested for violence prior to joining al Shabaab, he or she is assigned a 2. If not, a zero. Yet, both risk factors, such as rejection of democracy, and mitigating factors, such as support for democracy, are weighted in the same direction. Thus, an individual who professes support for democracy, which is considered to mitigate against his or her future violent behaviour, is given a 2, instead of a 0 or a -2. The outcome is that both mitigating and risk factors point in the same, instead of the opposite, direction. Moreover, there is no specification in the assessment instrument of how to interpret the numbers and what the cut-offs for low risk or high risk are. Instead, the SOPs state that screeners should not consider their judgments beholden to the number. The problems of usability and the risk of arbitrariness thus loom large.

The lack of predictability in screening processes poses a crucial challenge for low-level al Shabaab affiliates considering defection: unlike high-value individuals who negotiate their deals with the government prior to defection, low-level individuals considering defection can have little certainty about the personal consequences of their decision. The lack of clarity regarding eligibility for amnesty and the non-transparency of screening processes means that potential defectors must risk their lives twice: first to escape al Shabaab; and second by taking on the risk that they may be screened as high-risk.

The opacity regarding who hands him or herself in to Somali authorities or AMISOM, who seeks their protection, and whom they detain remains a significant challenge. There is still no systematic database available to international or Somali oversight bodies indicating the

reception that will be given to those seeking protection, to defectors, and to detainees. Many women may simply be released immediately. Men may be pressured to become informants or join the intelligence service during the screening process, without ever receiving a high-risk or low-risk label.<sup>70</sup> The Somali public and the international community mostly see those assessed as high-risk only when they are executed in public after a military court finds them guilty.

### High-Risk Defectors

Prior to the establishment of the defectors' rehabilitation centres, many, if not most, al Shabaab detainees were sentenced to death by military courts and executed in public.<sup>71</sup> Under the existing system, only high-risk defectors and many captured individuals are sent to military courts where they face a high likelihood of being sentenced to death and executed. The courts and laws are widely seen as not providing basic rights to the accused, although these are enshrined in international human rights law and the Somali Provisional Constitution.<sup>72</sup> No rehabilitation centres are available for high-risk defectors.

In general, most Somali intelligence and government officials maintain that they do not have the capacity to process, house and feed large numbers of high-risk defectors and detainees in facilities, particularly for prolonged periods – which is what would be required if they were to sentence these individuals to long-term prison sentences instead of execution.<sup>73</sup> While complaining that the international community predominantly supports facilities and processes for low-risk defectors, a top Somali intelligence official further argued that high-risk defectors need to be sentenced to death or else they will radicalise other detainees and facilitate escapes. He offered an example of al Shabaab holding a court within the central prison in Mogadishu and executing a prisoner as an example of such subversion.<sup>74</sup> International advisors confirmed that the Mogadishu prison is indeed not safe, and access to it remains risky for both international consultants and Somali officials.<sup>75</sup> The quality of Somali prisons is indeed by and large very poor.

Government officials also maintain that regular civilian courts do not have the capacity to prosecute al Shabaab detainees and high-risk defectors because of a lack of laws on terrorism, a lack of secure facilities, and because civilian judges are afraid of al Shabaab retaliation.

Clearly, the Somali military, law enforcement, and justice apparatus also lacks the capacity to collect evidence and mount effective prosecutions that would conform to international standards. As with the screening process, evidence and decisions are based mostly on interrogation, which may involve substantial coercion, and on information from informants and others “who know” the individual.<sup>76</sup> As with the overall screening of those who defected or were captured, there is little visibility as to who is sent to military courts. Thus, whether some high-risk individuals are held in detention for a long time without trial or after trial, or whether they are released through bribery or informal means, is not apparent. Nevertheless, corruption is widely suspected.<sup>77</sup>

One exception to the overwhelming tendency of the military courts to sentence to death those they try for links to al Shabaab occurred in Baidoa. There, the court sentenced a number of al Shabaab members to prison. The international community has since supported the Baidoa prison by providing “de-radicalisation” training, religious re-education, and other rehabilitation services, as well as family engagement. The last element has been the most challenging, due to a loss of family ties, difficult security situation in parts of Somalia where prisoners' families reside, and discouragement by prison staff.<sup>78</sup> When the high-risk prisoners are about to be released, it is expected that the family will collect them at the prison and that they will be monitored for at least six months.<sup>79</sup>

In response to the claims of the Somali government that it lacks the capacity to process high-risk al Shabaab defectors and detainees through civilian courts, the UN and other international partners have built a special secure court and prison complex in Mogadishu. This complex has 150 beds, as well as places for judges and prosecutors, and offers them a safe place to stay. This court is expected to try its first cases in early 2018.<sup>80</sup> The Somali government has endorsed the operations of the new facility, but securing the agreement from the Somali government to transfer cases from the military courts to this special court took three-and-a-half years. Yet to be resolved is how the issue of death penalty will be handled, as the UN does not support it.

### Low-Risk Defectors

If defectors are lucky enough to be classified as low-risk, they can volunteer to be placed in one of three small-scale DDR-like<sup>81</sup> facilities, or special facilities for children, all of which benefit from either UN or bilateral international financial and technical assistance.

These DDR-like facilities offer low-risk defectors an alternative to going to court. However, those who successfully complete the programs do not appear to receive explicit and legally-binding guarantees against future prosecution for past association with al Shabaab, particularly as no law governs the process. Rather, a discretionary decision is made to offer low-risk defectors the DDR-like program, with the implicit understanding that such defectors will not be prosecuted after completing the program for past association with al Shabaab.

Since in the judicial process, al Shabaab affiliates incur a very substantial risk of being sentenced to death, most low-risk defectors choose to go to the DDR-like centres. Thus, the full voluntariness of their choice can be questioned. Nonetheless, UN officials providing technical assistance to the low-risk defectors programs insist that UN redlines for engagement are: that the process is voluntary; that the centres are not misused as detention centres; and that children are separated from adults in the centres.<sup>82</sup> All of these points constituted significant challenges through 2015,<sup>83</sup> and have since improved significantly.<sup>84</sup> In 2017, between 450 and 500 individuals were in the rehabilitation centres at any one time.<sup>85</sup>

Three rehabilitation centres are currently in operation in Somalia: two in Baidoa and Kismayo, where the current implementing partner is an international organisation that for security reasons did not want its name disclosed; and another centre called Serendi in Mogadishu, where the implementing partner is a UK contractor (although the contractor has not requested that its name be withheld, for uniformity of treatment this report does not state it). The Serendi facility is funded by the governments of the United Kingdom and Denmark; the facilities in Kismayo and Baidoa by the government of Germany. The UN provides technical assistance to all of them. The Somali government is the owner of the national program and participates in the administration of the centres, with the goal of eventually fully administering the centres and their programming. A centre in Belet Wayne closed due to operational and funding challenges, as well as insecurity, though discussions are under way as to whether it should be re-opened.

All of these DDR-like facilities focus exclusively on ex-al Shabaab defectors, including ex-combatants and individuals who, while living under al Shabaab rule, provided services, such as cooking, cleaning or selling supplies, to the group. But they do not cover those associated with other armed groups. The rehabilitation process includes five pillars: outreach, reception, screening, rehabilitation, and reintegration.<sup>86</sup>

The outreach program consists of radio broadcasts and social media campaigns, often featuring voices of low-risk individuals in the rehabilitation centres explaining how they are treated well. One such outreach effort is named “Be Among Your People,” and it emphasises the defectors’ eventual reintegration into society. Somali intelligence officers and international advisors

involved with the defectors program have also emphasised the effectiveness of personal radio or cell phone communications from former al Shabaab fighters who have gone through the low-risk defectors program to communicate the availability and benefits of such programs to others considering defection.

The reception at the front lines by Somali intelligence services, Somali military and police, AMISOM, and militias and screening by NISA remain opaque and problematic. However, the draft SOPs constitute a partial step forward, as discussed above.

The purpose of the rehabilitation process is to equip beneficiaries with the skills needed to socially, politically, and economically reintegrate back into Somali society. During the rehabilitation phase, in addition to receiving medical care, beneficiaries receive de-radicalisation and religious re-education aimed at eliminating radical beliefs, psychological treatment to address their trauma and grievances, (e.g. possible mistreatment from Somali authorities), and literacy education. During the rehabilitation phase, beneficiaries also interact with their family members through family visits or weekend leaves, a process that is supposed to help with their reintegration into society.

Recipients also receive vocational training, focused on building skills in construction, plumbing, mechanical repair, tailoring, barber services, agriculture and livestock husbandry – a selection typical of such vocational training in DDR and rehabilitation programs across the world. At times, more innovative training at the Baidoa facility also included driving lessons for possible jobs as taxi drivers. The fishery sector may provide another opportunity in Somalia. In all of these sectors, of course, Somalia's labour supply vastly surpasses demand for labour. Job placement for defectors remains a very difficult obstacle. Amidst Somalia's collapsed war-torn economy, persisting insecurity, grinding poverty regularly skirting famine, and a large youth bulge, jobs are scant for everyone. At times enterprises are also cautious to hire al Shabaab defectors, particularly if the group maintains a presence in the area and the community fears retaliation against defectors and associating with them.<sup>87</sup>

Many defectors thus end up working for the security sector or join militias. In the short term, these may well be the most easily accessible jobs and such conversion may change the battlefield dynamics. However, in the medium term, such practices and outcomes perpetuate the militarisation of Somali society. The Somali economy and foreign aid can support a limited number of fighters in the SNA and police. Militias will eventually need to be dismantled, perhaps with some reintegrated into police forces, as currently planned. But many will not qualify, and their numbers exceed the planned total size of the police force. Salaries associated with formal and informal jobs in security services will dry up and Somalia will face the perpetual problems of armed men without resources extorting communities, engaging in predation, and being susceptible to violent clan rivalries and discrimination.

Reinsertion – and, in aspiration, reintegration – remains one the least developed and most challenging elements of the effort, with more programming hoped for in the future. Upon exit from the program, many low-risk defectors end up working in the security sector. However, monitoring beneficiaries after exit, which is crucial for assessing the program's effectiveness, is a challenge due to insecurity. A large presence of Somali intelligence and security services in reinsertion communities can draw the attention of al Shabaab and undermine the security of both defectors and receiving communities. Some beneficiaries refused to participate even in phone calls.

Indeed, the issue of security looms large in multiple ways over the programs. Paramount among them is the physical security of the rehabilitation centres and of the released defectors and their families from al Shabaab attacks. Such attacks sometimes occur very close to areas of return.

Attacks on the rehabilitated can also come from Somali security operatives, private militias, and rival clans in communities to which they return. The Somali government has no way of providing or guaranteeing security to the individuals as it does not control much of its territory. And although the program is meant to rehabilitate those posing a low-risk, security concerns for the community receiving them after they complete the program is also a crucial issue.

Compared to the state of the low-risk defector program in March 2015 when the author conducted a prior assessment, several elements have crucially improved. Among the most improved factors since 2015 is the predictability of exit from the three rehabilitation facilities for low-risk defectors. Until then, defectors were held at the Serendi facility for many years without any clear prospect for release. Even at the Baidoa facility, NISA officials often decided on the terms of release, at times making joining Somali intelligence or security service a condition for release.<sup>88</sup> In the cases of Serendi and Kismayo, and to some extent Baidoa during the 2012-15 period, the DDR-like facilities overlapped with detention. This was also due to the decision of Somali and AMISOM to having hand over to those facilities persons rounded up on the battlefield and during clearing sweeps, even if they had merely lived under al Shabaab control. Now, the exit from the Baidoa and Kismayo facilities after three months is straightforward. It is also far more predictable and clear in Serendi, although there the length of mandated stay varies and exit is based on the approval of a committee, detailed below. The quality of service and rehabilitation deliveries also improved across the three facilities.

Some Somali analysts question whether the term defector, including its Somali translation, is appropriate, since Somali culture strongly disapproves of “defecting,” and “surrendering” is equally socially problematic.<sup>89</sup> And the stigma of the label “defector” may inappropriately penalise individuals who are better described as victims of the group. For instance, what about a cook who is running away from a village that had been under al Shabaab control? Should such a person be considered a defector or merely a victim seeking protection from the arriving AMISOM or Somali forces? He may well be deserving of rehabilitation aid, but should he be saddled with the label and stigma of “defector”? Accordingly, there is an effort underway to improve the Somali terms used for the program.

### **Comparing the Centres for Low-Risk Defectors**

The programming design and content of the rehabilitation and reinsertion phases varies significantly across the centres. For all five phases of the low-risk defectors program, the UN has identified the harmonisation of the programming and the development of standard operating procedures as key priorities. Ongoing efforts to harmonise exit procedures and the service delivered across the facilities are important for the sake of fairness and equality of treatment that low-risk defectors receive.

The most important differences between the Baidoa and Kismayo facilities, on the one hand, and the Serendi facility, on the other, are: the length of the rehabilitation program; freedom to go in and out of the facility; the presence of NISA officials in the facility; the exit process; and emphasis on reintegration.

At Baidoa and Kismayo, the total length of stay from entry to exit is three months. While the implementing partner would prefer a longer program, a lengthier stay could not accommodate even the current flow of defectors. With emphasis on voluntariness, beneficiaries have a greater capacity to go in and out of the centre.

The Baidoa and Kismayo centres also limit the ability of NISA and other Somali security officials to have free access to the centre and to the defectors there. They do this to prevent problems they had faced in the past regarding the association of the defectors program with the use of defectors for intelligence provision, sometimes through coercion.<sup>90</sup> NISA officials, nevertheless,

are pushing for greater securitisation of the Baidoa and Kismayo centres, including unlimited access to them. They hail their continued access to the Serendi camp – even after the 2015 improvements – as the right model and stress that their screening process does not guarantee the weeding out of al Shabaab infiltrators. NISA argues that in order to ensure infiltrators cannot jeopardise the security of the centres, the defectors, and local communities, they need to be able to interrogate and monitor beneficiaries.<sup>91</sup>

Reinsertion and full re-integration of beneficiaries to their communities is a key emphasis of the Baidoa and Kismayo centres and an outstanding challenge, with more programming planned in the future.<sup>92</sup> At various times, the international implementing partner has partnered with Soyden, a Somali NGO, to conduct community-based reconciliation activities with defectors. These include truth-telling, victims' narratives, and defectors asking for forgiveness of the community.<sup>93</sup> Soyden operates such community reconciliation programs in other areas and beyond the formal defectors program, as detailed below.

The Serendi camp for defectors started was founded in 2012 as an initiative of former Danish special operations forces officers and several Somali intelligence officials and entrepreneurs, with funding from the Danish government.<sup>94</sup> An ad hoc program in its initial years, it soon became mired with accusations of: multi-year detention of child and adult defectors; use of defectors, including children, for intelligence purposes; housing children together with adults; and not providing children with access to their families.

In 2015, the Serendi camp facility, with funding from the government of the United Kingdom, was taken over by a UK contractor as the implementing partner. Multiple UN officials and other interlocutors reported significant improvements of conditions and programming at the facility, including strong compliance with international human rights, humanitarian and refugee laws. All minors were transferred to UNICEF and its implementing partners and to Somali NGOs in 2015.<sup>95</sup> The stay is longer than at Baidoa and Kismayo, but does not exceed 12 months. If, after 12 months, an individual does not have a family and community to go to, or the area to which he would return is insecure, he can apply for a longer stay at the facility.<sup>96</sup> The standardisation and predictability of exit has been assessed by a representative of the UK contractor to be a great success and improvement.<sup>97</sup> With several hundred people released, the certainty of exit is a definite improvement over the pre-2015 practice of keeping individuals there for many years.

During an initial period of about two months, the beneficiary is not allowed to leave the centre. After this period, he can apply for weekend leave. Somali intelligence officials have easy access to the facility and claim to monitor beneficiaries during such weekend leaves,<sup>98</sup> though the robustness of such monitoring is questionable.<sup>99</sup>

Exit is tailored toward release after six months, since the education package is designed around a six-month program. However, beneficiaries can submit an exit application at any time, with an expected minimum stay of between three and four months. A social worker at the facility works with the individual to prepare for the exit interview and certification of the exit board permitting his release. The exit board consists of NISA intelligence officials, officials of the Defectors' Rehabilitation Program, and Serendi Centre Management representatives. The approval of exit is based on several conditions, including medical approval and NISA certification that the reinsertion area is safe. While no application has yet been rejected, release can be delayed if these conditions are not met, or due to slow progress toward rehabilitation goals, particularly religious re-education.<sup>100</sup>

Reinsertion and rehabilitation are a relatively new phase of focus for the UK implementing partner, as most of the funding has so far focused on the rehabilitation phase. Thus, the community programming conducted by the international implementing partner in Baidoa and

Kismayo – such as cultural and sports events or projects for youth at risk<sup>101</sup> – has not yet been made part of the release package for beneficiaries in Serendi.<sup>102</sup>

### **Rehabilitation of Children Associated with Al Shabaab**

Like other militant actors in Somalia and even Somali intelligence and security forces, al Shabaab recruits many under eighteen, often forcibly. Moreover, many children who become associated with al Shabaab are born and live all their lives in al Shabaab controlled areas. They do not have any concept of life outside of al Shabaab control and may truly believe that they are defending their communities from dangerous infidels and apostates; or they may simply be obeying orders so as to survive physically and economically.<sup>103</sup>

One of the great improvements of the defectors process as compared to the 2015 process has been the removal of children from Serendi and other Somali detention and prison facilities, and the establishment of separate rehabilitation facilities for them. Rehabilitation facilities for minors associated with al Shabaab, funded by UNICEF, have been established and administered by two Somali NGOs.<sup>104</sup> At the rehabilitation facilities, the Somali implementing partners provide medical and psychosocial support, as well as literacy, life skills, and vocational training (e.g. repairing cell phones, masonry or electrical work). Children are released to their families after a stay in the facility, if security conditions allow. Since many children come from al Shabaab controlled areas where their extended families still reside, a large number are not able to return home.

However, difficulties with the transfer of minors associated with militancy persist. First, UNICEF tends to become mostly aware of minors associated with al Shabaab once they are captured or once they defect. Persisting insecurity and difficulty of access impede the detection of minors associated with militias; nor are there sufficient enforcement mechanisms in place to ensure that such minors are handed over to UNICEF.

After years of unwillingness to comply with international laws and standards related to minors in conflict, according to UN officials, the Somali government now cooperates far more extensively with the UN on issues regarding under-aged combatants and al Shabaab associates, and recognises its international obligations.<sup>105</sup>

However, difficulties still arise, including with sub-federal state authorities who do not want to comply with international regulations. In March 2016 in Puntland, for example, 96 children accused of participating in an al Shabaab terrorist attack were arrested and placed in adult prisons. It took many months for the UN to negotiate the transfer of most of them to UNICEF.<sup>106</sup> The perception of communities of the cities of Bosaso and Garowe, where al Shabaab attacks had taken place, as well as of some Puntland government officials, was that the children were dangerous terrorists, not victims without consent. There was significant pressure on the Puntland government to execute them. After months of negotiations, the UN was able to secure the handover of those under fifteen to UNICEF and its funded facilities in Mogadishu. However, as a Puntland law defined only those under fifteen as children, those over fifteen remain in prison in Puntland and have been sentenced to very heavy penalties of imprisonment for 20 years and in some cases the death penalty. UNICEF remains engaged with the Puntland authorities in trying to get the sentences dropped, and to get the government of Puntland to pass a juvenile criminal law.<sup>107</sup> The dispute over who is a child and a minor is merely one example of the many significant disjunctions between Somalia's laws and its international treaty obligations.

The UN continues to deal with Somali national and state authorities on the development of standard operating procedures for the screening and reception of children, including age determination and more, and for their handover to UNICEF.

### Rehabilitation of Women Associated with Al Shabaab

As of the end of 2017, no rehabilitation facility exists for low-risk women defectors. Earlier, a women's section of the Baidoa rehabilitation centre closed due to: security concerns; community rejection of the facility due to rumours that it housed high-risk female al Shabaab agents; and lack of funding.<sup>108</sup> Discussions were under way about reopening a facility for women in 2018.<sup>109</sup> Currently, if NISA or AMISOM deem women who defected or who were captured to be low risk, they are released to their communities, if they are nearby, but with little transparency. Alternatively, they are released to areas where they were encountered or to which they were transferred by the security forces. Some may be able to return to their communities, while others may become internally displaced, making them highly vulnerable to persecution, physical violence, and economic hardship.<sup>110</sup>

Several instances of community retaliation against women considered to be “al Shabaab wives” have been recorded in various parts of Somalia, including in Kismayo and Baidoa. In those cases, local authorities and some community members wanted to expel from the area women accused of being associated with al Shabaab, and their children. Local authorities and communities often fear them, seeing them as al Shabaab spies, and do not want to associate with them. They may exhibit little empathy, even if the women had been forcibly married to al Shabaab fighters or had simply found themselves under al Shabaab control. There have in fact been instances of al Shabaab using both women and children as spies, much like the Somali intelligence services who use children for “finger-pointing” (the Somali expression for using informants to denounce al Shabaab associates). Women who bear children for members of the group are granted more freedom of movement and communications, such as easier access to cell phones. In some cases, these women – particularly wives of al Shabaab commanders – are even granted more informal influence than they would enjoy within traditional clan structures. Reports of such privileges further fuel community suspicions.<sup>111</sup>

Women, particularly those from minority clans or who are internally displaced, currently suffer the greatest vulnerability and marginalisation. This is due to a lack of rehabilitation programs available to them, and their low standing in the clan hierarchy. The absence of rehabilitation facilities for low-level female al Shabaab defectors, associates, and victims is a major gap in existing programs. Moreover, in formal courts, women often do not obtain fair hearings and judgments, since corruption in the judicial system often privileges those who can pay greater bribes – rarely something a woman can do – or have greater political or clan influence. In the social sphere, women are highly vulnerable to community ostracism, retaliation, and expulsion, which can have severe implications for their safety and security and that of their children. This gap in formal government- and donor-supported programs is all the more acute given that traditional clan-based justice mechanisms such as *xeer* pose risks of marginalisation and mistreatment of women.

At the same time, women in Somalia are not merely marginalised, vulnerable victims. They are also important vectors of reconciliation. As mothers, they can influence their sons' vulnerability to al Shabaab recruitment. They can also facilitate defections, as sons seeking to leave al Shabaab often contact their mothers and ask them to pave the way toward community reintegration by reaching out to clan elders. Sons may also ask their mothers to contact NISA to obtain guarantees they will not be sent to military courts and killed. Sons may also reach out to male relatives to arrange negotiations with clan elders to accept them back, even if they do not go through the formal defectors programs.<sup>112</sup>



## Traditional Justice Mechanisms, Such as Xeer, and Reconciliation

In addition to the above formal processes, traditional justice and reintegration processes through customary justice xeer councils also take place independently of the formal processes, or sometimes as part of the reinsertion/reintegration phase of the formal low-risk defectors program, such as in the Baidoa centre programming.

Customary justice xeer councils are administered by male judges of clans and rely on the oral tradition of understood norms and dispute resolution. It is unclear how many al Shabaab defectors and associates go through these informal traditional justice processes as a way to leave the battlefield and reintegrate into their communities without ever interacting with formal Somali authorities. The details of the process are also unclear, but it is reasonable to assume these processes vary substantially. On the surface, xeer seems to allow for significant reconciliation options, at least for males associated with al Shabaab. And that has indeed sometimes been the case. A key concept of the xeer system assumes the collective responsibility of the clan for crimes committed by an individual clan member. These crimes can be repaid collectively through the use of blood money or diya as collective repayment for crimes.<sup>113</sup> Thus, two families or two clans can be reconciled after one committed crimes against the other, or after warring, through payments of compensation. Many have suggested linking xeer councils with existing defectors and DDR-like programs.<sup>114</sup>

But the customary xeer system comes with several difficulties for men accused of association with al Shabaab. Wealthier and more powerful clans often discriminate against other clans and sub-clans, and are the dominant or in some cases the only clans represented in the councils. The verdicts of the xeer councils cannot be appealed or challenged. In matters of reconciliation and more broadly, clan elders seek to and often do hold community lives in their hands. They can strongly influence or outright determine how a clan aligns itself in conflict, how the community votes, who can stay in the community, and who is thrown out, and what kinds of compensation or punishment are meted out.

Furthermore, if no compensation is agreed upon or if one party deems the compensation inadequate, the family or clan is permitted, and in fact required by honour, to retaliate. Retaliation may not necessarily target the actual perpetrator, but rather any member of his clan or family. Such cycles of revenge and counter-revenge have repeatedly taken place in Somalia since 1991, including vis-à-vis those associated with al Shabaab.<sup>115</sup> Moreover, by not emphasising individual responsibility and instead privileging community-based compensation or revenge, the system downgrades individual culpability and accountability, thus failing to create deterrence against individual human rights abuses and other crimes.

Further, like the formal processes, the issue of women and children formerly associated with al Shabaab entails special challenges. The xeer system under-privileges women, who are not allowed to even directly address the male elders and must act through male representatives.<sup>116</sup> If the woman comes from a subordinate minority clan, such as the Bantu, or is displaced and does not have clan protection, she is unlikely to receive any justice or to be able to (re)integrate into the local community. Such women can easily end up without any protection and resources. Moreover, being judged by a traditional council can create double jeopardy for women since a Somali woman has a dual clan status based on both her husband's and her father's clan membership.<sup>117</sup> Thus she can face discrimination as a woman and as a member of a minority clan, even only by marriage. Since many minority clans ally with al Shabaab precisely because of their subjugated status, women who have a connection to those clans are highly vulnerable.

## Somali NGO Reconciliation and Peace-Building Efforts

Somali NGOs play an important role in facilitating the formal program for low-level defectors as well as informal defection, and, more fundamentally, community reconciliation that enables acceptance and effectiveness of amnesty and defectors programs. The NGO Soyden, for example, has at various times been hired by implementing partners at Baidoa to facilitate the reinsertion of low-level defectors into their communities.

To that effect and beyond, Soyden organises various community reconciliation and reintegration programs by engaging elders, women's groups, and business representatives to mediate conflict and reconciliation with clans, such as over resources or grievances, and to accept back defectors. Programming for the latter includes trauma healing exercises, such as through drama, paintings, lectures, and the production of pictorial books in which victims draw their traumas.<sup>118</sup> The NGO also provides training for clan elders, to encourage trauma healing and forgiveness. Among its flagship programs is one called Peace Tree, a voluntary 12-week program designed to teach empathy and forgiveness. Attendees are taught how forgiveness helps them break the cycle of violence, including by learning about emotional control and brain functioning.

By Soyden's count, some form of Soyden programming has been delivered to 3,900 individuals in 35 districts during the past seven years. Soyden self-assesses that its programs are highly effective, and those assessments are shared by some international consultants and representatives of implementing partners involved in defectors programs in Mogadishu.<sup>119</sup> No independent evaluation could be conducted for this study. Nonetheless, the NGO also acknowledges multiple challenges, such as funding shortfalls, security concerns, and the need for involvement of local authorities not tainted by criminal behaviour. In the context of mediation between al Shabaab returnees and local communities.

### 3. Overall Assessment of the Current Approaches to Amnesty, Defectors Programs, and Co-optation Deals

Amnesty and defectors programs in Somalia play an important role in reducing the intensity of conflict and paving the way for eventual peace and reconciliation. Over the past decade, they have experienced important improvements, the most significant coming after 2012 and again after 2015 as a result of international community involvement. Its funding, technical expertise, and, crucially, insistence on compliance with international human rights standards and humanitarian laws have produced significant improvements in Somali policy design and implementation.

Still, major challenges remain that require joint Somali-international policy attention and persistence. The inability to meet optimal standards amidst persisting multifaceted violent conflict, difficult politics, and extremely low government capacity should not preclude international assistance. And the absence of an adequate legal framework, preferable as that would be, does not mean that the defectors program and amnesty offers should be suspended until the requisite laws are enacted by the Somali parliament. Due to the fractious nature of Somali politics, passing such laws could take years.

Out of the three government-led programs – for high-value defectors, high-risk defectors, and low-risk defectors – the one with the greatest involvement of the international community, i.e., the low-risk defectors program – has registered the greatest improvements. By facilitating disengagement from the battlefield, enabling low-risk combatants and al Shabaab associates to avoid military courts, and facilitating rehabilitation, the program saved lives – of al Shabaab associates and within communities. By enabling defections, both the high-value and low-value individual defections also hold the promise of weakening al Shabaab militarily. Nevertheless these hoped-for effects have not been robust or decisive so far.

However, the need for improvement persists across all three categories, as well as the related amnesty announcements. Simply relying on traditional clan mechanisms is not sufficient, as these processes themselves are not adequate and create high risks of unequal treatment. There is a need for greater interaction between formal government-led processes, internationally sponsored and facilitated processes, and the Somali people and communities. In addition, these processes require greater clarity, specificity, and legal certainty of these processes.

#### **The Lack of Clarity and Certainty for Defectors**

The ad hoc nature of the amnesty declarations, with unclear eligibility standards or attached conditions, is problematic. The relationship between amnesty declarations and various defectors programs remains unclear, with some individuals still defecting outside amnesty windows. Further, Somalia has yet to link amnesty declarations and defectors programs to an overarching strategy for ending the conflict. Due to arbitrary screening practices, a potential defector who is not a commander cannot predict whether he will be classified as low-risk or high-risk. Even a victim who merely lived under al Shabaab rule and out of necessity, provided some services or paid zakat to the group, cannot be sure what will happen to him if he defects. Thus, a potential low-value defector must risk his life twice – first to escape al Shabaab, and second in case he is classified as high-risk and thus meets military justice, and very likely the death penalty. Defectors also face legal uncertainty, as there is no legal framework for the defectors programs and amnesty declarations, and those who undergo the former successfully do not

appear to receive explicit guarantees against future prosecution for their association with al Shabaab. That lack of legal certainty applies even to high-value defectors.

### **Impunity and Victims' Rights**

Conversely, a major deficiency of the high-value defectors program is the absence of accountability for serious crimes. The absence of a truth-telling accountability requirement at a minimum perpetuates impunity and undermines victims' rights. And since many high-value defectors retain their armed militias, the risk persists that they will rejoin the conflict against the government and particular communities.

### **Exclusion, Marginalisation, and Broader Accountability**

A more comprehensive recognition of the motivations of individuals joining al Shabaab is crucial for improving rehabilitation services for defectors (as well detainees and prisoners) and for creating a bedrock for reconciliation and conflict mitigation in Somalia. Many Somali intelligence and government officials tend to be singularly focused on radical ideology as the principal motivation.<sup>120</sup> Thus, with the support of donors, they seek to build rehabilitation processes primarily focused on religious re-education. That is convenient because hiring imams to deliver religious re-education is relatively easy. It enhances the officials' patronage networks, regardless of the imam's credibility with those undergoing re-education.

However, recruitment in Somalia is in fact driven by grievances of power abuse and perceived injustice. Thus, for example, if clan discrimination persists, those who joined al Shabaab because they belonged to a marginalised minority clan will be highly vulnerable to retaliation by the dominant clan after they leave the rehabilitation program. Even if religious re-education changed their views, the new discrimination will produce new grievances and resentments. Eventually, they may feel compelled to take up arms again, even if with a different, non-jihadist, group. The persistence of exclusion, marginalisation, and power abuse can thus undermine and eviscerate even well-designed amnesties and defectors programs.

### **Reinsertion of Defectors to Communities**

Reinsertion processes for al Shabaab defectors and people who lived under al Shabaab rule also remain underdeveloped, under-resourced, and inadequate. Resentment is growing in communities about al Shabaab abuses and broader impunity. New resentments are being generated as a result of what some Somalis perceive as privileging al Shabaab defectors while neglecting the community. Some even speak of a moral hazard, with those who joined al Shabaab temporarily qualifying for rehabilitation services and vocational training.<sup>121</sup> At other times, communities fear former al Shabaab members and associates. Clearly, there needs to be a significant expansion of healing and reconciliation processes within the community, such as those delivered by Somali NGOs. Clan elders can be important vectors of such reconciliation efforts, but they need training and oversight, particularly if there is a history of significant clan discrimination and rivalries in affected areas.

Material opportunities, such as in the form of public works delivery, job creation programs, and vocational training, need to be delivered to receiving communities to assuage resentments and perceptions of moral hazard. Such efforts will also help enable reinsertion and facilitate sustainable reconciliation. More donor programming should be devoted to this aspect of the amnesty and defector programs.

Yet, international donor funding can be significantly constrained by laws prohibiting the provision of material support to terrorists. Such laws may well serve to create a deterrent effect among segments of society in particular countries. But in a conflict or post-conflict setting, they can become a straight-jacket disabling conflict mitigation and programming to prevent the re-emergence of violent extremism. There is a great need among members of the international community, including the United States, to develop funding flexibility and certification mechanisms to support rehabilitation programs for defectors and detainees, as well as among communities receiving former combatants and their associations.

### **Militias**

Because of financial constraints on the size of a Somali police and military forces as well as their lack of qualifications, it will not be possible to absorb many existing clan militia members into formal services, as currently planned. That is especially so given that any clan member who is given a weapon (which most Somali men have anyway), or who answers the call of clan elders, can be considered a member of the clan militia. Moreover, many lack the basic education to be retrained as police officers, are inexperienced in dealing with civilians, and may have committed significant human rights abuses, which precludes them from entering Somalia's police forces.

### **Foreign Fighters**

Currently, foreign fighters are mostly off the radar in defectors programs and detention and demobilisation processes. Yet, prior to 2015, there were instances in which foreign fighters, including minors from Kenya, found themselves in Serendi and other detention facilities.

A considerable number of al Shabaab members likely originate from Kenya. They are not merely Somali Kenyans, but, as a result of Kenya's draconian policies and measures, especially after al Shabaab's attack on Nairobi's Westgate Mall attack in 2013, Kenyan Muslims in general.<sup>122</sup> Of course, Muslims in Kenya join for complex reasons, including many unrelated to the draconian policies of the Kenyan government, a crucial driver as that is.<sup>123</sup> Other foreign fighters in Somalia may come from Tanzania or Europe. Currently, there are no clear processes and opportunities for them to surrender and be repatriated, nor are there established protocols and international agreements, or even regional discussion fora and platforms as to how to return them to their home countries.

## 4. Conclusions and Policy Implications

Including leniency options for those who did not commit grave atrocities and for populations who lived under control of militant groups improves prospects for reconciliation, justice, and eventual peace. Particularly those who found themselves under militant control are often victims first of all, and sometimes above all. At other times, victims may become perpetrators but their offenses, such as collecting zakat for al Shabaab, may be minor. Treating such individuals or clans that aligned with al Shabaab because of their prior oppression and marginalisation with harsh punishments risks perpetuating cycles of violence and retaliation as well as injustice.

However, simply forgiving those who have committed crimes, especially serious ones, without any accountability risks perpetuating impunity. Thus, the design of the amnesty and defectors programs is crucial.

Somali society broadly needs to be given systematic opportunities to provide input into the formal government-led processes as well as into interactions of traditional mechanisms and formal processes. Somali communities report that their safety and the prospect of peace is enhanced by the existence of the DDR-like defectors programs and efforts at community and cross-community healing and reconciliation. But they also report fear and substantial ambivalence toward amnesty and leniency programs that do not guarantee accountability. They are deeply sceptical of political deals with prominent warlords. As a sixteen-year-old-boy, a minor from Puntland who had been sentenced to death for allegedly participating in an al Shabaab attack, told a UN delegation visiting the prison, “I have a concern. We were dragged off to the war by al Shabaab and now you see us as criminals and want to kill us. How come Sharif Sheikh Ahmed, former leader of ICU, became president?”<sup>124</sup>

Until now, the government-led processes, including repeated declarations of amnesty for al Shabaab, have been ad hoc and always top-down, without policy and legal specificity and without a government capacity to fully enforce them.

A broad endorsement of the basic framework that balances accountability and reconciliation without tilting too extremely toward either amnesty or highly punitive measures will allow the government of Somalia to move away from its haphazard and constantly wavering approach. Particularly if a societal endorsement of the basic precepts is combined with an adequate legal framework for a conditional amnesty and defectors programs, the government of Somalia will be able to put in place a more consistent approach that is not so vulnerable to the vagaries of politics and politicking in Somalia. The goal should be to move toward an overarching strategy in which clearly-defined conditional amnesties can promote a transition away from conflict and toward reconciliation instead of factional politics surrounding clan and powerbroker competition. It can thus also become a model also for deeper and broader societal reconciliation.

Implementing such processes will take a long time and is likely to face many challenges, including the fractious nature of Somali politics and the constant parochial competition among clans and among powerbrokers. AMISOM’s planned departure and the prospect for conflict intensification further restricts the implementation of these processes. Nonetheless, putting in place reconciliation processes that address grievances of marginalised clans and groups can avert a greater intensification of conflict and prevent new cycles of violence.

To that effect, this report recommends that the following strategies and policy measures be adopted:

**Organise Broad-Based Societal Conversations about Justice and Reconciliation:** Such dialogues should focus on how to balance reconciliation with justice. They can explore the potential role of judicial and non-judicial accountability mechanisms, such as truth-telling and disclosure of crimes and acts. They should also consider which of these mechanisms would be most acceptable to Somali society while ensuring compliance with international law. The dialogues should also cover the recognition of victims' rights. They could include Somali government officials and clan elders, as well as women and civil society members from across Somalia, not merely Mogadishu. While security constraints will make outreach difficult, Somali civil society and business community can facilitate at least some outreach into areas dominated by al Shabaab. Minority clans need to be robustly represented. One event or one process is not sufficient. Instead, such a community dialogue should run for several weeks or months and include a variety of mechanisms, such as phone surveys, local community meetings organised by NGOs and reported to government and international interlocutors in Mogadishu, as well as discussion fora in the capital.

**Develop a Legal Framework for Conditional Amnesty and Reconciliation Informed by the Above Dialogue and Move Away from Ad Hoc Declarations of Amnesty:** Development of a legal framework for amnesty and defectors programs, as well as for prosecuting terrorism, needs to proceed and pick up speed. But both the legal and policy framework need to be informed by societal dialogue. The international community should continue to work diligently with Somali authorities to ensure compliance with international laws and standards. Traditional justice mechanisms, too, should be open to societal and government oversight. A legal framework for amnesty should lead to lesser reliance on ad hoc and unclear presidential declarations of amnesty. Meanwhile, however, existing defectors program and reconciliation processes should not be halted and held hostage to the absence of the laws and policy frameworks, even as their development, detailed clarification and specification, legal ratification, and the establishment of legal certainty are necessary. Even without legal certainty and specific policies, the current suboptimal processes save lives.

**Expand International Legal Tools for Supporting Conditional Amnesties, Transitional Justice, and Defectors Programs:** To avoid funding shortfalls for defectors programs, international donors need to review laws on terrorism. New flexibility, additions, and amendments need to be developed to ensure that counter-terrorism laws (e.g. laws against providing material support to terrorists, do not inadvertently prevent crucial programming for rehabilitation of combatants and populations who lived under the militant's control, for peace-building and reconciliation, and for countering and preventing violent extremism. The international community must also work with national governments and provide legal guidance to ensure that counterterrorism laws do not perversely create new grievances by charging populations who lived under militant control with crimes of financing terrorism merely because they had to pay their oppressors taxes or provide other forms of support.

**Expand Reinsertion, Reintegration, and Reconciliation Programming:** Psychosocial therapy and healing processes should not be provided merely to defectors but also to receiving communities. Efforts by Somali NGOs provide lessons for such programming and show the value of truth-telling. With proper training and monitoring, clan elders and women should be mobilised as important vectors of rehabilitation, reconciliation, and peacebuilding.<sup>125</sup> Because of capacity problems and insecurity, such processes will need to be fairly simple. Vocational training and job creation efforts, too, need to be rolled out within receiving communities to mitigate resentment that those who took up arms receive rehabilitation education, training, and jobs, while those who resisted al Shabaab or were victims persist in dire conditions. Creating jobs in far flung communities may be extremely difficult, however some public works or agriculture programs are often feasible. Traditional development actors should become more systematically involved in the reinsertion processes.

**Subject High-Value Defectors to Some Accountability:** At a minimum, high-value defectors should be required to disclose their crimes. Better, some evaluation of their crimes should take place, with screening mechanisms for them developed as well.

**Urgently Establish Rehabilitation and Detention Facilities and Programs for Female al Shabaab Defectors and Associates:** In rehabilitation facilities for women, much will need to be gender-tailored. This includes, vocational training, managing access to children, and religious re-education. Beyond the rehabilitation programming, justice and political representation mechanisms for women in Somalia need to be strengthened.

**Develop and Improve Transparency of Reception and Screening Processes of Defectors and Detainees:** There should be a greater transparency regarding differentiation between a detainee, a defector, or a victim seeking protection. Somali intelligence, military, police forces, and AMISOM should be mandated to maintain databases of such reception auditable by relevant international and Somali oversight actors. Similarly, proper auditing of reception and screening processes is necessary. Somalia must move away from the practice in which those who come into contact with AMISOM and Somali authorities disappear into a black hole, only to emerge again with a death sentence by military court and a public execution. Improving the draft screening tool, including clarifying the aggregation of screening questions and their weighing, is also necessary.

**Expand Civilian Courts and Rehabilitation Support for High-Risk Defectors and Detainees Awaiting Trial or Sentenced to Imprisonment:** The special civilian court for high-risk defectors should promptly be made operational. Reliance on military courts and the death penalty should be reduced as much as possible, while strict adherence to human rights and legal standards, including in cases regarding high-risk defectors, need to be systematically promoted. In order to reduce the chance that prisons will foster recruitment to terrorism and crime, rehabilitation support for high-risk defectors and detainees needs to be expanded. The Baidoa prison pilot effort serves as an example.

**Strengthen Post-Exit Monitoring of Low-risk Defectors and Released Prisoners:** Such monitoring and sometimes further rehabilitation assistance or enforcement measures are crucial for preventing terrorism or crime recidivism. But such monitoring needs to be designed in ways that avoid putting receiving communities at risk.

**Develop Disarmament, Demobilisation, Justice, Accountability, and Reconciliation Processes for Armed Actors Beyond al Shabaab:** Somalia will not achieve peace if it ignores the multiple armed actors other than al Shabaab, such as various militant groups, warlords and clan militias. The justice, accountability, and reconciliation policies and procedures developed for al Shabaab can serve as a model for those other actors. Having a consistent framework for all such armed actors would be desirable. Militias, anti-al Shabaab warlords, as well as Somali police and military forces will also eventually need to be subject to accountability for serious crimes. Their victims will also need to have their rights recognised.

**Develop Defectors Programs for Foreign Fighters and Establish Repatriation Protocols:** Regional processes involving Somalia, its neighbours, and other countries from which fighters come to Somalia should be urgently established. Starting such a dialogue with Kenya, perhaps under regional aegis, should be a priority. Such protocols for defection and repatriation need to comply with international human rights obligations and be as specific, transparent, and clear to foreign fighters as possible.

**Move Away from a Militarisation of Somali Society and Address Underlying Root Causes of Conflict, Such as Corruption, Exclusion, and Clan Discrimination:** Even if al Shabaab is defeated or one day makes a political deal with the government, Somalia will not achieve peace if griev-



ances and discrimination persist. Prioritising clan reconciliation is necessary in order to prevent former al Shabaab affiliates who are reinserted into communities from joining militias, as this is often their only way of having a livelihood. This is also necessary for the sake of a broader peace. Thus, it is crucial to empower marginalised clans, reliably protect them against dominant clans, and ensure their fair representation in political processes and government institutions. Some such reconciliation can take place at the local level. However, national- and state- level government officials need to stimulate and promote reconciliation, inclusion, and activity, rather than sabotage such empowerment for their clan and personal gain. The focus should also be on combatting and reducing the widespread corruption of Somali institutions and the usurpation of public resources by Somali powerbrokers – which al Shabaab adroitly exploits.

**Expand Monitoring and Evaluation of all of these Processes:** All amnesty, leniency, and accountability processes require monitoring, evaluation, and if necessary, redesign. Training Somali monitors and evaluators, particularly for areas that international partners find too insecure, is important so that Somali themselves can own, adapt, and improve such processes. And as a secondary benefit, this will also create jobs beyond the military sector.

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74. Author's interviews with a top NISA official, Mogadishu, December 2017.
75. Author's interviews with international consultants and U.N. officials, Mogadishu, December 2017.
76. Author's interviews with Somali intelligence officials, Somali NGO legal experts, and U.N. officials, Mogadishu, December 2017.
77. Author's interviews with Somali legal experts, Somali human rights NGO representatives, and U.N. officials, Mogadishu, December 2017.
78. James Khalil, "Pilot Rehabilitation Project for High Risk Prisoners in the Baidoa Prison – Final Evaluation," January 2017, <http://mptf.undp.org/document/download/18268>.
79. Author's interviews with U.N. officials, Mogadishu, December 2017.
80. *Ibid.*
81. Between 2014 and 2016, the United Nations labeled those programs as DDR; but since 2017, the UN changed its terminology, referring to them instead as "DDR-like" defectors programs -- partially in recognition that armed conflict has not ended in Somalia, and in anticipation that a formal post-conflict DDR will likely emerge. On the broader challenges of conducting DDR amidst on-going counterterrorism and offensive military operations, see Vanda Felbab-Brown, *DDR in the Context of Offensive Military Operations, Counterterrorism, CVE and Non-Permissive Environments: Key Questions, Challenges, and Considerations* in James Cockayne and Siobhan O'Neil, eds. *UN DDR in an Era of Violent Extremism: Is it Fit for Purpose?*, United Nations University, June 2015, <https://i.unu.edu/media/cpr.unu.edu/attachment/1122/UN-DDR-in-An-Era-of-Violent-Extremism.pdf>.
82. Author's interviews with UN officials involved with the defectors program, Mogadishu, December 2017.
83. Felbab-Brown, "DDR – A Bridge Not Too Far."
84. Author's interviews with UN officials involved with the defectors program, representatives of international donor countries involved with the defectors program, and international contractors helping to implement the programs and run the rehabilitation centers, Mogadishu, December 2017.
85. Author's interviews with UN officials involved with the programs, international contractors administering the defectors program, and Somali intelligence officials involved with the defectors program, Mogadishu, December 2017.

86. Author's interviews with U.N. officials, Mogadishu, December 2017.
87. Author's interview with Somali business and civil society representatives, Somali analysts, and UN officials, Mogadishu, December 2017.
88. Author's field visit to Baidoa and conversation with facility administrators, local intelligence officials, and defectors, March 2015. See, Felbab-Brown, "DDR-A Bridge Not Too Far."
89. Author's interviews with Somali security and cultural analysts, Somali advisors to the U.N. mission in Somalia, and Somali NGO representatives, Mogadishu, December 2017, and with Somali NGO representatives, Nairobi, December 2017.
90. Author's interviews with representatives of the international implementing partner and Somali think tank policy experts and former Somali intelligence officials, Mogadishu, December 2017.
91. Author's interviews with Somali NISA officials involved with the defectors program and U.N. officials, Mogadishu, December 2017.
92. Ibid.
93. Author's interviews with Soyden representatives, Mogadishu, March 2015, and by Skype, Nairobi, December 2017.
94. Author's interviews with the Danish special operation forces officer, Mogadishu, March 2015, and with a Somali intelligence official involved in its inception, Mogadishu, December 2017.
95. "Somalia: Special Representative Zerrougui Calls for Stronger Measures to Protect Children Affected by Armed Conflict," Office of the Special Representative of the Secretary-General for Children and Armed Conflict, July 26, 2016, <https://childrenandarmedconflict.un.org/press-release/somalia-special-representative-calls-for-stronger-measures-to-protect-children/>.
96. Author's interview with Somali intelligence official involved with the Serendi facility, Mogadishu, December 2017.
97. Author's Skype interview with representative of U.K. implementing contractor, January 2018.
98. Author's interview with Somali intelligence official involved with the Serendi facility, Mogadishu, December 2017.
99. Author's interviews with international advisors, Mogadishu, December 2017.
100. Ibid., and author's interview with Somali intelligence official involved with the Serendi facility, Mogadishu, December 2017.
101. For one assessment of what kind of youth-at-risk projects may be effective in Somalia, built around so-called rational sensibility approaches, see Lilla Schumicky-Logan, "Addressing Violent Extremism with a Different Approach: The Empirical Case of At-Risk and Vulnerable Youth in Somalia," *Journal of Peacebuilding and Development*, 12(2), October 2017: 66-79.
102. Author's interviews with U.N. officials involved in the defectors program, Mogadishu, December 2017, and Skype interviews with U.K. government representative in Mogadishu involved with the Serendi center, January 2018 and with a representative of the U.K. implementing contractor, January 2018.
103. Author's interviews with Somali NGO representatives and U.N. officials, Mogadishu, December 2017.
104. As with the other implementing partners, for security reasons, their names are specified in the report.
105. Author's interviews with U.N. officials, Mogadishu, December 2017.
106. Ibid.
107. Author's interviews with U.N. officials involved with the negotiations and visits to the prisons in Puntland, Mogadishu, December 2017.
108. Author's interviews with U.N. officials and Somali administrators of the Baidoa rehabilitation facility, Mogadishu and Baidoa, March 2015, and with U.N. officials, Mogadishu, December 2017.
109. Author's interviews with U.N. officials, and international implementing partners of the Baidoa, Kismayo, and Serendi facilities, Mogadishu, December 2017.
110. Author's interviews with Somali NGOs specialising in women empowerment, Somali lawyers, and U.N. officials, Mogadishu, December 2017.
111. Author's interviews with international consultants specialising in al Shabaab policies and Somali NGOs specializing in women empowerment, Mogadishu, December 2017.
112. Author's interviews with NISA officials and representatives of Somali NGOs working for women's empowerment.
113. Ubink and Rea.
114. Abdurahman Abdullahi, "Conceptions of Transitional Justice in Somalia: Findings of Field Research in Mogadishu," *Northeast African Studies*, 14(2), 2014: 7-43.
115. Ibid.
116. See, for example, Janine Ubink and Anna Rea, "Community Justice or Ethnojustice?" Engaging with Customary Mechanisms to Reintegrate Ex-Combatants in Somalia," *International Journal of Transitional Justice*, 11(2), July 2017: 276-296.
117. Ibid.: 279, 291, and 293.
118. Author's interviews with Soyden representatives and U.N. officials, Mogadishu, March 2015, and by Skype with Soyden representatives, Nairobi, December 2017, and with international consultants and rep-

representatives of international implementing partners, Mogadishu, December 2017.

119. Author's interviews with Soyden representatives and U.N. officials, Mogadishu, March 2015, and by Skype with Soyden representatives, Nairobi, December 2017, and with international consultants and representatives of international implementing partners, Mogadishu, December 2017.

120. Author's interviews with Somali government and intelligence officials, Mogadishu, March 2015 and December 2015.

121. Author's interviews with representatives of Somali civil society, including women empowerment NGOs, business community, and Somali analysts, Mogadishu, December 2017.

122. See, for example, Anneli Botha, "Radicalisation in Kenya: Recruitment to al-Shabaab and the Mombasa Republican Council," Institute for Security Studies, ISS Paper No. 265 September 2014, <https://issafrica.s3.amazonaws.com/site/uploads/Paper265.pdf>;

123. For other motivations, see, for example, James Khalil and Martine Zeuthen, "A Case Study of Counter Violent Extremism (CVE) Programming: Lessons from OTI's Kenya Transition Initiative," *Stability*, 3(1), 2014, <https://www.stabilityjournal.org/articles/10.5334/sta.ee/>.

124. Statement recounted to the author by one member of the visiting U.N. delegation, Mogadishu, December 2017.

125. See also Joyce Gichuru, "Participation of Women in Peace Building in Somalia: A Case Study of Mogadishu," Occasional Paper, International Peace Support Training Center, Series 5, No. 6, 2014, [http://www.ipstc.org/media/documents/IPSTC\\_OP\\_No6.pdf](http://www.ipstc.org/media/documents/IPSTC_OP_No6.pdf).