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United Nations Office on Drugs and Crime



TECHNICAL ASSISTANCE HANDBOOK

ON

APPROPRIATE USE OF NON-CUSTODIAL MEASURES FOR TERRORISM-RELATED OFFENSES



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EXECUTIVE SUMMARY

States are required either under their own laws or as a result of their international law obligations to investigate, prosecute and, where justified, detain individuals involved in terrorist activities. Detention is one of the most effective ways to ensure that society is protected from harm on the part of those it detained. Detention is not, however, a panacea against the risk of terrorism. It also has evident shortcomings in that it is generally only temporary and might, in fact, contribute to further radicalization. Detention alone also fails to address the causes of terrorism and, if applied indiscriminately, might further nurture terrorism and stretch the resources of the state. As a result, alternatives to detention have been sought for those convicted for terrorism or those suspected of involvement with terrorist organisations.

Alternatives to detention for terrorists and suspected terrorists come in a variety of forms. They include means and mechanisms that are built into the existing judicial structure and those that function outside of it. Within the judicial system, recourse to non-custodial sentences or control orders have thus provided alternatives to detention for suspected or convicted terrorists. This sort of alternatives can operate and should operate at all stages of the judicial process – from arrest, pre-trial, trial, sentencing and post-sentencing. There are certain pre-conditions to the possibility of using such alternatives to detention in relation to terrorists, in particular: a) the necessary legal framework allowing for it and providing enough legal certainty; b) a clear, transparent, and non-discriminatory policy of case-selection; c) adequate and sufficient resources; d) a transparent and fair system of evaluation and filtering of individual cases; e) a clear and foreseeable practice regarding the process of exiting such programs.

Non-judicial alternatives similarly include a variety of different mechanisms, methods and procedures, some rather informal, others more formalised. Truth and reconciliation commissions, traditional justice mechanisms, disengagement, rehabilitation and de-radicalisation programs have all been tried in relation to convicted or suspected terrorists. All these alternatives have in common that they seek to draw individuals away from the attraction of terror organisations and seek to reintegrate them peacefully into society.

The challenge of finding alternatives to detention for terrorists and suspected terrorists could be greatly reduced if a number of basic steps were taken, in particular, these: first, states should limit the scope of what constitutes ‘terrorism’ under its own laws and

what acts or conduct could come under that general prohibition. In many cases, states criminalise as terrorism acts and conduct that have only the most remote connection with terrorist activities. Secondly, states should, in all cases, abide strictly with their human rights obligations in the context of their counter-terrorism activities – including in cases of detention or alternatives thereto. These two measures combined would go some way, ensuring that only those personally and materially connected to terrorist activities are treated as a threat to society and that in any such case, they are treated fairly and equitably.

Alternatives to detention can sometimes be combined with a policy of prosecution detention either as an incentive to certain actions by the individuals concerned (e.g., an amnesty in exchange of participation in a truth and reconciliation commission) or as part of a process of detention (e.g., a disengagement program run in the context of a prison). In that sense, detention and alternatives to detention should better be understood as a partly overlapping continuum of measures all intended to balance the need of society to guarantee its own security and to ensure that those who posed a threat to it disengage and rehabilitate with a view to reintegration into that society.

Alternatives to detention for terrorists and suspected terrorists are particularly important for those with only a remote connection to terror organisations and those who represent a low risk for society (such as children). Women require a particular, gender-sensitive, approach to detention, although they may in some cases represent as serious a security threat as men.

In order for alternatives to succeed, adequate resources – financial and in terms of expertise and inter-agency coordination – as well as effective outreach towards relevant communities (in particular, victims; affected communities; relevant professionals; members of terror organisations) will need to be provided.

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1. INTRODUCTION

Detention and its alternatives

Counter-terrorism treaties and numerous resolutions of the United Nations Security Council make it clear that the *default* response to terrorism is one based on criminal law, prosecution and detention. This is the logical consequence of the gravity which terrorism poses to society.

Over time, however, the limitations of an all-prosecution and detention strategy have become apparent, including: a failure to address the root causes of terrorism; filling of prisons, including with individuals only remotely linked to terror organization; extensive use of resources of the state; financial cost of the all-detention strategy; the need for reconciliation in some of the countries concerned; and complicating the process of reintegration into society. With this realization came a growing recognition of the need to consider, in appropriate cases, alternatives to imprisonment for those accused or convicted of committing terrorism-related offences.¹ “That recognition is the result of both practical considerations – including the overcrowding of prisons, the negative impact on human rights and social cohesion, and the expense involved in incarceration – and the realization that alternatives are often more effective than imprisonment in reducing recidivism.”²

Among the various circumstances and considerations of relevance to deciding upon the best-suited alternative or alternatives to detention for terrorists and terror suspects in a given context are factors including these: the scope and magnitude of the terror challenge; the existing legal framework, and associated international law obligations; the amount and type of resources available; the social, cultural, and religious context; the extent of problems associated with women and children for which specific measures and procedures are required; and whether the country in question is involved in an ongoing armed conflict or is a post-conflict state. All these and other relevant factors will determine in each case what alternatives are possible candidates to address some of the challenges associated with combating terrorism.

¹ UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 115-116. See also Global Counterterrorism Forum, “Recommendations on the effective use of appropriate alternative measures for terrorism-related offences” (<https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/2016%20and%20before/Effective%20Use%20of%20Appropriate%20Alternative%20Measures%20ENG.pdf?ver=2020-01-13-153915-323>).

² UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 115-116.

Purpose(s) of Manual

The purpose of the present manual is to consider some of the existing alternatives to detention for those suspected of terrorism or those convicted of terrorism-related offences. There is no one-size-fits-all formula for all situations. Instead, the very possibility of alternatives to detention for (suspected) terrorists depends on the peculiar circumstances of the country concerned. So do the various alternatives to it. This Report will not, therefore, propose a particular course of action or strategy to address alternatives to detention. Instead, it lays out various possible strategies, measures and courses of action that could be considered, tested and implemented by states intending to provide for alternatives to detention for suspected terrorists and/or convicted terrorists. This should set a general framework within which a state or local authorities could consider a variety of measures – some judicial, some non-judicial – that could offer an alternative – or a supplement – to a strategy based on prosecution and detention.

Alternatives to detention come in a variety of forms. One division between them distinguishes between judicial and non-judicial measures. The former are built into and are implemented through the judicial organs of the state. They focus on legal obligations and instruments and strongly favor a response, and require that the necessary legal framework be put in place to provide for such alternatives. Resources – both financial and in terms of expertise – will be important to ensure the effectiveness of any such mechanism. The latter – non-judicial alternatives – are built outside of that system and run parallel to it. Alternatives to detention can also be distinguished on the ground of their being conditional to the performance of certain actions (e.g., testifying before a truth commission) or not. In relation to judicial alternatives, they can be distinguished according to the stage of the proceedings at which they are used (pre-trial; trial; sentencing; post-sentencing). For non-judicial alternatives, one can – roughly – distinguish between three groups of measures: a) those based on traditional or customary justice mechanisms; b) the rehabilitation-disengagement-deradicalisation schemes; c) transitional justice mechanisms (in particular, truth and reconciliation commissions, reparation programs and restorative justice mechanisms); and d) administrative measures. Some of these overlap in part – either through their goals or methods – and can often be combined. They have in common that they operate outside of the *normal* legal framework that regulate counter-terrorism activities in most states. They also seek to address the challenge of terrorism through a different prism than the prosecution-detention strategy. Instead of focusing primarily on retribution and

deterrence, they take into account a broader set of factors and considerations, including: reconciliation; rehabilitation; prevention; and reform. As such, they also have a strong communal element tied ultimately to the goal of securing a safer and fairer sort of society.

All of these alternatives have in common a number of elements. First, in a sense, they are an exception to the principle that crimes of the seriousness of those under consideration should normally be subject to the full force of the law. As such, they are likely to be challenged and criticized as unjustified, a sign of weakness or as creating a risk for society. To provide a safe alternative to detention, a great deal of effort will therefore have to be undertaken to both explain their value to society and to ensure that they are implemented in a way that does not create a risk that they seek to address. Second, they are all linked to the fact that terrorism has become a widespread challenge. It requires states to deploy a great deal of its resources to combat. Those resources are also often needed for other tasks. Terrorism must therefore be addressed in a variety of ways that is calibrated to the variety of forms that it may take but also accounts for the reality of the limitations of resources that exists in every state. Third, all of these alternatives depends on their being made compliant with basic standards of human rights. Alternatives to detention for terrorists or suspected terrorists is therefore only ever permitted when those alternatives are compatible with the range of fundamental rights recognized as forming part of the customary international law of human rights (and whatever related treaty obligations a given state might have in addition to those). Particularly important is the fairness of the process, the fact that any individual subject to it should be presumed innocent (unless already convicted through a legally valid prosecution), the legality of any evidence used in such process, the absence of torture or other forms of mistreatment, and general respect for personal freedom.

Terminology

Throughout this manual, the default expression “detention” will be used to refer to measures that have the effect of depriving an individual of his or her liberty.³ The broader notion of “deprivation of liberty” will also be used and encompasses situations in which persons are in police custody, in prison or in administrative detention.⁴

2. DETENTION OF (SUSPECTED) TERRORISTS – BENEFITS; LIMITS; AND SHORTCOMINGS

2.1 Value of criminal prosecutions and detention

The criminal prosecution and detention of terrorists constitutes a critical element in the arsenal of justice and accountability of any state. It arises from a variety of legal obligations binding on states and forms an integral part of any state's security regime. as such, a response based on strict enforcement of law and detention of suspects and convicted terrorists has occurred as a matter of course and general practice in most states confronted with terrorism.

The implications of acts of terrorism are not limited to the territory of any single state. Implications are often transnational and international in character. Terrorist acts constitute a threat to international peace and security, so that they should be treated as acts of the utmost gravity which call for a response that accounts for both the level of threat involved and the need for international cooperation.⁵ They have thus resulted in a variety of international responses, including through the adoption of counter-terrorism instruments (including 19 'universal' ones), a variety of UNSC resolutions and a variety of other binding or non-binding international instruments.

Discussing alternatives to the prosecution and detention to pursue, prosecute and punish crimes of this gravity therefore requires a clear understanding of the value and merits of the criminal prosecution and imprisonment of individuals convicted for such acts. The use of alternatives to the '*mano dura*' response to terrorism is also bound to raise concerns as it could create a perception of weakness on the part of the state or unjustified leniency. Instead, finding alternatives to prosecution and detention of terrorists and terrorist suspects will require strength on the part of any authorities and a good deal of political capital on the part of the states considering the use of such possibilities.

To decide where to draw the line between a response based on law and detention and one looking at alternatives, one should therefore be clear about the advantages and inconveniences of both of them. Slye and Freeman have pointed out that ‘[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.’⁶ Accountability in this context is therefore essential. It contributes to a sense of moral balance, can participate in the search for the truth and gives victims a degree of satisfaction to repair some of the harm done to them.

The prosecution and detention of terrorists also serves an important security function. First, it nullifies or reduces for a time the risk of further acts of terrorism during the period of detention,⁷ and thus contributes to the generally protection of the population.⁸ Secondly, it prevents the return of those detained to the battlefield and thus erodes a terror group’s capacity to recruit. Detention thus provides the most immediate sort of response that society can adopt to try to protect itself from the risk of harm from terrorism.

⁶ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 12.

⁷ A number of returnees were thus involved in terrorist attacks in Brussels, Paris, Istanbul and London between 2015 and 2017. See also J. Morton and M. D. Silber, *When Terrorists Come Home - The Need for Rehabilitating and Reintegrating America’s Convicted Jihadists* (https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf) (footnotes omitted):

The recidivism rate among violent extremist offenders within the United States is unlikely to be zero. While the re-offender rate for violent extremist offenders appears to be much lower than among other federal prisoners,¹³ in 2010 the Director of National Intelligence assessed that 25 percent of former Guantanamo Bay detainees were confirmed or suspected of re-engaging in terrorist or insurgent activities.¹⁴

⁸ UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, *Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters* (2018), para 3

‘States have an obligation to protect the lives of individuals subject to their jurisdiction, and this includes the adoption of effective measures to counter the threat posed by foreign fighters.’

See, e.g., HM Government, *Contest - The United Kingdom’s Strategy for Countering Terrorism* (June 2018) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618/_CCS207_CCS02189297981-_CONTEST_3.0_WEB.pdf), 4849-, para 164 (footnote omitted):

We consider the police and prosecuting authorities’ ability to secure convictions in terrorist cases an important measure of success in stopping acts of terrorism. In the year ending 31 December 2017, the Crown Prosecution Service conducted 86 trials for terrorism-related offences in England and Wales, an increase of 39% from the previous year. Of the 86 persons proceeded against, 90% were convicted. In the remaining eight cases the defendant was acquitted.

The prosecution and punishment of such serious crimes also serves the purpose of re-asserting the relevance and importance of the rule of law, which might have been undermined as a result of terrorist violence.⁹ In a society whose commitment to democracy and the rule of law has been tested by terrorism, the prosecution and punishment of terrorists through a fair and impartial trial has been an important way to re-assert the importance and relevance of the rule of law. It has also signified the superiority of democratic values over those pursued by terrorists.

The presence, existence and effectiveness of a strong enforcement mechanism also creates an incentive and leverage for alternative means of transitional justice. For instance, voluntary participation in a truth and reconciliation commission or a truth-seeking mechanism might be a great deal more attractive to would-be participants if the alternative is a long prison sentence. It is therefore important that prosecution/detention strategies and alternatives to detention not be perceived as competing strategies. Both might be necessary and reinforce each other.¹⁰

Finally, detention might offer an opportunity – though by no means the only opportunity – for rehabilitation.¹¹ For this to be the case, however, resources and efforts would have to be invested by the state to ensure that detention serves that purpose and does not merely serve as a way to keep terrorists away from society.

⁹ See, generally, UNGA, *Uniting against terrorism: recommendations for a global counter-terrorism strategy Report of the Secretary-General*, A/60/825, 27 April 2006, paras 20ff

77. The fundamental basis for our common fight against terrorism is respect for human rights and the rule of law. Strengthening the international legal architecture within which we strive to prevent and combat terrorism must therefore be a priority. The Security Council in resolution 1373 (2001) contributed to this end by deciding that all States should ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, and that such terrorist acts are established as serious criminal offences in domestic laws and regulations. States need to be able to implement and enforce these laws and bring perpetrators to justice, with due respect for human rights.

¹⁰ OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 47:

Countering VERLT requires both effective criminal-justice action, in compliance with international human rights standards, against those who incite terrorism and/or seek to recruit for terrorism, and multidisciplinary efforts to address conditions conducive to terrorism.

¹¹ See, generally, “Rome Memorandum On Good Practices For Rehabilitation And Reintegration Of Violent Extremist Offenders,” *Global Counterterrorism Forum* (2018) (<https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rome-Memorandum-ENG.pdf>) (footnote omitted):

[W]hile prisons have at times been environments where violent extremism has festered, the prison setting can also present opportunities for positive change – serving as a place where the tide of violent radicalism can be reversed. Prisoners live in a controlled environment, where the negative influences from their past which pushed them toward violent extremism can be minimized. They can instead be surrounded by persons who encourage them to pursue a more positive path. There are examples of individuals who entered prison as extremists, were rehabilitated and were then released as enthusiastic messengers against violent extremist philosophies.

See also International Center for the Study of Radicalisation (ICSR), *Prisons and Terrorism Radicalisation and De-radicalisation in 15 Countries* (2010).

All the above considerations militate in favor of a response to the challenge to terrorism which provides as part of its apparatus for a strong and effective system of criminal prosecution and detention of terrorists.¹² But whilst such a regime is a necessary element of any legal system based on the rule of law, it cannot on its own resolve all the challenges raised by the scourge of terrorism. In particular, a strategy that focuses exclusively on prosecution and detention might fail to address the root-causes of terrorism and might create a range of other problems (from over-population of prisons to feelings of communal targeting). So whilst prosecution and detention constitute an important and critical aspect of states' response to the challenge of terrorism, criminal law is and must remain a means of last resort.¹³ Where alternatives to it exist, those should therefore be carefully considered and given a fair hearing not just as alternatives but also as complement to a prosecution-detention strategy.

2.2 Value of alternatives to detention and the limits of an all-detention approach

Whilst the prosecution and detention of terrorists has unquestionable benefits and more than a superficial attractiveness, an approach that is based exclusively on prosecutions and detention is unlikely to address the full range of challenges associated with terrorism. It might also create additional difficulties for the state concerned (from prison overcrowding to communal resentment).

¹² See Letter dated 18 February 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2015/123, and Annex ('Bringing terrorists to justice: challenges in prosecutions related to foreign terrorist fighters'), 23 February 2015,

1. In adopting its resolution 2178 (2014) on 24 September 2014, the Security Council delivered a clear message that Member States and the international community must take proactive measures to address the threat posed by foreign terrorist fighters. Recalling its resolution 1373 (2001), the Council reiterated the requirement that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts be brought to justice and decided that all States would ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense. A strong criminal justice system that includes a robust, proactive prosecution service is thus essential to the effective implementation of the resolution.

¹³ OSCE/ODIHR, Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework (2018) (<https://www.osce.org/odihr/393503?download=true>), p 34:

Recognize the crucial role of criminal law, in conformity with fundamental rule of law principles, in countering terrorism and FTF-related threats, and that overreaching approaches that operate outside of a rule of law-based criminal justice framework, with its established legal procedures and safeguards, are counter-productive;

[...]

- Ensure that criminal law is applied as a matter of last resort, in line with the principle of restraint in the use of criminal law and the interests of justice and with a view to prosecuting genuine terrorist conduct while curtailing over-reach;

First, the ‘all-detention/prosecution’ approach will **clog the judicial system and fill prisons** to a point where judicial and prison institutions face serious challenges to function effectively.¹⁴ An all prosecution-detention approach to combatting terrorism would in turn have number of associated potential negative consequences:

- It is likely to engender important **financial costs** for the State (including in respect of the cost of running prisons and running complex prosecutions);
- Under such an approach, with a long backlog of cases pending, **pre-trial detention could become exceedingly long** so that prisons would remained filled with individuals awaiting prosecutions, including many who might present little or no danger to their community and no risk of flight;¹⁵
- **Investigative and prosecutorial authorities** could be overwhelmed by the number of cases, which reduces their ability to conduct full and thorough investigations of individual cases and will drain the state’s resources and limit its ability to address the most dangerous offenders;¹⁶

¹⁴ This fact combined with limitations upon the state’s limited resources might contribute to creating inadequate prison conditions and overcrowding, which could in turn raise additional issues for the states concerned. See, e.g., <https://www.lowyinstitute.org/the-interpreter/terror-suspects-riot-jakarta-undercores-prison-problems>. See also Centre d’analyse du terrorisme (CAT), *La Justice Pénale Face Au Djihadisme - Le Traitement Judiciaire Des Filières Syro-Irakiennes (2014-2017)* (<http://cat-int.org/wp-content/uploads/2018/05/Rapport-Justice-p%C3%A9nale-face-au-djihadisme.pdf>), 39:

Malgré un renforcement réel des moyens légaux à sa disposition, l’institution judiciaire doit cependant faire face à un phénomène d’engorgement causé par la croissance exponentielle du nombre de dossiers liés au terrorisme djihadiste. Ainsi, depuis la loi du 21 juillet 2016, seuls deux dossiers en lien avec le djihad syro-irakien ont été jugés devant une Cour d’assises.

¹⁵ See *infra*.

¹⁶ See, generally, Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 12:

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.

And, *ibid*, 20:

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.

See also, *infra*, 6.2.3 Resources.

- This, in turn, could contribute to the need to obtain and rely upon ‘**confessions**’, which in some cases might have been obtained through coercion or violence;¹⁷
- Having to deal with a large number of cases, **judicial authorities have sometimes proceeded with unnecessary hast** when a more thorough consideration of the evidence might have provided greater safeguards for the defendants and for the credibility reliability of the fact-finding process;

¹⁷ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 12

[W]hen 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.

See UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, *Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters* (2018), para 71 (footnotes omitted):

The Counter-Terrorism Committee has noted that, in most States, prosecutions of foreign terrorist fighters can be undermined by difficulties in collecting admissible evidence abroad, particularly from conflict zones, or in converting intelligence into admissible evidence from information obtained through information and communications technology, particularly social media. It further noted that the pre-emptive investigation and prosecution of suspected foreign terrorist fighters is a further challenge for all regions, particularly in the light of due process and human rights concerns. The United Nations High Commissioner for Human Rights has expressed concern that the increased reliance on intelligence has had a deleterious effect on criminal justice in many countries.

See also S/2015975/, annex; and A/HRC/1650/. Regarding the use of evidence obtained through torture, see also UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, *Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters* (2018), para 73 (footnote omitted):

States must ensure fairness at all stages in a prosecution. In particular, they must guarantee the right to a fair trial by an independent and impartial tribunal and must not rely on evidence or intelligence obtained through torture. The General Assembly has urged States to ensure that the interrogation methods used against terrorism suspects are consistent with their international obligations and are reviewed on a regular basis to prevent the risk of violations of their obligations under international law, including international human rights and refugee and humanitarian law.

And General Assembly resolution 70/148, para. 6(q).

- Instead of generating a sense of individual and individualized criminal responsibility, such a state of affair could help nurture a sense in some communities that criminal responsibility is being treated as **collective, i.e., as communal, in character** rather than individual (i.e., guilt by association).¹⁸

¹⁸ See, e.g., <http://ifit-transitions.org/resources/publications/major-publications-briefings/the-limits-of-punishment-transitional-justice-and-violent-extremism/limits-of-punishment-collated.pdf/view>, pp 19-20:

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.

The mass detention of suspected terrorists has other shortcomings. First, it often fails to **distinguish adequately** between, on the one hand, individuals who committed serious criminal offences or have taken a willful part in the commission of serious criminal offences and represent a potential threat to society and, on the other, those who might have had only a loose association with a terror organization.

Casting the criminal law net too widely could exacerbate communal or group grievances and contribute to the perpetuation of a sense of disenfranchisement that helps terrorism flourish. Such an approach is also unlikely to address the root causes of terrorism.¹⁹

Second, detention is effective as a means of retribution and deterrence only for **as long as it lasts**.²⁰ With little or no effort to reform, educate or de-radicalise imprisoned terrorists, they will eventually come out of detention and might be more radicalized as a result than when they entered detention.²¹ This raises the question of the value of detention and what to do with former detainees once released from prison.

¹⁹ UNGA, *Uniting against terrorism: recommendations for a global counter-terrorism strategy Report of the Secretary-General, A/60/825*, 27 April 2006, paras 20ff.

²⁰ J. Morton and M. D. Silber, *When Terrorists Come Home - The Need for Rehabilitating and Reintegrating America's Convicted Jihadists* (https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf), 17 (suggesting that the average sentence for a terrorism-related conviction in the U.S. has remained around 14 years and 5-6 years in Europe). See also Linda Qiu, "Trump Calls Terrorism Trial Process 'A Joke,' Despite Hundreds Of Convictions," *The New York Times*, 2 November 2017 (<https://www.nytimes.com/2017/11/02/us/politics/fact-check-trump-terror-convictions.html>); and Sebastian Rotella, "Europe's Revolving-Door Prisons Compound Growing Terror Threat," *ProPublica*, June 23, 2015, <https://www.propublica.org/article/europes-revolving-door-prisons-compound-growing-terror-threat>.

²¹ S. V. Mardsen, *Reintegrating Extremists – Deradicalisation and Desistance* (Palgrave Pivot, 2017), 118-119

A further barrier to reintegration can be the experience of imprisonment. First, being incarcerated can prove a difficult experience which can entrench negative attitudes towards statutory agencies. This can undermine the task of developing a productive relationship with the former prisoner. A second way prison can act as a barrier is through the capital that individual gain as a consequence of imprisonment. The kudos can enhance their reputation, making it more difficult to find ways of fulfilling those goods related to social standing. The result can be a refusal to engage with change agents in an effort not to lose this capital [...].

See also, *ibid*, 56-57.

Furthermore, however desirable, the effective investigation of terror cases for the purpose of prosecution will in almost all cases prove extremely complex. In particular, access to evidence is generally most challenging either because it cannot easily be reached (e.g., if it is to be found in a territory experiencing an armed conflict) or because of the sensitive nature of that information.²² As a result, a great deal of cases might result in acquittals and/or in convictions for minor offences. This could have the effect of putting back into society without oversight individuals who are potentially problematic. Seeking alternatives to prosecution and detention in such cases might help smooth the process of return and help the process of rehabilitation of such individuals.

²² See, generally, Letter dated 18 February 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2015/123, and Annex ('Bringing terrorists to justice: challenges in prosecutions related to foreign terrorist fighters'), 23 February 2015, in particular, paras 10ff and 25ff; and UNSC Resolution 2396, S/RES/2396 (2017), 21 December 2017:

Recognizing that Member States face challenges in obtaining admissible evidence, including digital and physical evidence, from conflict zones that can be used to help prosecute and secure the conviction of foreign terrorist fighters and those supporting foreign terrorist fighters,

See also UNODC, *Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia* (2018), 33

Cases involving FTFs pose unique challenges to prosecutors and investigators, particularly in respect to the collection of admissible evidence. Material that can often be gathered to prove domestic terrorism offences such as eye witness testimony and recovered weapons, may be unavailable in cases involving foreign conflict zones. In particular, a major hurdle is proving intent to travel.

Early liaison and a constructive working relationship between investigators and prosecutors can help to resolve some of these issues, determining the evidence that will be required to support a prosecution, as well as indicating any potential problems regarding the admissibility of evidence. This is particularly so in jurisdictions applying the Common Law legal system, with investigations led by the police and where prosecutors might not ordinarily be involved until charges are laid or a case proceeds to court.

As with terrorism investigations in general, collection of evidence can be resource-intensive and very time consuming. In attempting to protect public safety, enquiries are often time imperative and urgency can be required to preserve available evidence. Coordinated investigations by dedicated teams of investigators can help to meet these challenges. As the nature of the threat constantly evolves, so does the need to adapt to meet it. This section now briefly looks at some of the main evidential challenges faced in FTF investigations.¹⁷⁴

In FTF cases, much of the information about persons fighting overseas comes from the work of domestic or foreign intelligence services. Generally classified as "secret", conditions imposed on the sharing of material normally mean that it cannot be adduced as evidence in open court. This is often due to genuine fears of exposing methodology or the sources of information, exposure of which could be counterproductive to future intelligence gathering and even endanger lives. The protection of national security and other public interests can conflict with the administration of justice in a specific prosecution.

See also Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/31301-/LoP-Framework-Paper-final.pdf>), 12; and Thomas Renard And Rik Coolsaet (editors), *Returnees: Who Are They, Why Are They (Not) Coming Back And How Should We Deal With Them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands* (Egmont Paper 101, February 2018) (http://www.egmontinstitute.be/content/uploads/201802//egmont.papers.101_online_v13-.pdf), 61; Vanda Felbab-Brown, 'Nigeria Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 105.

Mass incarceration also raises concerns from the point of view of **international human rights law**. The rights to be presumed innocent, to be brought to trial without undue delay, to have access to a lawyer and to an effective defence, to be released pending trial unless otherwise required are all rights that could potentially be affected by such practice.

Furthermore, prosecutions are generally based on counter-terrorism legislation, which draw little normative distinction between those involved in the commission of serious criminal offences and those *merely* associated with a terrorist group. Heavy reliance – and often, *exclusive*, reliance – on ‘confessions’ by prosecuting authorities also raises concerns regarding the effective protection of the fundamental rights of defendants in such cases.

Detention could also serve as **terror incubators or places of recruitment** for terror groups, which would perpetuate rather than solve the terror conundrum.²³ And makes the process of rehabilitation and reintegration all the more complicated.²⁴ And too great an emphasis on punishment and detention might also create a disincentive for members to **quit and disengage with their group**.

²³ See UNSC Resolution 2396, S/RES/2396 (2017), 21 December 2017:

Acknowledging that prisons can serve as potential incubators for radicalization to terrorism and terrorist recruitment, and that proper assessment and monitoring of imprisoned foreign terrorist fighters is critical to mitigate opportunities for terrorists to attract new recruits, recognizing that prisons can also serve to rehabilitate and reintegrate prisoners, where appropriate, and also recognizing that Member States may need to continue to engage with offenders after release from prison to avoid recidivism, in accordance with relevant international law and taking into consideration, where appropriate, the United Nations Standard Minimum Rules for the Treatment of Prisoners, or “Nelson Mandela Rules”,

See also UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters (2018), para 5 (footnote omitted):

‘Arbitrary arrests, incommunicado detentions, torture and unfair trials fuel a sense of injustice and may in turn encourage terrorist recruitment, including of foreign terrorist fighters.’

And S/2015/338; International Center for the Study of Radicalisation (ICSR), Prisons and Terrorism Radicalisation and De-radicalisation in 15 Countries (2010); Rappaport, A., Veldhuis, T.M., Guiora, A.N. Homeland Security and the Inmate Population: The Risk and Reality of Islamic Radicalization in Prison. In L. Gideon (Ed.) Special Needs of Offenders in Correctional Institutions. Thousand Oaks: SAGE Publishing (in press).

²⁴ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 24:

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.

The **Covid-19 crisis** has further complicated the matter insofar as detention might carry increased risk of contamination. Detention in those circumstances might also require the authorities to adopt necessary e-facilities to address issues related to the continued detention of individuals (not just in terrorism cases).²⁵

Finally, detention contributes little to the process of **reconciliation** necessary to societies affected by this sort of criminality, particularly in post-conflict societies. ‘[W]hile 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’.²⁶ Mass incarceration of individuals from a particular community could instead have the opposite effect by creating the perception that detention is being used as a means of retaliation against members of that community and thus may exacerbate perceptions of bias, discrimination and injustice.

These considerations mean that states should consider developing alternatives to the possibility of prosecution and detention of terror suspects, which address some of the shortcomings and limitations of a strategy that would depend exclusively on such an approach.²⁷ Some of these alternatives can rely upon the existence judicial systems while others might be built outside of it.

3. RELEVANT LEGAL FRAMEWORK

3.1 General considerations

The question of the detention and prosecution of suspected terrorists is regulated by both domestic and international law. Domestic law generally provides for a detailed regime of norms regulating various aspects of the terrorism equation – what conduct is regarded as amounting as terrorism in that legal order; what powers do the authorities have to combat it; what safeguards must be guaranteed in that context; etc.

International law adds a layer of legal complexity to that domestic legal regime. First, terrorism in all forms and manifestations is regarded as constituting ‘one of the most

²⁵ UNODC draft note on COVID-19 responses (overcrowding/prisons/terrorism-related offences).

²⁶ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 12.

²⁷ See United Nations Security Council, Counter-Terrorism Committee, Security Council Guiding Principles on Foreign Terrorist Fighters: The 2015 Madrid Guiding Principles + 2018 Addendum, S/2015/939 and S/2018/1177 (2019), 17 (footnotes omitted):

The employment of rigid prosecution policies and practices against foreign terrorist fighters can be counterproductive to the implementation of comprehensive strategies to combat such fighters and violent extremism. Member States should also consider alternatives to incarceration, as well as the reintegration and possible rehabilitation of returnees, prisoners and detainees.

serious threats to international peace and security and [...] any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed'.²⁸

As such, it is regulated by nineteen 'universal' sectorial conventions,²⁹ and by a number of regional conventions.³⁰

The adoption of a comprehensive, multidisciplinary approach that involves all branches of Government, as well as community and civil society stakeholders, can be a more effective way to bring terrorists to justice and can represent an effective long-term response to the risks posed by foreign terrorist fighters. Many Member States find it difficult to determine how to respond to the potential threat posed by specific categories of travellers, including minors, family members and other potentially vulnerable individuals, providers of medical services and other humanitarian needs and disillusioned returnees who have committed less serious offences. More research and sharing of experiences is needed in order to develop effective, context-specific criminal justice responses to foreign terrorist fighters and enable the effective assessment of the risks posed by various categories of returnees. In combating the threat of foreign terrorist fighters, it is important to address the full range of serious crimes committed during travel, in particular war crimes, crimes against humanity and gender-related crimes. Moreover, it is important to conduct an initial assessment of the foreign terrorist fighter to determine the level of culpability and thereby determine the appropriate way to handle each individual.

[...]

Guiding Principle 30

Member States should ensure that their competent authorities are able to apply a case-by-case approach to returnees, on the basis of risk assessment, the availability of evidence and related factors. Member States should develop and implement strategies for dealing with specific categories of returnees, in particular minors, women, family members and other potentially vulnerable individuals, providers of medical services and other humanitarian needs and disillusioned returnees who have committed less serious offences. Prosecution strategies should correspond to national counter-terrorism strategies, including effective strategies to counter violent extremism.

Guiding Principle 31

Member States should consider appropriate administrative measures and/or rehabilitation and reintegration programmes as alternatives to prosecution in appropriate cases. Such measures should be used in a manner compliant with applicable international human rights law and national legislation and should be subject to effective review.

Guiding Principle 32

Member States should ensure that their criminal justice systems are capable of dealing with all serious crimes committed by foreign terrorist fighters, in particular war crimes, crimes against humanity and crimes related to gender.

²⁸ UNSC Resolution 2178 (2014), S/RES/2178 (2014), 24 September 2014. See also UNSC Resolution 2396, S/RES/2396 (2017), 21 December 2017,

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever, wherever and by whomsoever committed, and remaining determined to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level, Reaffirming that terrorism poses a threat to international peace and security and that countering this threat requires collective efforts on national, regional and international levels on the basis of respect for international law and the Charter of the United Nations,

²⁹ See, generally: <https://www.un.org/counterterrorism/international-legal-instruments> (listing these).

³⁰ See, generally, United Nations, International Instruments related to the Prevention and Suppression of International Terrorism, 2008 (https://www.unodc.org/documents/terrorism/Publications/Int_Instruments_Prevention_and_Suppression_Int_Terrorism/Publication_-_English_-_08-25503_text.pdf); OSCE, Status of the Universal Anti-Terrorism Conventions and Protocols as well as other International and Regional Legal Instruments related to Terrorism and Co-operation in Criminal Matters in the OSCE Area (https://www.osce.org/files/f/documents/5/8/17138_0.pdf).

Several of these require member states to make certain types of conduct punishable and creates, in some instances, associated obligations to extradite or prosecute.

A large number of agencies, international bodies and international organisations – some regional, some international – have added a great deal of normative depths to this body of law.³¹ Particularly important for present purposes are a number resolutions of the United Nations Security Council. Some of them demand of all states that they should take steps to combat and punish certain categories of terrorist acts.³² This creates binding legal obligations for all states concerned. For instance, Resolution 1373 of the United Nations Security Council (UNSC) demands that all Member States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice. It also calls upon states to ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to effectively prosecute and to penalize the activities described in paragraph 6 of resolution 2178.³³ UNSC Resolution 2178 in turn demands that all Member States shall establish serious criminal offenses regarding the travel, recruitment, and financing of foreign terrorist fighters.

It also urges Member States to fully implement their obligations in this regard, including to ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting

³¹ See, generally, B. Saul (ed), *Research Handbook on International Law and Terrorism* (EE, 2020, 2nd ed).

³² See, e.g., UNSC Resolution 2396, S/RES/2396 (2017), 21 December 2017:

[...]

18. Urges Member States, in accordance with domestic and applicable international human rights law and international humanitarian law, to develop and implement appropriate investigative and prosecutorial strategies, regarding those suspected of the foreign terrorist fighter-related offenses described in paragraph 6 of resolution 2178 (2014);

19. Reaffirms that those responsible for committing or otherwise responsible for terrorist acts, and violations of international humanitarian law or violations or abuses of human rights in this context, must be held accountable;

UNODC, *Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia* (2018), 4447 ,45-.

³³ UNSC Resolution 1373 (2001), S/RES/1373 (2001), 28 September 2001. See also L.M. Hinojosa-Martinez, 'Security Council Resolution 1373: the cumbersome implementation of legislative acts', in B. Saul (ed), *Research Handbook on International Law and Terrorism* (EE, 2020, 2nd ed), 564.

the seriousness of the offense.³⁴ At the same time, resolution 2178 calls upon States to develop and implement prosecution, rehabilitation and reintegration strategies for returning foreign fighters.

UNSC Resolution 2396 builds upon those and urges Member States to develop and implement appropriate investigative and prosecutorial strategies, regarding those suspected of the foreign terrorist fighter-related offenses described in paragraph 6 of resolution 2178 (2014). It also reaffirms that those responsible for committing or otherwise responsible for terrorist acts, and violations of international humanitarian law or violations or abuses of human rights in this context, must be held accountable.³⁵ At the same time, resolution 2396 acknowledges that there is a need to distinguish between those involved in terrorist offences ‘from other individuals, including their accompanying family members who may not have been engaged in foreign terrorist fighter-related offenses’.³⁶ And whilst underlining the fact that women and children could pose a serious security threat, the resolution seeks to narrow down of what is considered a terrorist offence and emphasizes the need to find alternatives to the all *prosecution-detention* response to terrorism.

³⁴ UNSC Resolution 2178 (2014), S/RES/2178 (2014), 24 September 2014, in particular:

5. Decides that Member States shall, consistent with international human rights law, international refugee law, and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities;
6. Recalls its decision, in resolution 1373 (2001), that all Member States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, and decides that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense:
 - (a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;
 - (b) the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training; and,
 - (c) the wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training;

³⁵ UNSC Resolution 2396, S/RES/2396 (2017), 21 December 2017.

³⁶ *Ibid*, para 4.

UNSC Resolution 2199 further emphasises that States are required to ensure that their nationals and persons in their territory do not make economic resources available to ISIL and ANF, and related groups. It also reaffirms once more that all States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that such terrorist acts are established as serious criminal offenses in domestic laws and regulations. It also repeats that the punishment should duly reflect the seriousness of such terrorist acts.³⁷

The obligations created by those resolutions for states to criminalise and prosecute are in turn qualified in a number of ways insofar as the Security Council *also* invited states to consider the possibility of non-penal responses to such acts.³⁸ This effectively leaves a great deal of normative and practical discretion for states to devise mechanisms of transitional justice and rehabilitation geared towards addressing the challenge of terrorism other than through prosecution and detention.³⁹

³⁷ UNSC Resolution 2199 (2015), S/RES/2199 (2015), 12 February 2015, in particular, para 11. See also UNSC Resolution 2349 (2017), S/RES/2349 (2017), 31 March 2017, para 31:

Urges Governments in the Region to develop and implement consistent policies for promoting defections from Boko Haram and ISIL and for deradicalising and reintegrating those who do defect, and to ensure that there is no impunity for those responsible for terrorist acts, and abuses and violations of international human rights and violations of humanitarian law; and invites the international community to extend its support to the Governments in the Region in developing and implementing their disarmament, demobilisation, rehabilitation and reintegration strategies and policies;

³⁸ UNSC Resolution 2178 (2014) thus requires states to prevent, disrupt, prosecute, rehabilitate and reintegrate FTFs and recognized the importance of “comprehensively addressing underlying factors, including by preventing radicalization to terrorism, stemming recruitment, inhibiting foreign terrorist fighter travel, disrupting financial support to foreign terrorist fighters, countering violent extremism, which can be conducive to terrorism, countering incitement to terrorist acts motivated by extremism or intolerance, promoting political and religious tolerance, economic development and social cohesion and inclusiveness, ending and resolving armed conflicts, and facilitating reintegration and rehabilitation...”. UNSC Resolution 2396 (2017) calls for additional action to be taken in the areas of border security and information sharing; judicial measures and co-operation; and prosecution, rehabilitation and reintegration strategies. See also UNSC res 1373 (2001); 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).

³⁹ See also Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 18-19.

Third, when addressing the challenge of terrorism states must comply with their international law obligations,⁴⁰ including those arising from their human rights obligations.⁴¹ Thus, for instance, UN Security Council resolution 1456 (2003) and subsequent resolutions oblige states to ensure that any measure taken to combat terrorism complies with international law, in particular international human rights law, refugee law and international humanitarian law.⁴² Particularly important in this context are the various legal obligations arising for states from their – treaty or customary law – human rights obligations. These effectively set a normative framework within which any measures adopted by a state to combat terrorism – judicial, non-judicial, detention-based or not – will have to come. In other words, no category of measures adopted in response to terrorism can fail to comply with basic requirements of human rights law.

⁴⁰ UNSC Resolution 2178 (2014), S/RES/2178 (2014), 24 September 2014,

37. Encourages Member States to develop appropriate legal safeguards to ensure that prosecution, rehabilitation and reintegration strategies developed are in full compliance with their international law obligations, including in cases involving children;

See also UNGA, The United Nations Global Counter-Terrorism Strategy, A/RES/6020 ,288/ September 2006,

3. To recognize that international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law and international humanitarian law.

[...]

1. To reaffirm that General Assembly resolution 60158/ of 16 December 2005 provides the fundamental framework for the “Protection of human rights and fundamental freedoms while countering terrorism”;

2. To reaffirm that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law;

⁴¹ UNGA, Uniting against terrorism: recommendations for a global counter-terrorism strategy Report of the Secretary-General, A/60/825, 27 April 2006,

5. Inherent to the rule of law is the defence of human rights — a core value of the United Nations and a fundamental pillar of our work. Effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing ones. Accordingly, the defence of human rights is essential to the fulfilment of all aspects of a counter-terrorism strategy. The central role of human rights is therefore highlighted in every substantive section of this report, in addition to a section on human rights per se.

See also, *infra*, 3.4 Compliance with basic human rights standards.

⁴² Resolution 1456 (2003) adopted by the UN Security Council at its 4688th meeting, on 20 January 2003 (S/RES/1456 (2003)).

Where acts of terrorism take place in the context of an armed conflict, international humanitarian law could also be relevant, in particular as regards the permissible treatment of suspected terrorists.⁴³ The combined application of counter-terrorism legislation and international humanitarian law could at times prove rather problematic.⁴⁴ In such cases, the *International Committee of the Red Cross* has underlined the policy argument in favor of ensuring that counter-terrorism laws should not criminalize as terrorism conduct that, from the point of view of humanitarian law, would be lawful.⁴⁵

Also relevant in this context is the United Nations Global Counter-Terrorism Strategy.⁴⁶ This global instrument seeks to enhance national, regional and international counter-terrorism efforts and draws the outline of a common strategic and operational approach to the fight against terrorism. The practical steps envisaged under the Global Strategy include a wide array of measures ranging from strengthening state capacity to counter terrorist threats to better coordinating UN System's counter-terrorism activities. These are built on the four central pillars:

1. Addressing the conditions conducive to the spread of terrorism;
2. Measures to prevent and combat terrorism;

⁴³ See, generally, UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters (2018), para 16:

International humanitarian law is also known as the law of war or the law of armed conflict and is applicable to both situations of international or non-international armed conflicts. These rules are enshrined in the four Geneva Conventions and their Additional Protocols, as well as in customary rules of international humanitarian law. International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons, civilians, who are not or are no longer participating in the hostilities as well as fighters hors de combat and restricts the means and methods of warfare.

Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to Belgium, A/HRC/3343/Add.2, 8 July 2016, para 44

The Working Group notes with concern the apparent conflating of international humanitarian law with criminal law in the approach to addressing foreign fighters. As elaborated more fully in its 2015 report to the General Assembly, the Working Group recommends that special consideration be given to the scope of international humanitarian law, whereby mere direct participation in hostilities is not prohibited, and persons assuming exclusively non-combat functions are not viewed as directly participating in hostilities. Measures designed to prevent and punish travel for the purpose of engagement in, or support of, terrorism should therefore exempt acts that are otherwise lawful under international humanitarian law.

⁴⁴ Jelena Pejic, 'Armed Conflict and Terrorism', in Ana María Salinas de Frías, Katja Samuel, Nigel D White (eds), *Counter-Terrorism: International Law and Practice*, (OUP, 2012), 201f.

⁴⁵ See 32nd International Conference Of The Red Cross And Red Crescent, Geneva, Switzerland 8-10 December 2015: International humanitarian law and the challenges of contemporary armed conflicts Report Document prepared by the International Committee of the Red Cross.

⁴⁶ Resolution adopted by the General Assembly on 8 September 2006, (A/60/L.62)] 60/288. The United Nations Global Counter-Terrorism Strategy, A/RES/60/288, 20 September 2006.

3. Measures to build states' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in that regard; and
4. Measures to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.⁴⁷

Finally, as already outlined above, the international law of human rights forms a core part of the international law of terrorism.⁴⁸ It constitutes an essential safeguards against the risk of abuse associated with terrorism and the fight against terrorism.⁴⁹ These raise the imperative need to balance considerations of security with respect for the rule of law and human dignity. Strict compliance with human rights in the context of combating terrorism is at once a legal obligation of states that sets limits to what a state is permitted to do and an element of a successful strategy.

As far as the question of detention of terrorists is concerned, the above normative regime creates a principled commitment to criminalise and prosecute terrorist which has been increasingly qualified over time to allow for alternatives to a strategy uniquely based on repression. This has opened the door to the possibility of states conceiving of multi-faceted strategies that meet their international legal obligations while at the same time taken a broader view of what type of measures could effectively address the challenge of terrorism.

⁴⁷ The Sixth Review of the Strategy took place on 26 June 2018. The General Assembly examined the Report of the UN Secretary-General (A/72/840) on the implementation of the Strategy over the past two years. The Assembly adopted the resolution (A/RES/72/284) on the Review of the Strategy by consensus, as it had done with all other previous five resolutions on the Review of the Strategy.

⁴⁸ See, generally, UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 92-93. See also The United Nations Standard Minimum Rules for the Treatment of Prisoners (the *Nelson Mandela Rules*), adopted by the General Assembly in its resolution 70/175; The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the *Bangkok Rules*), adopted by the Assembly in its resolution 65/229; The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the Assembly in its resolution 43/173; United Nations Standard Minimum Rules for Non-custodial Measures (The *Tokyo Rules*) Adopted by General Assembly resolution 45/110 of 14 December 1990.

⁴⁹ See, *infra*, 3.4 Compliance with basic human rights standards.

3.2 Obligation to investigate and punish certain categories of terrorist acts

International law provides for an *erga omnes* obligation on the part of the territorial state to punish certain categories of international crimes, in particular, acts of genocide, grave breaches of the 1949 Geneva Conventions, torture and, arguably, crimes against humanity. This obligation is generally accepted as being *absolute* in character at least in respect of genocide, torture and grave breaches of the Geneva Conventions. In contrast, it is at least arguable that crimes against humanity and other types of war crimes could be subject to certain types of amnesties, if and when they meet certain conditions.⁵⁰ No equivalent general obligation to punish is – yet – recognized as a matter of customary international law in relation to terrorism. However, insofar as such acts might constitute or involve serious violations of human rights, certain duties might arise on the part of the state in regards to the investigation of such cases, particularly if the crime in question involved the violation of a victim's right to life.

Furthermore, certain international conventions and resolutions of the United Nations Security Council mentioned above impose obligations upon states to criminalise and prosecute certain categories of terrorist acts. These obligations are generally phrased and structured in such a way that they leave room for states to adapt their counter-terrorism strategies to the overall purpose of combating and preventing terrorism and to use, for that purpose, more than just the hard hand of the law.

3.3 No international regime of punishment

International law does not provide for the type or nature of sanctions that would be pertinent to punishing international crimes or acts of terrorism. The responsibility to make that determination belongs to the jurisdiction in question, i.e., to its legislative body through the adoption of relevant legislation and, in the implementation thereof, to its judiciary. This means, in effect, that the jurisdiction concerned could in principle decide what sanctions are desirable and appropriate in each case, subject to the prohibition on cruel and inhuman treatment and to the principle of equality of treatment. Subject to these limitations, international law does not prohibit a state from adopting those measures which it considers adequate and appropriate to punish international crimes or acts of terrorism.

⁵⁰ See, generally, G. Mettraux, *International Crimes: Law and Practice – Volume II: Crimes Against Humanity* (OUP, 2020), chap. 4.2. See also, *infra*, 6.3.7.2 Amnesties.

3.4 Compliance with basic human rights standards

Fundamental human rights form part of the corpus of international law which states are required to comply with in the context of their efforts to combat terrorism, whatever the means or method used to do so.⁵¹ This is the case whether or not an armed conflict exists at the time in the location of relevance.⁵² The investigation and prosecution of acts of terrorism, as well as any detention or imprisonment resulting therefrom will, therefore, have to comply with the relevant standards of human rights.⁵³

⁵¹ See, generally, UNGA, The United Nations Global Counter-Terrorism Strategy, A/RES/60/288, 20 September 2006, p 9

4. To make every effort to develop and maintain an effective and rule of law-based national criminal justice system that can ensure, in accordance with our obligations under international law, that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the principle to extradite or prosecute, with due respect for human rights and fundamental freedoms, and that such terrorist acts are established as serious criminal offences in domestic laws and regulations. We recognize that States may require assistance in developing and maintaining such effective and rule of law-based criminal justice systems, and we encourage them to resort to the technical assistance delivered, inter alia, by the United Nations Office on Drugs and Crime;

UNSC Resolution 2178 (2014), S/RES/2178 (2014), 24 September 2014,

Reaffirming that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, underscoring that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and noting that failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of the factors contributing to increased radicalization and fosters a sense of impunity,

UNSC Resolution 2396, S/RES/2396 (2017), 21 December 2017 (to the same effect); Global Counter-Terrorism Forum (GCTF), Glion Recommendations on the Use of Rule of Law-Based Administrative Measures in a Counterterrorism Context, 8ff; General principles 10ff; UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters (2018), paras 71ff; and UNODC, *Counter-Terrorism Legal Training Curriculum MODULE 4 Human Rights and Criminal Justice Responses to Terrorism*, 2014, (https://www.unodc.org/documents/terrorism/Publications/Module_on_Human_Rights/Module_HR_and_CJ_responses_to_terrorism_ebook.pdf).

⁵² In addition, as noted above, where an armed conflict exists, international humanitarian law will apply in addition to human rights law on the territory in which conflict is taking place. See, generally, C. Droege, 'The Interplay between IHL and IHRL in Situations of Armed Conflict' (2007) *Israel Law Review* (<https://www.icrc.org/en/doc/assets/files/other/interplay-article-droege.pdf>); D. Jinks, 'International Human Rights Law in Time of Armed Conflict', in A. Clapham et al (eds.), *The Oxford Handbook of International Law in Armed Conflict* (OUP, 2014), 656-674; F. de Londras, 'Counter-terrorist detention and international human rights law', in B. Saul, *Research Handbook on International Law and Terrorism* (Edward Edgar Publishing Ltd, 2015), 401.

⁵³ OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 43 (footnote omitted):

The investigation and prosecution of terrorism-related criminal cases, including of incitement to, and recruitment for, terrorism, should be based on specific evidence, guarantee due process and fair trials, as well as comply with the absolute prohibition of torture or other cruel, inhuman or degrading treatment or punishment, the right to life and the right to liberty and security.

See also Human Rights in Counterterrorism Investigations: A Practical Manual for Law Enforcement Officers (Warsaw: OSCE/ODIHR, 2013), < <http://www.osce.org/odihr/108930>>; OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 19:

The Universal Declaration of Human Rights thus guarantees the right of everyone to life, liberty and security of person (art 3). The International Covenant on Civil and Political Rights provides for similar safeguards.⁵⁴ Regional instruments are also relevant here. The European, African and Inter-American Conventions of Human Rights provide important normative frameworks within which states must operate. In addition, certain specialised instruments, like the Council of Europe Guidelines on Human Rights and the fights against terrorism, provide further specification of core human rights priorities.⁵⁵ And these fundamental guarantees will also apply where an armed conflict is or was taking place at the relevant time.⁵⁶

Terrorism is a denial of democracy and of human rights, which are at the very core of the OSCE. The OSCE participating States are determined to combat all acts of terrorism, without exception, as most serious crimes. States, through their police agencies in particular, have a duty to protect all individuals within their jurisdictions from terrorism, as part of their human rights obligations to guarantee the right to life, the right to security and other human rights and fundamental freedoms. This requires that they adopt a comprehensive approach to countering terrorism, with a particular focus on preventing and countering violent extremism and radicalization that lead to terrorism (VERLT), while upholding human rights and the rule of law.

The effectiveness and legitimacy of the state's actions against terrorism will be undermined if the state, through any of its agencies, uses its power in violation of international human rights standards. As the police play a central role in countering terrorism, it is particularly crucial that the police be held accountable for their actions in order to ensure legitimacy, confidence, trust and support from the public.

And, *ibid*, 48ff.

⁵⁴ See, in particular, ICCPR, art 9.

⁵⁵ Guidelines On Human Rights And The Fight Against Terrorism adopted by the Committee of Ministers at its 804th meeting (11 July 2002), Guideline XI:

XI Detention

1. A person deprived of his/her liberty for terrorist activities must in all circumstances be treated with due respect for human dignity.
2. The imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to:
 - (i) the regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client;
 - (ii) placing persons deprived of their liberty for terrorist activities in specially secured quarters;
 - (iii) the separation of such persons within a prison or among different prisons,

on condition that the measure taken is proportionate to the aim to be achieved.

See also EU regulation on combatting terrorism (2017 directive replacing framework decision from 2002) specifically requiring states to make certain offences punishable by *custodial sentences* heavier than those imposable under national law for such offences in the absence of the special intent required.

⁵⁶ See, generally, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226, para 25

25. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a

In particular, international law provides for a set of basic standards of human rights that must regulate the detention of suspects as well as their prosecution. First, the rights of any individual to liberty and freedom of movement must be respected and can only be subject to those restrictions that are authorized by law.⁵⁷ The right to liberty is important not just for its own sake, but because it is the guarantor to other fundamental rights.⁵⁸ ‘Liberty of person concerns freedom from confinement of the body, not a general freedom of action’.⁵⁹ Its effective protection will require states not just to refrain from acts of arbitrary arrest and detention, but will also demand of them to take positive

certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

See also W. Schabas, *U.N. International Covenant on Civil and Political Rights – Nowak’s CCPR Commentary* (3rd revised edition, N.P. Engel, 2019), 253, n 36; and L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP, 2011).

⁵⁷ UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters (2018), paras 21-22 (footnotes omitted):

21. The right to life, liberty and security of person is fundamental in international human rights law. It is the first substantive right protected by the Universal Declaration of Human Rights. Deprivation of liberty involves a more severe restriction on motion than merely interfering with freedom of movement. Examples of deprivation of liberty include arrest, imprisonment, house arrest, administrative detention and involuntary transportation, but may also include the cumulative effects of multiple restrictions on freedom of movement when, taken together, they would amount to a de facto deprivation of liberty. International human rights law protects against such deprivation of liberty, except on grounds of and in accordance with procedures established by law. But, even assuming that a deprivation of liberty is lawful, international human rights law also absolutely prohibits any deprivation of liberty that is arbitrary. The prohibition of arbitrary detention is non-derogable and must be understood to incorporate elements of “inappropriateness, injustice, lack of predictability and due process of law as well as elements of reasonableness, necessity and proportionality”. The right to life is non-derogable, and the Human Rights Committee has stated that the fundamental guarantee against arbitrary detention is also non-derogable insofar as even situations that allow for derogations in accordance with article 4 of the International Covenant on Civil and Political Rights cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances.

22. In addition, international human rights law accords a right to freedom of movement within a territory, however, this is limited to persons “lawfully within the territory of a State”. That too can only be restricted by procedures provided by law and only where proportionate and in pursuit of a legitimate aim (such as “to protect national security, public order, public health or morals or the rights and freedoms of others”). Restrictions on freedom of movement such as curfews and home confinement and restrictions on where targeted people can pray can violate not only the right to freedom of movement, but also the right to freedom of religion, association and expression, and the right to privacy and family life.

⁵⁸ Human Rights Committee, General Comment No 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, para 2:

Liberty and security of person are precious for their own sake, and also because the deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights.

⁵⁹ Human Rights Committee, General Comment No 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, para 3 (footnote omitted):

Liberty of person concerns freedom from confinement of the body, not a general freedom of action. Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity, as further discussed in paragraph 9 below. Article 9 guarantees those rights to everyone. “Everyone” includes, among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity.

See also 8541999/, *Wackenheim v. France*, para. 6.3.

steps to protect the liberty of those concerned.⁶⁰

While the right to liberty (and security) is not absolute, deprivation of liberty must not be arbitrary, and must be carried out with respect for the rule of law.⁶¹

Once detained, a person is entitled to certain minimum guarantees, including the right of any suspect and defendant to be treated fairly, the right not to be subjected to violence, the right to be brought before a judge to challenge his or her detention,⁶² the right to be presumed innocent until proven guilty (if charged with a crime) and to be tried without

⁶⁰ See, e.g., Human Rights Committee, General Comment No 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, para 7 (footnote omitted):

States parties have the duty to take appropriate measures to protect the right to liberty of person against deprivation by third parties.

See also concluding observations: Yemen (CCPR/C/YEM/CO/5, 2012), para. 24.

⁶¹ Human Rights Committee, General Comment No 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, para 9. See also UNODC, *Counter-Terrorism Legal Training Curriculum MODULE 4 Human Rights and Criminal Justice Responses to Terrorism*, 2014, (https://www.unodc.org/documents/terrorism/Publications/Module_on_Human_Rights/Module_HR_and_CJ_responses_to_terrorism_ebook.pdf), 24-25:

On the basis of provisions such as article 19 of ICCPR protecting the right to freedom of expression (see above, other examples in ICCPR are articles 12, 18, 21, and 22), human rights courts and treaty bodies have developed a test to establish whether a measure limiting a non-absolute right is legitimate. The following questions must be asked:

- Is there a legal basis for the measure limiting the right?
- Does the limitation on the right pursue a legitimate aim such as respect of the rights or reputations of others, the protection of national security, the maintenance of public order or public health or morals?
- If so, is the limitation necessary to achieve the legitimate aim, and is the extent of the limitation proportionate in pursuit of the identified legitimate aim? The existence and effectiveness of procedural safeguards will be a key aspect of the assessment whether the limitation of the right is proportionate.
- Does the restriction respect the principle of equality? Is it non-discriminatory? Measures that limit rights in a discriminatory way will fail the test of proportionality. Therefore, the question of discrimination is generally considered one aspect of the necessity and proportionality test.

Only if all of these questions can be answered in the affirmative in a specific case will a restriction on a non-absolute right be permissible under international human rights law. Regarding the possibility of derogations in times of public emergency, see generally UNODC, *Counter-Terrorism Legal Training Curriculum MODULE 4 Human Rights and Criminal Justice Responses to Terrorism*, 2014, (https://www.unodc.org/documents/terrorism/Publications/Module_on_Human_Rights/Module_HR_and_CJ_responses_to_terrorism_ebook.pdf), 25-26.

⁶² This excludes the possibility of secret detention of suspected terrorists. See UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, *Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters* (2018), para 27 (footnotes omitted):

International law clearly prohibits secret detention, which violates a number of human rights and humanitarian law norms that may not be derogated from under any circumstances. By placing the detainee outside the protection of the law, secret detention creates a heightened risk of torture and enforced disappearances. If widely or systematically practiced, it may even amount to a crime against humanity. It is not only States whose authorities keep the detainee in secret custody that are internationally responsible for violations of international human rights law. The practice of “proxy detention”, involving the transfer of a detainee from one State to another outside the realm of any international or national legal procedure (“rendition” or “extraordinary rendition”), often in disregard of the principle of non-refoulement, also involves the responsibility of the State at whose behest the detention takes place. The Geneva Conventions, applicable to all armed conflicts, also prohibit secret detention under any circumstances.

See also A/HRC/1342/.

undue delay, fairly, independently and impartially,⁶³ and the right to challenge their detention.⁶⁴

Their right to life and right not to be subject to torture or other forms of mistreatment must also be absolutely preserved and protected.⁶⁵ These are fundamental guarantees that are protected as a matter of general international law and which set limits to what a state can permissibly do when seeking to punish or prevent acts of terrorism.⁶⁶ In particular, the law of human rights sets strict limits and conditions to what restrictions of rights are authorized in such context.⁶⁷

⁶³ See, generally, UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, *Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters* (2018), para 25 (footnotes omitted):

Anyone arrested or detained has the right to be informed of the reasons for their arrest, including any charges against them, and to be informed of their rights and how to avail themselves of those rights, including the right to legal counsel. Anyone arrested or detained on a criminal charge also has the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power. Pre-charge detention without judicial review should not exceed 48 hours, any further delay must remain exceptional and be justified by the circumstances. In order to protect nonderogable rights, including the right to life and the prohibition of torture, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measures of derogation.

⁶⁴ See, generally, ICCPR, art 9(2), (4); ECHR, art 5(4); ACHR, art 7(4), (6).

⁶⁵ UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, *Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters* (2018), p 14.

⁶⁶ See, generally, <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

⁶⁷ See, generally, OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 49-50 (footnote omitted):

Most of the other rights particularly at stake when countering terrorism are qualified rights. This means that they can be lawfully restricted under international human rights law under the following conditions:

- The restriction must have a legal basis in national law, and that basis must be sufficiently clear so that individuals affected by it understand the consequences of their actions;
- It must pursue a legitimate aim (e.g., the protection of public safety and order, the protection of the rights and freedoms of others or the protection of national security);
- It must be necessary in a democratic society, i.e., there must be a pressing social need for the restriction on the right, and it must not destroy the essence of the right concerned;
- It must be proportionate to the aim sought to be achieved; and
- It must be non-discriminatory.

Permissible restrictions must be prescribed in law, must be necessary, proportionate as well as non-discriminatory.⁶⁸

Strict compliance with internationally recognised human rights is particularly important in the context of detention and other forms of restrictions of an individual's liberty. Any measure that restricts an individual's freedom must provide for judicial scrutiny of the decision imposing such measures so as to verify the conditions thereof; and the detained persons must have the ability to challenge the lawfulness of his or her detention before a judicial authority. Adherence to due process and the right to a fair hearing is also essential for the proper safeguarding of a person's liberty and security. Secret detention, corporal punishment, humiliating detention conditions or treatment, as well as torture are all absolutely forbidden:⁶⁹

9. As stressed by the Human Rights Committee, the right to liberty and security of person applies to everyone, including those convicted of crime.⁷⁰ While States enjoy a wide margin of discretion in their choice of penal policy, the right to liberty of person articulated in article 9 of the International Covenant on Civil and Political Rights requires that, as a basic principle, States resort to the deprivation of liberty only insofar as it is necessary to meet a pressing

⁶⁸ See, generally, UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters (2018), para 11 (footnote omitted):

Any measures undertaken to implement resolutions 2178 (2014), 2396 (2017) or other Security Council resolutions must comply with general human rights principles grounded in treaty law and customary law. This means that any measures which may limit or restrict human rights must be prescribed by law, be necessary, proportionate to the pursuance of legitimate aims and non-discriminatory. They should also be procedurally fair and offer the opportunity of legal review.

See also Human Rights Committee general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant. Regarding the possibility to derogate from these guarantees, see also UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters (2018), para 13 (footnotes omitted):

In a limited set of circumstances, States may also take measures to temporarily derogate from certain international human rights law provisions. As noted by the Human Rights Committee, measures derogating from the provisions of the International Covenant on Civil and Political Rights must be of an exceptional and temporary nature. Two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation; and the State party must have officially proclaimed a state of emergency. The obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers.

See also International Covenant on Civil and Political Rights, art. 4; European Convention on Human Rights, art. 15; and American Convention on Human Rights, art. 27; Human Rights Committee general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency; and A/HRC/3752/.

⁶⁹ Human rights implications of overincarceration and overcrowding Report of the United Nations High Commissioner for Human Rights, A/HRC/30/19, 10 August 2015, paras 9-11.

⁷⁰ See CCPR/C/GC/35, para. 3.

societal need and in a manner proportionate to that need.⁷¹ Moreover, any deprivation of liberty must not be arbitrary and must be carried out with respect for the rule of law.⁷²

10. One of the fundamental safeguards against arbitrary deprivation of liberty is the right to bring proceedings before a court to challenge the lawfulness of detention, which is a self-standing⁷³ and non-derogable right.⁷⁴ In order to render this right effective, such principles as impartiality of the court reviewing the detention, assistance by a legal counsel, access to legal aid and authorities bearing the burden of proof must be observed.⁷⁵ Yet, numerous human rights bodies have reported serious infringements upon the right to liberty as individuals are detained without any justification,⁷⁶ those arrested are not promptly brought before a judge,⁷⁷ and a judicial decision regarding continued detention is not rendered swiftly.⁷⁸ Moreover, the ability of detainees to challenge their continued detention is frequently hindered owing to a lack of access to legal representation and legal aid and even the unavailability of judges.⁷⁹

11. The Working Group on Arbitrary Detention stated that the principle that deprivation of liberty shall be imposed proportionately to meet a pressing public need is most relevant to detention pending trial.⁸⁰ This implies that pretrial detention should be a measure of last resort. However, international⁸¹ and regional⁸² bodies have expressed their concern over the increasing use of

⁷¹ See E/CN.4/2006/7, para. 63.

⁷² See CCPR/C/GC/35, para. 10.

⁷³ See A/HRC/30/37, para. 2.

⁷⁴ See A/HRC/30/37, paras. 22-25. See also CCPR/C/21/Rev.1/Add.11, paras. 11 and 16, and CCPR/C/GC/35, paras. 6-67.

⁷⁵ See A/HRC/30/37, guidelines 4, 8 and 14.

⁷⁶ See CAT/C/TGO/CO/2, para. 13.

⁷⁷ See www.achpr.org/files/sessions/37th/missionreports/ethiopia/misrep_specmec_priso_ethopia_2004_eng.pdf, pp. 24 and 25.

⁷⁸ See A/HRC/19/57, para. 53, and www.achpr.org/files/sessions/52nd/inter-actreps/185/activty_report_prisons_eng.pdf, pp. 21 and 22.

⁷⁹ See CCPR/C/TUR/CO/1, para. 17; A/HRC/19/57, para. 63; A/HRC/10/21, para. 45; CAT/C/54/2 para. 91; and www.achpr.org/files/sessions/52nd/inter-act-reps/185/activty_report_prisons_eng.pdf, p. 10.

⁸⁰ See E/CN.4/2006/7, para. 64.

⁸¹ See A/HRC/19/57, para. 48; CAT/C/54/2, para. 76; and CCPR/C/TUR/CO/1, para. 17.

⁸² See www.achpr.org/files/sessions/12th-eo/mission-reports/promotion_mission-2012/mission_report_mauritania_cpta_eng.pdf, para. 38. See also Council of Europe document CPT/Inf (2014) 31, para. 56.

pretrial detention and its excessive length, noting its significant contribution to overcrowding,⁸³ leading to a situation where, in some prisons, pretrial detainees constitute the majority of the population.⁸⁴

When resorting to deprivation of liberty, a state undertakes a duty of care⁸⁵ and carries with it special responsibility towards those held in detention.⁸⁶ The nature and scope of this obligation was clearly laid out by the UN High Commissioner for Human Rights:⁸⁷

Authorities in charge of places of detention bear the duty of care towards detainees,⁸⁸ a duty often neglected as — due to overcrowding — prison resources are overstretched and staffing levels are inadequate for the numbers of detainees. This leads to serious breaches of the right to security of detainees and instances where authorities fail to protect detainees from inter-prisoner violence.⁸⁹ Due to overcrowding, tensions may also arise between the staff and detainees⁹⁰ with a potential serious impact on discipline,⁹¹ leading to rule by the most powerful detainees,⁹² riots, disturbances and hunger strikes in protest to the conditions of detention.⁹³ Furthermore, overcrowding in detention facilities may be so extreme that the authorities are unable to ensure the protection of detainees in case of such emergencies as floods and fire,⁹⁴ which in turn may infringe upon their right to life.⁹⁵

⁸³ See CAT/C/TGO/CO/2, para. 12, and CAT/OP/MLI/1, para. 29.

⁸⁴ See CAT/C/46/2, para. 52, and CAT/C/GTM/CO/5-6, para. 17

⁸⁵ See Council of Europe document CPT/Inf (2015) 12, para. 54.

⁸⁶ See A/HRC/27/55, para. 51; *Caesar v. Trinidad and Tobago*, Inter-American Court of Human Rights Judgement (2005), para. 97; and communication Nos. 105/93–128/94–130/94–152/96, *Media Rights Agenda & Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights (1998), para. 91.

⁸⁷ Human rights implications of overincarceration and overcrowding Report of the United Nations High Commissioner for Human Rights, A/HRC/30/19, 10 August 2015, para 14.

⁸⁸ See Council of Europe document CPT/Inf (2015) 12, para. 54.

⁸⁹ See www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, p. 53, and *Neptune v. Haiti*, Inter-American Court of Human Rights Judgement (2008), para. 137; CPT/Inf (2015) 12, para. 106. See also Council of Europe document CPT/Inf (2014) 26, para. 110; CAT/C/BGR/CO/4-5, para. 23; CAT/C/GTM/CO/5-6, para. 18, CAT/C/MEX/CO.5-6, para. 19; CCPR/C/BOL/CO/3, para. 20; and CAT/OP/MEX/1, para. 178.

⁹⁰ See Council of Europe document CPT/Inf (2014) 31, para. 56; A/HRC/25/60/Add.1, para. 19; and CAT/OP/BEN/1, para. 210.

⁹¹ See CAT/OP/MLI/1, para. 49.

⁹² See CAT/OP/MEX/1, para. 166; CAT/C/BGR/CO/4-5, para. 23; and Council of Europe document CPT/Inf (2015) 12, para. 54.

⁹³ See CAT/C/BOL/CO/2, para. 18, and CAT/C/MAR/CO/4, para. 19.

⁹⁴ See *Pacheco Teruel et al. v. Honduras*, Inter-American Court of Human Rights Judgement (2012), para. 96. See also Council of Europe document CPT/Inf (2014) 26, para. 102, and CAT/OP/MEX/1, para. 176.

⁹⁵ See *Pacheco Teruel et al. v. Honduras*, Inter-American Court of Human Rights Judgement (2012), para. 66.

Human rights principles will play a particularly important part in regulating the permissibility and conditions of administrative measures, such as control orders and preventive detention.⁹⁶ Human rights law is also relevant and must be respected in the context of measures falling short of detention which affect the fundamental rights of the individual concerned and the effective enjoyment of those rights. The *Tokyo Rules* require, in particular, that “[t]he dignity of the offender subject to non-custodial measures shall be protected at all times.”⁹⁷

A failure to fulfil its human rights obligations would engage the responsibility of the state,⁹⁸ including its international responsibility.⁹⁹ Furthermore, disregarding those standards is a factor that is likely to contribute to an increase in radicalization, which could also foster a sense of impunity and lack of accountability.¹⁰⁰ Compliance with human rights standards is therefore both a legal obligation and a practical necessity.

⁹⁶ See, *infra*, dd/administrative measures. See also F. de Londras, ‘Counter-terrorist detention and international human rights law’, in B. Saul (ed), *Research Handbook on International Law and Terrorism* (EE, 2020, 2nd ed), 371, 375:

Article 9 of the ICCPR has been interpreted to permit preventive detention in pursuit of legitimate public purposes such as ‘public security’ 11 and subject to appropriate safeguards being in place.¹² Article 5(1)(c) of the ECHR allows for detention of an individual ‘for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so’ (emphasis added), which suggests that preventive detention is permitted under that regime.

See also UN Human Rights Committee, General Comment No. 8: Article 9 – Right to liberty and security of persons, UN Doc HRI/GEN/1/Rev.1 (30 June 1982), [4]; and Working Group on Arbitrary Detention, Civil and Political Rights, including Questions of Torture and Detention, UN Doc E/CN.4/1999/63 (18 December 1998); *Maestri v Italy* (2004) 39 EHRR 38 (regarding the provision of an ‘unfettered power’ of detention to the Executive); *Secretary of State for the Home Department v JJ* [2007] UKHL 45 (regarding control orders in the United Kingdom).

⁹⁷ United Nations Standard Minimum Rules for Non-custodial Measures (The *Tokyo Rules*) Adopted by General Assembly resolution 45/110 of 14 December 1990.

⁹⁸ See CCPR/C/GC/35, para. 8.

⁹⁹ See CAT/OP/MEX/1, para. 177.

¹⁰⁰ UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters (2018), para 5 (footnote omitted):

In resolution 2178 (2014), the Security Council underscored that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort. It noted the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and that failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of the factors contributing to increased radicalization and fosters a sense of impunity.

See also OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 32:

The effectiveness, legitimacy of, and trust in the state’s action against terrorism will be undermined if the state, through any of its agencies, uses its power in contravention of international human rights standards. This would be further exacerbated by the lack, real or perceived, of effective accountability, enabling impunity of state agents for unlawful counterterrorism measures.

3.5 Rights and interests of victims

As pointed out by the United Nations General Assembly, the rights and interests of victims are of central importance when it comes to addressing terrorism:

Victims of terrorist acts are denied their most fundamental human rights. Accordingly, a counter-terrorism strategy must emphasize the victims and promote their rights. In addition, implementing a global strategy that relies in part on dissuasion, is firmly grounded in human rights and the rule of law, and gives focus to victims depends on the active participation and leadership of civil society.¹⁰¹

Victims have a general right under international human rights law to the truth and to seek and obtain justice. This entitles them to demand that the state should diligently and expeditiously investigate the circumstances under which some of their rights or those of close relatives were violated. It also entitles them to remain informed of the course of such investigations and to be permitted to participate meaningfully to the process.¹⁰²

Any strategy directed towards responding to acts of terrorism should therefore treat the rights and interests of victims as a core priority.¹⁰³ Not only will this help fulfill their rights and expectations, but it will also reduce the risk of victims taking matters into their own hands.¹⁰⁴

¹⁰¹ UNGA, *Uniting against terrorism: recommendations for a global counter-terrorism strategy* Report of the Secretary-General, A/60/825, 27 April 2006, para 6.

¹⁰² See UNODC, *Handbook On Restorative Justice Programmes* (Criminal Handbook Justice Series, 2nd ed, 2020), 100ff. See also UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 169ff (with a particular gender focus on the question of access to justice and remedy for victims).

¹⁰³ See also United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 of 29 November 1985; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005); Council of Europe's Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters; Outcome of the Expert Group Meeting on Restorative Justice in Criminal Matters: Report of the Secretary-General, Commission on Crime Prevention and Criminal Justice, Twenty-seventh session, E/CN.15/2018/13.

¹⁰⁴ See International Center for the Study of Radicalisation (ICSR), *Reintegrating ISIS Supporters in Syria: Efforts, Priorities and Challenges* (2018) (<https://icsr.info/wp-content/uploads/2018/08/ICSR-Report-Reintegrating-ISIS-Supporters-in-Syria-Efforts-Priorities-and-Challenges.pdf>), 20 (footnotes omitted):

Local sources have also pointed out that instead of holding former ISIS members accountable, dozens of released ISIS fighters were accepted into the SDF ranks, which added to the growth of tensions among locals. Some of those individuals have become part of the SDF's tribal forces, while the majority are working in the intelligence sector, either as informants or handlers. But such efforts could be counterproductive and may lead to revenge killing among locals. In an interview, a local resident stated: 'It does not feel right to see a criminal walking free without a fair trial. But such actions do not come with no consequences. The families of the victims might take the law into their own hands when they feel that justice is not served'. For example, the person who was assassinated in Tabqa (Ussama al-Qawi) last February was named as being a security officer with ISIS before he joined the security apparatus affiliated with the SDF. Although it is not clear who was behind the incident, revenge might be a possible motive.

4. FINDING ALTERNATIVES TO DETENTION FOR SUSPECTED TERRORISTS: PRELIMINARY CONSIDERATIONS – CLARITY OF PURPOSE AND INDIVIDUALISED RESPONSE

4.1 Purpose(s): What does one seek to achieve?

The purpose or purposes of any rehabilitation and reintegration efforts for former terrorists should be clear and clearly stated.¹⁰⁵ Ambiguity of purpose(s) will undermine any such efforts and complicate outreach.¹⁰⁶ Resources, methods and facilities will depend on what is intended. So will the assessment of the program's value and success. A core element of any strategy to find alternatives to detention for terrorists or suspected terrorists is, therefore, to set out clear goals and purposes for such a strategy.

This should account for the extent of the problem being addressed as well as the state's capacities and resources. It should also account for the rights of all those concerned.

The first, basic, element of any such strategy is to address the shortcomings and limitations of an *all-punish, all-detain*, strategy.¹⁰⁷

¹⁰⁵ Tinka Veldhuis, *Designing Rehabilitation and Reintegration Programmes for Violent Extremist Offenders: A Realist Approach*, ICCT Research Paper March 2012 (<https://icct.nl/wp-content/uploads/2015/05/ICCT-Veldhuis-Designing-Rehabilitation-Reintegration-Programmes-March-2012.pdf>), 1-3 (noting that central to the *Realist* approach adopted in the paper is the notion that policies and programmes are most likely to succeed if the objectives are tailored to the specific contexts and needs of the individuals or groups involved).

¹⁰⁶ 'In many countries, a strategic approach to counterterrorism is incorporated into a document on national security policy. Several other countries and organizations have developed a specific document, which is publically available, that outlines their respective counterterrorism strategy. These strategic documents often utilize similar terminology but with variations in the actual meaning of specific terms.' See OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 30.

¹⁰⁷ See, *supra*, xx/limitations and shortcomings.

In particular, it seeks to add rehabilitation, reintegration or de-radicalisation as a factor of relevance to a more general counter-terrorism strategy.¹⁰⁸

The second common feature of any such program is the fact that, wanted or not, the question of reintegration of former terrorists will arise either as an alternative to detention or following completion of a period of imprisonment.

It is therefore in the interest of those concerned that this question should be addressed as soon as possible so as to increase the chance of successful reintegration and in order to try and reduce the risk of re-offending.

Thirdly, goals should be commensurate to the resources available to the state in question and to the threat posed by terrorism in the country in question. There is no point setting out an ambitious programs if the resources necessary to its implementations are unavailable.

In that sense, the strategies used in a state with large resources might not be entirely relevant or adequate to a state with limited resources. Evaluation of resources should also account for the sort of expertise that would be necessary for the sort of program being considered.

Fourthly, the goals set by a state in terms of rehabilitation and reintegration of terrorists must be consistent at all times with their other obligations, in particular, their obligation to protect their own population and to adopt all necessary measures to combat and prevent acts

¹⁰⁸ UNODC, *Custodial And Non-Custodial Measures: Alternatives to Incarceration* (2006) (https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Alternatives_Incarceration.pdf), 1-2:

Imprisonment has several objectives. It keeps persons suspected of having committed a crime under secure control before their guilt or innocence is determined by a court. It punishes offenders by depriving them of their liberty after they have been convicted of an offence. It keeps them from committing further crimes while they are in prison and, in theory, allows them to be rehabilitated during their period of imprisonment. The goal of rehabilitation is to address the underlying factors that led to criminal behaviour and by so doing, reducing the likelihood of re-offending. However, it is precisely this objective that is generally not being met by imprisonment. On the contrary, evidence shows that prisons not only rarely rehabilitate, but they tend to further criminalise individuals, leading to re-offending and a cycle of release and imprisonment, which does nothing to reduce overcrowding in prisons or to build safer communities.

[...]

However, the goal of introducing alternatives to prison is not only to address the problem of overcrowding in prisons. The wider use of alternatives reflects a fundamental change in the approach to crime, offenders and their place in society, changing the focus of penitentiary measures from punishment and isolation, to restorative justice and reintegration. When accompanied by adequate support for offenders, it assists some of the most vulnerable members of society to lead a life without having to relapse back into criminal behaviour patterns. Thus, the implementation of penal sanctions within the community, rather than through a process of isolation from it, offers in the long-term better protection for society.

There are also economic arguments in favour of alternatives. In western societies, the supervision of offenders within a probation system is normally much less costly than the upkeep of a prisoner.

See also HM Government, *Contest - The United Kingdom's Strategy for Countering Terrorism* (June 2018) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf), 29.

of terrorism.¹⁰⁹ It must also be and remain compatible with their human rights obligations.

Besides these core features, a variety of – overlapping – purposes have been put forth in various disengagement/rehabilitation programs for terrorists, including these:

- **De-radicalisation**,¹¹⁰
- **Disengagement**,¹¹¹
- **Combat the *attraction* of fundamentalism and combat its ideology**;¹¹²

¹⁰⁹ See OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 30:

States have an obligation to provide protection against acts of terrorism, and this requires that they put particular emphasis on preventing terrorism. This is reflected in their international legal obligations and political commitments. The UN Global Counter Terrorism Strategy notably defines a holistic approach to counterterrorism that includes:

- Measures to address conditions that are conducive to the spread of terrorism;
- Measures to prevent and combat terrorism; and
- Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism

¹¹⁰ See also GCTF, Initiative to Address the Life Cycle of Radicalization to Violence Recommendations on the Effective Use of Appropriate Alternative Measures for Terrorism-Related Offenses (<https://theij.org/wp-content/uploads/English-Effective-Use-of-Appropriate-Alternatives.pdf>):

Recommendation 11: The use of alternative measures for terrorism-related offenses should be linked to disengagement, rehabilitation, and reintegration efforts.

It is recognized that the underlying premise for using alternative measures in any criminal case is to promote rehabilitation and support successful reintegration into society. This is particularly important for terrorism-related offenses because it can break the cycle of violent extremism and limit opportunities for recidivism and recruitment.

¹¹¹ See, *infra*, dd/disengagement.

¹¹² C. Boucek, “Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare,” Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 1

Central to Saudi counterterrorism efforts has been the use of unconventional “soft” measures designed to combat the intellectual and ideological justifications for violent extremism. The primary objective of this strategy is to engage and combat an ideology that the Saudi government asserts is based on corrupted and deviant interpretations of Islam.

See also Middle East Institute, *Deradicalization Programs in Saudi Arabia: A Case Study* (2015) (<https://www.mei.edu/publications/deradicalization-programs-saudi-arabia-case-study>)

What is unique about the Saudi program, however, is its scope. Never has a state applied such a range of different programs simultaneously and so thoroughly. By targeting individuals’ religious convictions, psychological states, socio-economic positions, family groups, and even romantic lives, the Saudi government is able to reshape all aspects of the detainees’ lives, offering them a complete break with their jihadist pasts. This is complimented by thorough post-release surveillance.

- **Reintegration in society;**¹¹³
- **Peace and security;**¹¹⁴
- **Eroding membership of terror groups and enticing exit from such groups;**¹¹⁵
- **Providing a degree of accountability, justice and truth** as well as redress for victims and affected communities;¹¹⁶

¹¹³ Tinka Veldhuis, *Designing Rehabilitation and Reintegration Programmes for Violent Extremist Offenders: A Realist Approach*, ICCT Research Paper March 2012 (<https://icct.nl/wp-content/uploads/2015/05/ICCT-Veldhuis-Designing-Rehabilitation-Reintegration-Programmes-March-2012.pdf>), 9:

Thirdly, what are short term versus mid- and long term objectives of rehabilitation efforts? In the short term, the central objective is to prepare inmates for their transition back into mainstream society and assist them in becoming law-abiding citizens. Programmes seek to prevent the individual from running straight back into the arms of groups or individuals who pushed the individual towards extremism and terrorist activities in the first place. In the long run, rehabilitation programmes should contribute to shaping an environment in which the ex- inmate can nest and live a sustainable, law-abiding life. Hence, recidivism should be prevented not only in the short and middle term, but also in the longer term.

See also S. V. Mardsen, *Reintegrating Extremists – Deradicalisation and Desistance* (Palgrave Pivot, 2017), 11 (suggestion that ‘reintegration’ is a more appropriate framework than deradicalization, which focuses on the creation of a network of social relations and a deepening commitment to a wider community) and 44 (‘Looking more carefully at the notion of reintegration in a terrorism context, offences draw attention to the two-way notion of reintegration, that is, the need for both society and the individual to play a role in producing successful outcomes. [...] The task of reintegration therefore demands change agents to act as bridges – behavioural, symbolic and practical – between the individual and society. In this way, they are able to support three types of reintegration: social – into positive social networks and the family; economic – into the labour market or training; and political – either ‘softly’ through acceptance of the British legal framework, or more concretely, through proactive involvement in the community.’).

¹¹⁴ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 29:

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.

¹¹⁵ J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 4

Beyond the immediate aim of rehabilitating residents, the FGS and its international partners firmly understand the ultimate strategic objective of the Serendi programme to be undermining Al-Shabaab through incentivising additional disengagements. H

¹¹⁶ See, *supra*, xx/victims.

- **Reducing risk to public safety and security;**¹¹⁷ and
- **Addressing – some of – the conditions conducive to the creation and support of such organisations.**

These goals overlap in part and are often combined. The purpose or purposes being pursued will often consist of a combination of some of those.¹¹⁸ It is important that there be clarity of goals and priorities so that the program and its resources are tailored to these and expectations adapted accordingly. Ultimately, most of these have in common that they seek to reduce intent, rather than capability.

Choice and designation of purposes must also be in tune with reality. They must align with the resources available to the states.¹¹⁹ They must also be in line with the reality on the ground, both in terms of security and acceptance by the concerned individuals and communities.

Programs that are overly ambitious or that depend on resources not readily available to the authorities are likely to disappoint or fail. An assessment of the purposes of such a program must therefore be continuously reviewed so as to ensure that they are consistent with reality and, if necessary, adapted to the real capabilities of the program.

¹¹⁷ GCTF, Initiative to Address the Life Cycle of Radicalization to Violence Recommendations on the Effective Use of Appropriate Alternative Measures for Terrorism-Related Offenses (<https://theij.org/wp-content/uploads/English-Effective-Use-of-Appropriate-Alternatives.pdf>)

Therefore, there is data regarding the benefits these types of measures can produce. For instance, successful interventions can reduce risk to public safety and security by effectively rehabilitating and reintegrating the individuals so that they are law-abiding, productive members of society. For individuals charged with, or convicted of, terrorism-related offenses, the use of these alternative measures provide an opportunity to start the rehabilitation and disengagement process earlier where they may have a better chance of success. Also, these measures avoid some of the negative effects of detention on offenders and their family members, such as stigma and economic hardship. In addition, the costs associated with alternative measures are typically less than those associated with pre-trial detention or post-conviction incarceration.⁷ Furthermore, the use of an alternative measure can assist in reducing prison overcrowding, thereby reducing the opportunities for prison violence due to the low number of staff to inmates. Offering an alternative measure to an individual charged with, or convicted of, a terrorism-related offense may also assist in gathering information and securing cooperation regarding other offenders or crimes.

See also J. Horgan and K. Braddock, 'Rehabilitating the terrorists? Challenges in assessing the effectiveness of de-radicalisation programs', *Terrorism and Political Violence*, 22 (2010), 267-291 (calling for the purpose to be defined in terms of risk reduction rather than deradicalization).

¹¹⁸ See also OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 30.

¹¹⁹ See, *infra*, xx/resources.

4.2 Individualised approach

4.2.1 General considerations

There is no one-size-fit-all solution to addressing the challenge of terrorism. Nor is there such a solution when it comes to rehabilitating and reintegrating terrorists. Every situation will have to find its own solution.¹²⁰ Even ‘best practices’, which are outlined in this and other Reports, will often need to be tailored and adapted to the reality of the situation concerned and to the individual(s) concerned.¹²¹ Therefore, this Report should not be regarded as a recipe to be followed slavishly. Instead, the lessons to be drawn from past experiences are intended to inform and guide the choice of others. Expectations must also be realistic.

¹²⁰ Tinka Veldhuis, *Designing Rehabilitation and Reintegration Programmes for Violent Extremist Offenders: A Realist Approach*, ICCT Research Paper March 2012 (<https://icct.nl/wp-content/uploads/2015/05/ICCT-Veldhuis-Designing-Rehabilitation-Reintegration-Programmes-March-2012.pdf>), 10-11:

One of the strongest qualities of the Realist approach is its clear acknowledgement of the fact that programmes are dynamic enterprises which are embedded in complex social systems that strongly influence policy mechanisms and outcomes. Extremist rehabilitation programmes that are seemingly effective in country A might produce completely different, even counter-productive results in country B when not tailored to the specific environment.

Building upon the work of Pawson and Tilley, Veldhuis goes on to identify four layers of contextual factors which must be accounted for when devising a rehabilitation program: a) the individuals involved; b) the interpersonal relationships between the stakeholders and actors involved should be supportive of the programme; c) the institutional setting; d) the wider infrastructural system (ibid).

¹²¹ Cameron Sumpter, Yuslikha K. Wardhani & Sapto Priyanto (2019): Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2018.1560666, p. 17; France, Ministère de la Justice, « Prévenir Pour Protéger » Plan national de prévention de la radicalization (2018), 22 (in particular, measures 58 and 59); J. Morton and M. D. Silber, *When Terrorists Come Home - The Need for Rehabilitating and Reintegrating America's Convicted Jihadists* (https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf), 15

One thing is certain: every rehabilitation and reintegration program needs to be particularized for local conditions.⁶¹ As the Global Counterterrorism Forum's (GCTF) Rome Memorandum on Good Practices for Rehabilitation and Reintegration describes it, programs “must be tailored to the local conditions, cultures, and legal traditions.”⁶²

See also Naureen Chowdhury Fink And Ellie B. Hearne, “Beyond Terrorism: Deradicalization And Disengagement From Violent Extremism,” International Peace Institute, October 2008, <https://www.ipinst.org/wpcontent/uploads/publications/beter.pdf>; “Rome Memorandum On Good Practices For Rehabilitation And Reintegration Of Violent Extremist Offenders,” Global Counterterrorism Forum, Accessed October 30, 2018, 2, <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rome-Memorandum-ENG.pdf>; J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 2-3.

The design of any such program should be informed by available evidence, drawn from relevant expertise and experiences that pertain specifically to the context of concerned.¹²² As pointed out by the Global Counter-Terrorism Forum:

In addition to assessing an offender's suitability for receiving an alternative sentence, it is important to assess the overall effectiveness of alternative measures, both on the individual and as a policy. It is critically important to collect and review data on a regular periodic basis to monitor the effectiveness of any assessment tool or other evidence-based approach in order to identify which aspects of the measure are working and which need adjustment.¹²³

It is the responsibility of the authorities to conduct a context-specific evaluation prior to tailoring a regime and to continue monitoring and evaluating it as it is rolled out.¹²⁴ The process has been summarized thus:

'customisation; consultation and testing; the applicable legal framework; and strategyformation.'¹²⁵

Particularly relevant to the drawing up of such a plan are the following considerations: a) the magnitude of the challenge (in particular, the number of individuals and communities involved); b) the amount and type of resources available to the state and other relevant actors; c) the security situation on the ground, in particular, whether a

¹²² Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 12 and 23:

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.

¹²³ GCTF, Initiative to Address the Life Cycle of Radicalization to Violence Recommendations on the Effective Use of Appropriate Alternative Measures for Terrorism-Related Offenses (<https://theij.org/wp-content/uploads/English-Effective-Use-of-Appropriate-Alternatives.pdf>).

¹²⁴ See, again, Tinka Veldhuis, *Designing Rehabilitation and Reintegration Programmes for Violent Extremist Offenders: A Realist Approach*, ICCT Research Paper March 2012 (<https://icct.nl/wp-content/uploads/2015/05/ICCT-Veldhuis-Designing-Rehabilitation-Reintegration-Programmes-March-2012.pdf>) (arguing for a realist approach to rehabilitation program design), in particular, 15ff (regarding the need for an evidence-based policy evaluation)

¹²⁵ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 12 and 16.

conflict is ongoing; d) the purpose or purposes pursued by the program; e) the level and depth of political engagement into the process; f) the nature and scope of criminality to be addressed; g) the views and position of victims and victims' groups; h) the existence (or not) of an armed conflict. Once these factors and the purposes which the program seeks to achieve have been taken into account, consideration will need to be given to the various infrastructural and institutional preparations necessary for the effective rolling out of such a program, which include the following:

In addition to reasons for failure, programme theories need to incorporate necessary preconditions for success, which again have to be identified across different contextual layers and translated accordingly into (sub-) objectives and corresponding instruments. At the infrastructural level, these may include a clear identification of the target population (who is eligible and who's not?), a coherent approach among different actors and stakeholders, a supportive political and cultural environment, and sufficient available legal and bureaucratic manoeuvre space. At the institutional level, preconditions may comprise ongoing individual risk and needs assessments, a safe prison environment, sufficient resources and the adequate training of staff. Sound communication between different actors involved and an across-the-board adherence to the same programme theory are factors included at the interpersonal level. At the individual level, necessary preconditions for success, such as sufficient motivation and essential skills of the actors involved, should be recognised and dealt with appropriately before the programme commences.¹²⁶

4.2.2 Distinguishing between different categories of individuals

When seeking alternatives to detention, one should carefully distinguish between different categories of individuals. On the one hand are those against whom there is evidence of participation in serious criminal offences. In relation to those, prosecution and incarceration might be the sole or primary solution to addressing their deeds. The nature and gravity of their actions and the intrinsic dangerousness of such individuals calls for and generally justifies such measures.

¹²⁶ Tinka Veldhuis, *Designing Rehabilitation and Reintegration Programmes for Violent Extremist Offenders: A Realist Approach*, ICCT Research Paper March 2012 (<https://icct.nl/wp-content/uploads/2015/05/ICCT-Veldhuis-Designing-Rehabilitation-Reintegration-Programmes-March-2012.pdf>), 18-19.

On the other hand are individuals said to have been associated with terror organizations without there being evidence of their involvement in the commission of any other crime. Detention might still be necessary in some cases, e.g., where there are clear and objective indications of dangerousness.¹²⁷

The evaluation process that is expected to determine what response to give to the acts of a given terrorist has been well summarized in those terms:

An effective assessment of the potential threat posed by the offender and his/her eligibility for a pre-trial or post-conviction alternative measure is perhaps the most crucial element, because it informs all aspects of the decision-making process. The specific risk that is being addressed needs to be clearly identified and incorporated into any assessment tool, which should be administered by trained professionals. Potential factors may include: (1) the severity of the crime charged; (2) the level of radicalization to violence and commitment to violent extremism; (3) the offender's receptiveness to intervention and treatment; and (4) the likelihood of the person re-offending. There are a number of different general risk assessment models that may be a good starting point for determining the eligibility of an offender. Some of the most widely used models used include: (1) the "risk, needs, and responsivity" (RNR); (2) the invention cycle, which includes assessment, planning, intervention, and evaluation; and (3) the desistance approach, which includes understanding how and why people stop offending.¹⁷ States may also consider assessment criteria used for other categories of offenders, such as gangs or organized crime members, to help inform criteria that would be most effective for assessing eligibility and suitability of alternative measures for an offender charged with or convicted of a terrorism-related offense.¹²⁸

Particularly sensitive in this context are children, young adults and women who, whilst in detention, are particularly vulnerable to violence and harm. These two categories should be treated with particular attention to their vulnerability when seeking alternatives to detention.¹²⁹ In particular, children should be treated primarily as victims and their best interest constitute the focus of any assessment of a response to their association with a terrorist group.

¹²⁷ Regarding the question of making that assessment, see, *infra*, xx/filtering.

¹²⁸ GCTF, Initiative to Address the Life Cycle of Radicalization to Violence Recommendations on the Effective Use of Appropriate Alternative Measures for Terrorism-Related Offenses (<https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/2016%20and%20before/Effectivity%20Use%20of%20Appropriate%20Alternative%20Measures%20ENG.pdf?ver=2020-01-13-153915-323>), 6.

¹²⁹ See, *infra*, dd/children and dd/women.

It is therefore critical to ensure an *individualized* rather than *collective* response to the challenge posed by suspected or convicted terrorists and that this response is consonant with the goals of peace, reconciliation and respect for the rule of law outlined above.

4.2.3 Women

The question of alternatives to detention for terrorist or terrorist suspect raises particular challenges and difficulties when it comes to women.¹³⁰ Addressing this issue requires a gender-sensitive approach to the issue at all relevant stages of the process (investigation; prosecution; detention; and alternatives thereto).¹³¹ UNODC's *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* offers a most comprehensive review of these issues, which are beyond the scope of the present report.¹³²

¹³⁰ See, generally, UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019). See also UNSC resolution 2242 (2015), S/RES/2242 (2015), 13 October 2015 (recognizing the differential impact of terrorism on the human rights of women and girls, and calling for the greater integration by Member States and the United Nations of their agendas on Women, Peace and Security, counterterrorism and countering violent extremism); UNGA resolution 70/148, A/RES/70/148, 25 February 2016 (urging states to ensure that gender equality and non-discrimination were taken into account when shaping, reviewing and implementing all counter-terrorism measures, and urging them to promote the full and effective participation of women in those processes); UNGA resolution 72/194, A/RES/72/194, 23 January 2018. See also UNODC, *The Gender Equality Strategy for the United Nations Office on Drugs and Crime and the United Nations Office in Vienna* (2018–2021).

¹³¹ Ibid. See also UNSG, *Key Principles For The Protection, Repatriation, Prosecution, Rehabilitation And Reintegration Of Women And Children With Links To United Nations Listed Terrorist Groups*, April 2019 (https://www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/key_principles-april_2019.pdf), 6:

Specific Principles regarding the Rights of Women

- Women can be both facilitators, supporters, perpetrators of crimes and victims of violence, abuses and other human rights violations. Women suspected of committing crimes should be prosecuted in a fair and non-discriminatory manner within the framework of international standards, while given the support they need as victims.
- Criminal justice processes must be gender responsive, and address the needs of women, in particular young women, including within detention, interrogation, as well as witness protection programmes. Such gender-sensitive practices are key to effectively protecting women who are victims of sexual and gender-based violence from secondary victimization and stigmatization.
- Women survivors of violence, abuses and other human rights violations must be provided with all possible support. The rehabilitation and reintegration of women requires tailored strategies to address their specific needs and minimize risks leading to stigmatization and exclusion.

See also UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System*, 2017 (https://radical.hypotheses.org/files/2016/04/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf), p 108ff, 118ff; United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules, 2010):31 The Bangkok Rules emphasize the need for pre- and post-release reintegration programmes which take into account the gender-specific needs of women, as well as the provision of assistance to women to facilitate their social reintegration (rules 45 to 47).

¹³² See also OSCE, *Understanding Gender and Preventing and Countering Violent Extremism and Radicalization Leading to Terrorism: Good Practices for the Security Sector* (April 2019); and UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls* (Vienna, 2014).

It is generally agreed that women and children need to be treated with particular care and diligence. Prisons and detention centers are particularly inadequate for both of these categories.¹³³ Their heightened sensitivity to detention calls with even more urgency for the search of alternatives to detention for women and, even more so, girls.¹³⁴ It is also generally accepted, however, that age or gender does not necessarily mean that they are not potentially dangerous or did not take part in the commission of serious terrorist acts.¹³⁵ Therefore, whilst rehabilitation programs and alternatives to detention must account for the gender of those concerned, it should not be assumed from this alone that they do not represent a serious security risk or disengagement challenge. *A contrario*, an assumption of dangerousity should not be made from the mere fact a woman or a child was linked to a terror organization – by reason of a relative’s involvement therein or for any other reason. As pointed by the UN Security Council in Resolution 2178, a careful balancing exercise must therefore be struck.¹³⁶ In its *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism*, UNODC noted the following:¹³⁷

¹³³ UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 93ff. See also *Handbook on Women and Imprisonment*, Criminal Justice Handbook Series, 2nd ed. (United Nations publication, Sales No. E.14.IV.3), p. 7; *Training Curriculum on Women and Imprisonment: Version 1.0*, Criminal Justice Handbook Series (Vienna, 2015), pp. 7–8; and OHCHR, *Pathways to, conditions and consequences of incarceration for women*, Note by the Secretary-General, A/68/340, 21 August 2013; UNODC and World Health Organization (WHO), *Women’s Health in Prisons: Correcting Gender Inequality in Prison Health* (2009).

¹³⁴ See also UN Bangkok Rules on Women Offenders and Prisoners, 65/229. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), A/RES/65/229, 16 March 2011, Rule 1:

In order for the principle of non-discrimination embodied in rule 6 of the Standard Minimum Rules for the Treatment of Prisoners to be put into practice, account shall be taken of the distinctive needs of women prisoners in the application of the Rules. Providing for such needs in order to accomplish substantial gender equality shall not be regarded as discriminatory.

¹³⁵ See, e.g., <https://www.aspistrategist.org.au/violent-extremism-mind-the-women-and-children/>

A 2017 report from the Heritage Foundation concluded that 17% of terrorist plots in Europe since 2014 featured women. IS also claimed responsibility for an attack perpetrated by three women at a police station in Mombasa in September 2016, and authorities in Morocco disrupted a group of 10 women planning suicide attacks across the country a month later.

[...]

Children are also vulnerable to being exploited and recruited for violence for tactical benefit. The Heritage Foundation noted that 25% of attacks in Europe since 2014 involved teens or pre-teens. From 2014 to 2016, IS is thought to have recruited and trained more than 2,000 boys—referred to as the ‘Lion Cubs of the Caliphate’. Between April 2011 and July 2017, at least 56% of Boko Haram’s 434 bombers were women, and 81 were children or teenagers. Using child soldiers gives groups and their attacks maximum publicity. In addition, training and indoctrinating children from an early age is an investment in the organisation’s longevity.

See also <https://institute.global/insight/co-existence/complex-challenge-female-isis-returnees>

¹³⁶ UNSC Resolution 2178 (2014), S/RES/2178 (2014), 24 September 2014, para 31:

Emphasizes that women and children associated with foreign terrorist fighters returning or relocating to and from conflict may have served in many different roles, including as supporters, facilitators, or perpetrators of terrorist acts, and require special focus when developing tailored prosecution, rehabilitation and reintegration strategies, and stresses the importance of assisting women and children associated with foreign terrorist fighters who may be victims of terrorism, and to do so taking into account gender and age sensitivities;

¹³⁷ UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 104–105.

Appropriate prison-based interventions to assist violent extremist prisoners to disengage from violent extremism,¹³⁸ as well as rehabilitation and social reintegration measures to prepare prisoners for their release and re-entry into the community, are key elements in a strategy related to preventing and countering violent extremism.

Effective disengagement, rehabilitation and reintegration interventions should be targeted to address the specific needs of each such prisoner, the nature of the violent extremist group involved, and the environment into which the former violent extremist prisoner will be released.¹³⁹

Disengagement, rehabilitation and reintegration programmes should therefore take into account gender-specific needs and experiences of violent extremist prisoners:

- An effective intake, assessment and classification system for new inmates is highly beneficial in designing disengagement, rehabilitation and reintegration measures. The form and aims of these measures will likely differ significantly based on whether the prisoner has been assessed as low-risk, which is more common for female violent extremist prisoners, and which may be more suited for engagement with external partners and fellow inmates, as opposed to for high-risk violent extremist prisoners, which demand a more controlled programme with less contact with third parties.¹⁴⁰
- Specific challenges exist with reintegrating women convicted of violent extremist offences, owing to, for example, the stigma surrounding this association, an assumption that women have been subjected to sexual violence, and the fear of potential retaliation.¹⁴¹
- Vocational training opportunities should take into account a diverse range of interests and skills of violent extremist prisoners, and not only those tailored to the majority male population of such prisoners. This

¹³⁸ Generally, disengagement interventions include a variety of activities such as psychological counselling and support; cognitive-behavioural programmes; social work interventions; faith-based debate and dialogue; education; vocational training; creative therapies; physical therapies (e.g., yoga, sport, exercise); family activity; and social, cultural and recreation (Handbook on the Management of Violent Extremist Prisoners, p. 75).

¹³⁹ Handbook on the Management of Violent Extremist Prisoners, p. 70.

¹⁴⁰ Global Counterterrorism Forum's Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders, good practice 3.

¹⁴¹ Handbook on the Management of Violent Extremist Prisoners, pp. 65, 125 and 126.

is an important means of enabling former violent extremist prisoners to restore their livelihoods upon release, and is particularly important for women who have been rejected by their families and may have to become economically independent.

- Women, together with individuals with gender expertise, should participate in the design of interventions for female violent extremist prisoners in order to develop a gender-sensitive lens for programme development.¹⁴²

In every case, alternatives to detention should therefore be carefully considered and these alternatives adapted to the peculiar needs and circumstances of women and girls.¹⁴³

Particularly important in this context is the identification of and treatment of women and girls who have been victims of abuse and violence.¹⁴⁴ Attention should also be paid to the nature and circumstances in which women and girls came to engage in terrorist activities. Detention measures should in principle be avoided for women (and girls) whose association to a terrorist organization is limited to a family relationship (father, husband, brother) with that organization.¹⁴⁵ Careful nurturing of a family and social networks away from terrorist connections and educational as well as vocational efforts

¹⁴² Ibid., p. 64.

¹⁴³ See, generally, https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf pp 57 (children) and 63ff, 68ff and 74ff (women). See also United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules); and United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) which underlie:

- Take into account the specific circumstances of women who have committed offences, including mitigating factors and their caring responsibilities, and give preference to non-custodial measures and sanctions instead of imprisonment; and
- Provide a separate framework for the sentencing of children, within a juvenile justice system, which avoids the institutionalization of children to the maximum possible extent, giving preference to alternatives which assist the development and rehabilitation of children in conflict with the law.

See also: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/65/229. Alternatives to detention are particularly warranted for the very young. See Centre d’analyse du terrorisme (CAT), *La Justice Pénale Face Au Djihadisme - Le Traitement Judiciaire Des Filières Syro-Irakiennes (2014-2017)* (<http://cat-int.org/wp-content/uploads/2018/05/Rapport-Justice-p%C3%A9nale-face-au-djihadisme.pdf>), 19

En cas de retour d’un mineur, celui-ci est judiciairisé au-dessus de 13 ans. Les mineurs de moins de 13 ans font l’objet d’une prise en charge d’ordre éducative. 10 mineurs ont été jugés entre 2014 et 2017 pour leur participation aux filières djihadistes syro-irakiennes.

¹⁴⁴ See, e.g., UNODC, *Handbook On Restorative Justice Programmes* (Criminal Handbook Justice Series, 2nd ed, 2020), 20. See also UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), Chapter 5.

¹⁴⁵ See also Protection of human rights and fundamental freedoms while countering terrorism Note by the Secretary-General, A/64/211, 3 August 2009, para. 31; and UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 113ff.

should form an integral part of any strategy of alternatives to detention involving women and girls. At the same time, states should guard against the *stereo-typing* of women as being necessarily innocent victims in the context of terrorism.¹⁴⁶

Ultimately, each and all decisions on alternatives to detention should be based on factual determinations rather than a priori and assumptions based on gender.

4.2.4 Children

As underlined in the United Nations *Convention on the Rights of the Child*, the need to find alternatives to detention is of particular urgency in relation to children: “The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”¹⁴⁷ Detention should be, in relation to them, an absolute last resort.

The United Nations Security Council has clearly underlined the importance of giving

¹⁴⁶ UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 123:

Authorities in charge of screening or de-radicalization programmes must also be particularly careful to avoid making decisions based on gender stereotypes. On the one hand, in some countries there is a tendency to consider women’s association with terrorist groups as generally involuntary or innocent, and to therefore allow them to return to civilian life without undergoing thorough screening procedures. As a result, it is primarily, if not exclusively, men who are subject to prolonged administrative detention for the purposes of determining their “profile”, and in order to make a first determination as to the likelihood of their involvement in acts of terrorism and whether they pose a significant security risk. On the other hand, while women are often not considered for prosecution owing to gender stereotypes, they are often deemed to have been indoctrinated or brainwashed, therefore requiring de-radicalization, even when the coercive nature of their association with the terrorist group is undisputed. In its resolution 2396 (2017), the Security Council called upon Member States to employ – for both terrorism suspects and their accompanying family members – evidence-based risk assessments, screening procedures, in accordance with domestic and international law, without resorting to profiling based on any discriminatory ground prohibited by international law.

¹⁴⁷ United Nations Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49, art 37(b). See also United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)(<http://www.un.org/documents/ga/res/40/a40r033.htm>); UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System*, 2017 (https://radical.hypotheses.org/files/2016/04/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf), p 87-88 (footnotes omitted):

Pretrial detention should be applied as a measure of last resort and for the shortest appropriate period of time. As acknowledged by the Committee on the Rights of the Child, there will be circumstances where it may be necessary to detain a child alleged to have committed an offence, but these should be limited to where the child is an immediate danger to himself or herself or others, or it is considered necessary to ensure his or her appearance at the court proceedings. The Committee on the Rights of the Child recommended that, if a child is detained during the pretrial phase, the detention should be reviewed every two weeks to determine whether the criteria for detention continue to be met. The Committee also recommended that the period of pretrial detention before the child is charged (i.e. the period when the child is under investigation) should not exceed 30 days and that the court should make a final decision on the charges not later than six months after they have been presented. The imperative to limit delays to a minimum in cases involving children applies also when the charges concern terrorism-related offences.

consideration to the status and need for protection of children in this sort of context.¹⁴⁸ Reintegration and rehabilitation, rather than punishment, should form the core of any strategy dealing with children linked to terror organisations.¹⁴⁹ Restorative, rather than penal, justice should therefore be favored in principle.¹⁵⁰

¹⁴⁸ UNSC Resolution 2178 (2014), S/RES/2178 (2014), 24 September 2014, para 36:

Recognizes the particular importance of providing, through a whole of government approach, timely and appropriate reintegration and rehabilitation assistance to children associated with foreign terrorist fighters returning or relocating from conflict zones, including through access to health care, psychosocial support and education programs that contribute to the well-being of children and to sustainable peace and security;

See also Working Paper No. 3: Children and Justice During and in the Aftermath of Armed Conflict, produced by the Office of the Special Representative of the Secretary-General for Children and Armed Conflict; UNODC Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Criminal Justice System.

¹⁴⁹ See, e.g., UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System*, 2017 (https://radical.hypotheses.org/files/2016/04/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf), p 106ff (noting that '[a]chieving social reintegration should be the primary purpose of any action taken by public authorities affecting children recruited by terrorist and violent extremist groups, and it is a crucial step to ensuring that the child will assume a constructive role in society.' And highlighting (a) Health and psychosocial recovery and support; (b) Educational and vocational opportunities; and (c) Return to family and community life as key elements of that process) and, *ibid* 112; UNODC, *Roadmap on the Treatment of Children Associated with Terrorist and Violent Extremist Groups* (<https://indd.adobe.com/view/61793921-8dc6-4fc2-9e46-b27c6390fff2>) (noting that reintegration and rehabilitation of children with links to terrorist and violent extremist groups should be a key priority of states and relevant stakeholders and calling to apply a child-and-gender-sensitive approach to that goal). For detailed guidance on the adaption of non-judicial processes to the rights and needs of children, see Hamilton and Dutordoir, "Children and justice in the aftermath of armed conflict"; UN-Women, UNICEF and UNDP, *Informal Justice Systems: Charting a Course for a Human Rights-based Engagement* (2013); and Sharanjeet Parmar and others, eds., *Children and Transitional Justice: Truth-telling, Accountability and Reconciliation* (Florence, Italy, UNICEF Innocenti Research Centre; Cambridge, Massachusetts, Harvard Law School, 2010).

¹⁵⁰ UNODC, *Handbook On Restorative Justice Programmes* (Criminal Handbook Justice Series, 2nd ed, 2020), 34 (footnotes omitted):

From an educational and developmental point of view, the benefits of applying restorative justice approaches are obvious. When anchored in the respect of the rights of the child, a restorative justice process can promote accountability and reintegration of children who have committed an offence through a voluntary, non-adversarial problem-solving process. The process itself can be of great educational value.

The last 15 years have seen an unprecedented growth in the use of restorative justice in the youth justice context, as an alternative to the criminal justice process or part of diversion schemes. This may reflect a paradigm shift concerning juvenile justice in the context of growing attention being placed on children's developmental needs, their human rights, and legal safeguards.

[...]

Restorative justice processes must be implemented in a manner that guarantees children's safety, respects their rights and remains consistent with the principle of the best interests of the child. Making the process and its outcomes subject to judicial review can ensure that the rights of the child are respected and that the process is lawfully conducted. In practice, however, the presence of such an oversight mechanism appears to be the exception rather than the norm.

Furthermore, consistent with the *Convention of the Rights of the Child*, a state's response in this context should in all cases focus around the notion of 'best interests' of the child.¹⁵¹

¹⁵¹ See, generally, UNSG, Key Principles For The Protection, Repatriation, Prosecution, Rehabilitation And Reintegration Of Women And Children With Links To United Nations Listed Terrorist Groups, April 2019 (https://www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/key_principles-april_2019.pdf), 5:

Specific Principles regarding the Rights of Children

- The best interests of the child must be given primary consideration in all actions concerning them, including in relation to maintaining family unity. Member States, with United Nations support, should implement Best Interest Assessment/Best Interest Determination (BIA/BID) processes with key safeguards in place, to determine whether repatriation or other actions are in the best interest of a child. Member States should seek the free and informed consent of parents before separating children for repatriation, unless separation is decided to be in the child's best interests.
- Alternative care arrangements should be explored for situations in which children cannot remain with their parents or where it is not in the best interest of the child to remain with his or her primary care givers. Family-based interim care arrangements should be prioritized, followed by community-based interim care arrangements.
- Children linked with United Nations listed terrorist groups should only be detained as a measure of last resort and for the shortest appropriate period of time. Alternatives to detention for children should be prioritized. Children should be detained separately from adults unless otherwise in their best interests and to prevent family separation.
- Rehabilitation and reintegration of children linked with United Nations listed terrorist groups must be prioritized, in line with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. This includes access to age and gender appropriate services, including mental health and psychosocial support, education and legal assistance.
- Member States must respect the privacy and confidentiality of children with links to United Nations listed terrorist groups.
- Member States should prevent the further stigmatization of children with links to United Nations listed terrorist group where possible. In the absence of criminal evidence, Children should not be placed on watch lists or in other databases based on family affiliation or alleged affiliation with an armed group.

See also UNODC, Handbook On Restorative Justice Programmes (Criminal Handbook Justice Series, 2nd ed, 2020), 1819- (footnotes omitted):

- The Convention of the Rights of the Child (CRC): The CRC recognizes the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth so as to reinforce the child's respect for the human rights and fundamental freedoms of others, taking into account the age of the child and the desirability of promoting his or her social reintegration, and his or her assumption of a constructive role in society (article 40 (1)). It also recognizes children's right to be heard and participate in decisions affecting them (article 12 (2)) and that in all actions concerning a child, the best interests of the child should be the primary consideration (article 3 (1)). The CRC encourages the use of alternative measures to deal with the child without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected (article 40 (3) (b)). Restorative justice programmes are uniquely suited to achieve these objectives. The CRC also requires that measures be taken for the protection, physical and psychological recovery and social reintegration of child victims (article 39).
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules, 1985): In line with the dispositions of the CRC mentioned above, the Standard Minimum Rules for the Administration of Justice state that, in order to facilitate the discretionary disposition of juvenile cases, community programmes such as temporary supervision and guidance, restitution and compensation of victims should be established (rule 11.4). The Rules also recommend that juvenile justice proceedings "shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely" (rule 14.2). A restorative justice programme is uniquely suited to facilitate that participation and ensure that the process is guided by the principle of the best interests of the child.

The need for prosecution and detention of children is therefore to be considered carefully in every situation; so is the manner and setting in which their case should be addressed.¹⁵² Alternatives to prosecution and detention should normally and generally be favoured.¹⁵³

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- United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines, 1990): The Guidelines suggest that juvenile crime prevention measures could include the provision of assistance and support to help resolve conditions of instability or conflict (para. 13).
 - United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice (2014): The Model Strategies recommend the provision of “legal aid” and legal information to children participating in alternative dispute resolution mechanisms and restorative justice processes (para. 6 (l)). Recognizing the merits of restorative justice programmes, particularly as alternatives to criminal proceedings, the Model Strategies recommend the use of diversion programmes and the implementation of restorative justice programmes for children as alternative measures to judicial proceedings (para. 31). The Model Strategies, because of the serious nature of violence against children and the severity of the physical and psychological harm caused to child victims, urge caution in the use of informal justice systems when dealing with perpetrators of violence against children. Member States are encouraged to ensure that, through such mechanisms, “violence against children is appropriately denounced and deterred, that perpetrators of violence against children are held accountable for their actions and that redress, support and compensation for child victims is provided” (para. 25).

¹⁵² Global Counterterrorism Forum (GCTF), Initiative to Address the Life Cycle of Radicalization to Violence Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context (<http://strproject.oijj.org/system/files/documents/english-neucha-tel-memorandum-on-juvenile-justice.pdf>), in particular, Good practice 5 and 6. UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters (2018), para 53:

For children who have been recruited and who are being dealt with by the juvenile justice system, the Convention on the Rights of the Child, in particular articles 37 and 40, apply. The Global Counterterrorism Forum Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context (GCTF Memorandum) provides guidance on the development and implementation of policies regarding children in terrorism cases in order to enhance the juvenile justice system in a counterterrorism context. The GCTF Memorandum notes that particular attention should be given to alternatives to prosecution, and that any justice action undertaken concerning the child should aim at his or her reintegration into society. A child subject to detention is likely to suffer immediate stigmatization, disruption of education and social development, and further severance from their community, thus jeopardizing the possibility of effective reintegration and rehabilitation. Not all child returnees are dealt with by the criminal/juvenile justice system, particularly those who are very young. These children have unique needs for specialized child-sensitive rehabilitation and reintegration measures.

¹⁵³ UNSG, Key Principles For The Protection, Repatriation, Prosecution, Rehabilitation And Reintegration Of Women And Children With Links To United Nations Listed Terrorist Groups, April 2019 (https://www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/key_principles-april_2019.pdf), 7:

There should be a presumption against the prosecution of children and they should be treated primarily as victims. Children should not be detained or prosecuted solely for their association with or membership in any armed group, including designated groups. Nonjudicial measures should be preferred in relation to children accused of any crimes in relation to terrorist groups. Children’s best interests require prioritization of rehabilitation and reintegration in any contact they have with the law.

Mere membership in a terror organization should normally not suffice to justify prosecution and detention of a child.¹⁵⁴

These principles should apply at all stages of the process, from initial arrested, pre-trial and all through any subsequent process. Pre-trial diversion should be favored over prosecution.¹⁵⁵

¹⁵⁴ UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System*, 2017 (https://radical.hypotheses.org/files/2016/04/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf), p 74 (footnote omitted):

The Paris Principles state that children who have been associated with armed forces or armed groups should not be prosecuted or punished or threatened with prosecution or punishment solely for their membership in those forces or groups (para. 8.7). In addition, they provide that children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law, not only as perpetrators. Accordingly, they should be treated with rehabilitation in mind and alternatives to judicial proceedings should be sought wherever possible (paras. 3.6 and 3.7), with the consequence that justice measures should be seen as a measure of last resort. In addition, it is reaffirmed that children accused of crimes under international or national law allegedly committed while associated with armed forces or armed groups are entitled to be treated in accordance with international standards for juvenile justice (para. 8.8).

And, *ibid*, 7980-

It is therefore important to note that in the Paris Principles, it is stated that children who have been associated with armed forces or armed groups should not be prosecuted or punished or threatened with prosecution or punishment solely for their membership of those forces or groups (para. 8.7). Against this background, States should refrain from charging and prosecuting children associated with terrorist or violent extremist groups for mere association with those groups, in particular in any such cases where the child's association with the terrorist or violent extremist group is comparable to the situation of a child soldier who is associated with an armed force or armed group.

¹⁵⁵ UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System*, 2017 (https://radical.hypotheses.org/files/2016/04/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf), p 83-84

The international legal framework on juvenile justice provides for the opportunity to apply pretrial diversion measures from the earliest stages of the proceedings. According to article 40, paragraph 3 (b), of the Convention on the Rights of the Child, States should seek to promote, whenever appropriate and desirable, measures for dealing with children in conflict with the law without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.¹²⁶ Diversion measures can only be applied following informed consent of the child (rule 11.3 of the Beijing Rules). Whenever possible, police custody and pretrial detention should be avoided and alternative measures to detention should be considered, such as close supervision, care or placement with a family or in an educational setting or home. This is in line with article 37, subparagraph (b), of the Convention on the Rights of the Child, which states that detention should be used only as a measure of last resort and for the shortest appropriate period of time. International standards and norms also contain a number of provisions aimed at ensuring that conditions of pretrial detention comply with the rights and needs of children and are consistent with the presumption of innocence. They include:

- a) Children should be separated from adults, except in certain circumstances where it may not be in their best interests to do so, ¹²⁷ and girls should be separated from boys. Children in pretrial detention should also be held separately from convicted children;¹²⁸
- (b) Children have the right to prompt access to legal counsel, and they can apply for free legal aid and communicate regularly with their legal advisers, in respect of privacy and confidentiality requirements;¹²⁹
- (c) The child's contact with his or her parents and family should be maintained regularly, regardless of the nature of the offence that the child may be charged with;
- (d) Children should receive and retain materials for their leisure and recreation to the extent that this is compatible with the interests of the administration of justice;¹³⁰
- (e) Children have the right to challenge the legality of the detention before a court or other competent independent and impartial authority and the right to a prompt decision on any such action.¹³¹

And alternatives to prosecution should normally be preferred. And where a child is subject to prosecution, this should be done in a specialized legal and judicial environment that accounts for their status as children.¹⁵⁶

And, *ibid*, 88:

Despite the serious nature of terrorism-related offences, States, as well as international organizations, are increasingly recognizing the need and utility of alternatives to formal judicial proceedings, as well as alternatives to detention. Indeed, the progressive broadening of national counter-terrorism strategies has led to greater focus on prevention and reintegration. During the past few years, the range of terrorism-related offences has widened considerably; at the same time, States have been dealing with a growing number of individuals charged with terrorism-related offences, whether in countries affected by conflict or in countries faced by a high number of returning foreign terrorist fighters. Accordingly, measures that can foster a more solid link to the community and address violent extremist behaviour through specialized treatment are showing increasing merit. In the case of children, international law requires to provide for multiple diversion options, as well as alternatives to detention. Such measures have the inherent merit of preventing the risks of victimization and stigmatization that are associated with long periods in police custody or detention and are thus more responsive to the developmental needs of children.¹⁴⁰ Accordingly, diversion measures should be applied at all stages of the proceedings, including during trial, and alternative measures should also be considered from the moment of arrest, and also as a sentence. International standards do not limit the applicability of diversion measures on the basis of the seriousness of the offence. It is thus strongly recommended that domestic legislation and regulations adopt a similar view, stressing that the most relevant criteria to decide on the appropriateness of diversion or alternative measures should be the individual assessment of the personal circumstances and needs of the child. Restorative justice, mediation and community-based programmes for children are only some of the options that could prove effective in cases of children accused of terrorism-related offences. In view of the diverse avenues of recruitment of children by terrorist and violent extremist groups, and the influence of various “push factors” and “pull factors” (see chapter I above), effective prevention of further recidivism will require strategies that can tackle the root causes of the problem. Indeed, diversion and alternatives are particularly appropriate means for achieving this goal, as they generally focus on the impact of criminal behaviour, forms of reparation for the victims, and at the same time, they provide an opportunity to work on and improve positive skills.¹⁴¹ This is not to say that proportionality to the gravity of the offence should not be taken into account. However, different diversion and alternative measures include varying degrees of monitoring and accountability and are thus mindful of proportionality considerations, responding to public safety interests. At the same time, by involving actors beyond the justice system, diversion and alternatives to detention usually contribute to the development of effective coordination mechanisms and a heterogeneous network of practitioners that play a considerable role in the prevention of terrorism and violent extremism, as well as in the reintegration phase.

¹⁵⁶ UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System*, 2017 (https://radical.hypotheses.org/files/2016/04/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf), p 70, in particular, 71 ff (regarding the international legal framework regarding juvenile justice) and 72 (noting that ‘the primary purpose of any action taken against a child in contact with the justice system as an alleged offender must be the rehabilitation and reintegration of the child rather than punishment’) and 77 (footnotes omitted) (‘One major difference relates to the dual role of juvenile justice, which is aimed not only to preserve public safety and hold a perpetrator accountable for having committed a crime, but also to protect the rights of a child alleged to have committed an offence and promote his or her reintegration into society. Another major difference is that the best interests of the child remain a primary consideration, even in criminal cases. Children are also provided with a greater level of procedural protection by the Convention on the Rights of the Child.’). See also UNODC, *Roadmap on the Treatment of Children Associated with Terrorist and Violent Extremist Groups* (<https://indd.adobe.com/view/61793921-8dc6-4fc2-9e46-b27c6390fff2>), section 5, p 6 (noting that in line with the Convention on the Rights of the Child, throughout any justice proceedings concerning a child alleged offender, the following key principles must always be applied: the right to non-discrimination; the best interests of the child; the right to life, survival and development; and the right to participate and to be heard).

If convicted and sentenced, his or her status should weigh significantly on the type and length of measure imposed upon them so as to ensure that they do not suffer disproportionate harm as a result of detention.¹⁵⁷

Requiring particular attention and protection are girls and boys, who would be vulnerable to harm if detained. The need for their detention should in all cases remain a last resort, justified only in the most extreme of circumstances where there is no credible alternative to it. In a letter of 18 February 2015, the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed the President of the Security Council in those terms:

The current phenomenon of foreign terrorist fighters includes young girls and boys under the age of 18 years, who are being targeted to travel abroad to participate in terrorist activities. In many countries, legislation enables interdiction of their travel at the border, before departure. Any terrorist act would be prevented, but that raises the questions of whether the legislation should be levelled at such young offenders without the further commission of a crime, when a conviction would result in a sentence of between 15 years to life imprisonment, and whether such a sentence would be proportionate or appropriate, especially for a young, first-time offender who is intercepted at the border.¹⁵⁸

¹⁵⁷ UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System*, 2017 (https://radical.hypotheses.org/files/2016/04/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf), p 95-96

Throughout the judicial process, and especially at the time of sentencing, judges have a crucial and complex role. They are required to take into account the need to promote and facilitate the reintegration and rehabilitation of the child, while at the same time they need to consider the needs of the victims and the particular seriousness of terrorist acts and to deter reoffending. International law requires the adjudication of children to be based on due consideration of both the circumstances of the offence and the personal situation of the child. Thus, while the risks of reoffending should not be discounted, it is crucial to take into account the conditions that led to the recruitment of the child, the power imbalance between the terrorist group and the child, and the impact of these factors on the consent of the child to any criminal act following recruitment.

Furthermore, the court is required to apply deprivation of liberty only as a measure of last resort and to consider all possible non-custodial sentences. While alternatives to deprivation of liberty have the merits of focusing on the educational, psychosocial and behavioural needs of the child, they can also focus on preventing further violence and include effective monitoring systems.

For instance, non-custodial measures can provide anger management and anti-aggression training to address violent tendencies. Short-term fostering orders or residence orders can be used in exceptional circumstances to remove the child from the families or personal environment when these are deemed to be conducive to further criminal activity. Other measures, such as supervision orders, focus on prohibiting certain activities and ensuring closer monitoring of the child's life, without affecting the child's living arrangements and educational activity.¹⁵⁴

Finally, the absolute prohibition of capital punishment and life imprisonment without possibility of release applies without exception in terrorism-related cases. Therefore, under no circumstances can it be considered acceptable to apply such measures to a person sentenced for offences that were committed before the young person turned 18, regardless of the type of crime that may have been committed.

¹⁵⁸ Letter dated 18 February 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2015/123, and Annex ('Bringing terrorists to justice: challenges in prosecutions related to foreign terrorist fighters'), 23 February 2015, in particular, para 40.

The United Nations Security Council, Counter-Terrorism Committee, has also issued these useful guiding principles in relation to children.¹⁵⁹ Bearing in mind the consequences of submitting children to criminal proceedings and detention, States should therefore look at other ways of addressing offending behavior by children.

Alternatives to detention should be regarded as particularly suited to them¹⁶⁰ and their prosecution and detention an undesirable last resort.¹⁶¹

¹⁵⁹ United Nations Security Council, Counter-Terrorism Committee, Security Council Guiding Principles on Foreign Terrorist Fighters: The 2015 Madrid Guiding Principles + 2018 Addendum, S/2015/939 and S/2018/1177 (2019), 35-36, para 45 (footnotes omitted). See also United Nations, “Guidance note of the Secretary-General: UN approach to justice for children”, September 2008.

¹⁶⁰ Global Counterterrorism Forum (GCTF), Initiative to Address the Life Cycle of Radicalization to Violence Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context (<http://strproject.oijj.org/system/files/documents/english-neucha-tel-memorandum-on-juvenile-justice.pdf>), Good Practice 7

Bearing in mind the consequences of submitting children to criminal proceedings, which may raise the level of their vulnerabilities, States should look at other ways of addressing offending behavior by children. Diversion seeks conditional channelling of children in conflict with the law outside the judicial proceedings towards a different way of addressing the issue that enables many children’s cases to be resolved by non-judicial bodies, thereby avoiding the negative effects of formal judicial proceedings and a criminal record. 18 Children who may be diverted into a program should be given the opportunity to be heard before a final decision is made. 19

States are encouraged to implement and promote laws that contain specific provisions for the application of diversion mechanisms, whenever appropriate and desirable. Such diversion proceedings may be carried out at different stages of the process, including before the initiation of criminal proceeding, during criminal proceedings, and as an alternative to incarceration. Guidelines should be developed allowing law enforcement officials, prosecutors, and judges to exercise their discretion to divert children into diversion programs at different stages of the process.

The child will be assessed before entering a diversion program. Diversion programs for children involved in terrorism-related activities need to be carefully tailored to the characteristics of the child and the offense committed. Diversion programs that intend to target children radicalized to violence or recruited for terrorism-related offenses should include disengagement and de-radicalization components as well as educational elements, vocational training, and psychological support, all aimed at supporting reintegration.

The successful completion of the diversion program by the child should result in a definite and final closure of the case, and no criminal or other forms of public records should be kept.

And, *ibid*, Good Practice 8:

Consider, and apply where appropriate, alternatives to arrest, detention, and imprisonment, including during the pre-trial stage and always give preference to the least restrictive means to achieve the aim of the judicial process.

A child subject to detention is likely to suffer immediate stigmatization, disruption of education and social development, and further severance from their community, thus jeopardizing the possibility of effective reintegration and rehabilitation.

In accordance with international legal instruments, and in line with international juvenile justice standards, measures that do not involve detention should be considered for children who are being processed through the criminal justice system.²⁰ Prosecutors and judges play a key role in deciding about protective, supportive, educational and security measures for children facing terrorism-related charges. Consistent with the laws in their countries, judges should be given a variety of possible alternatives to institutional care and detention. Alternatives in the shape of community-based options for the supervision of children can be appropriate alternatives to detention. Such community-led intervention programs should include a de-radicalization component where appropriate.

¹⁶¹ HRC, General Comment No 24, para 112:

Especially for children, criminal justice responses should not be the norm, but used as a matter of last resort and with a pedagogical orientation, with the purpose of rehabilitating children. Particular caution must be exercised in the prosecution of the increasingly broad crimes of association or support.

Rehabilitation program geared towards children should carefully account for their age and vulnerability.¹⁶² And they should be built upon the assumption that children

These offences are of particular relevance to the roles children often assume in FTF-related contexts and where concerns regarding individual criminal culpability are heightened. According to the recommendations of the UN Committee on the Rights of the Child regarding the minimum age of criminal responsibility, criminal justice responses for FTF-related acts are not appropriate for young children.²⁶³

And, *ibid*, footnote 263:

263 The Committee recommends as a minimum standard that children under the age of twelve should not be considered criminally responsible. It considers a minimum age of criminal responsibility below the age of 12 years not to be internationally acceptable and has described a high age level of 14 or 16 years as commendable. See: General Comment No. 10 (Children's rights in juvenile justice), UN Committee on the Rights of the Child, UN Doc. CRC/C/GC/10, 25 April 2007, paras. 30ff, (hereafter, General Comment No. 10, UN Committee on the Rights of the Child).

See also UNICEF, *Justice For Children: Detention As A Last Resort Innovative Initiatives in the East Asia and Pacific Region*;

¹⁶² Global Counterterrorism Forum (GCTF), Initiative to Address the Life Cycle of Radicalization to Violence Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context (<http://strproject.oiji.org/system/files/documents/english-neucha-tel-memorandum-on-juvenile-justice.pdf>), Good Practice 11 (footnote omitted):

Good Practice 11: Develop rehabilitation and reintegration programs for children involved in terrorism-related activities to aid their successful return to society.

Rehabilitation and reintegration programs for children should seek to safeguard the interests of both society and children. The successful rehabilitation and reintegration of children will also safeguard the interests of society at large.

There are very few juvenile support organizations that specialize in preventing and countering violent extremism. There is a need to develop more specialized and individualized support programs that take into account the individual characteristics of the child, including gender, preparing children to return to their families and communities after having been detained or imprisoned for their involvement in terrorism-related activity.

Rehabilitation and reintegration programs should be available to children involved in terrorism-related activity that have been diverted from the judicial process (see Good Practice 7 of this Memorandum), or are completing or have completed custodial sentences.

Rehabilitation and reintegration programs, whether delivered in the community or through court orders or in detention, should take a multi-sector approach involving actors such as psychologists, mental health workers, social workers, law enforcement, community leaders, school teachers, and families, and should continuously assess the child.

Programs should strive to restore links between children and their families, peers, community, and society, where appropriate. Programs may be tailored to the cultural and religious background of the targeted child. Programs that also address the families of the child should constitute a significant element of the rehabilitation and reintegration process. Post-release support to facilitate the reintegration process is also necessary to facilitate continuing education, secure employment, and to counter stigmatization that often accompanies children that have been alleged to be involved in terrorism.

Rehabilitation and reintegration processes and policies benefit from open communication, and coordination and collaboration between judicial and prison authorities, juvenile support organizations, and social service organizations that work with children after their release from specialized juvenile institutions, as appropriate.

in such cases are also victims of others.¹⁶³ Their care, rather than punishment and retribution, should be at the core of any such program.

When it comes to detention (or quasi-detention settings), it is also generally accepted that genders should not be mixed at such facilities.¹⁶⁴

This would be true of internment or other rehabilitation facilities, which should in principle keep genders apart. Similarly, when detained children should be dealt with separately than adults to ensure their security and well-being and so that their particular situation can be addressed in individualized fashion.¹⁶⁵

¹⁶³ Thomas Renard And Rik Coolsaet (editors), *Returnees: Who Are They, Why Are They (Not) Coming Back And How Should We Deal With Them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands* (Egmont Paper 101, February 2018) (http://www.egmontinstitute.be/content/uploads/2018/02/egmont_papers.101_online_v1-3.pdf), 74:

As far as children are concerned, similarities and differences are perceptible between the three countries. All start from the same premise, that children are victims and not criminals.

The UN Special Representative of the Secretary-General for Children and Armed Conflict has likewise recommended that states treat children associated with armed groups primarily as victims. UN Special Representative of the Secretary-General for Children and Armed Conflict, Annual report to the UN Human Rights Council, UN Doc. A/HRC/3129 ,19/ December 2015, para. 65. See also UNSG, *Key Principles For The Protection, Repatriation, Prosecution, Rehabilitation And Reintegration Of Women And Children With Links To United Nations Listed Terrorist Groups*, April 2019 (https://www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/key_principles-april_2019.pdf), 5:

- Children should be treated first and foremost as victims and their treatment must be determined with the best interests of the child as the primary consideration, in line with the Convention on the Rights of the Child. This includes actions taken by both public and private actors and in legislative, judicial, and administrative decisions. Children have special rights and protections that apply in all situations, irrespective of the children's age, sex, or other status, including actual or perceived family or personal affiliation.

See also UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System*, 2017 (https://radical.hypotheses.org/files/201604/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf), p 40ff, and 75 where it is noted that:

the imperative of treating a child recruited by a terrorist or violent extremist group “primarily as a victim” does not mean that the child should be granted immunity for criminal acts committed during his or her association with the terrorist or violent extremist group. Instead, the notion of primary victimization should be duly recognized, integrated and considered at the different stages of the justice process. This means that children should be awarded the safeguards and guarantees of child victims, concerning safety, safeguards and appropriate assistance, including reparations. [...] It also means that prosecution should always be regarded as a measure of last resort and, whenever a child is alleged to have committed a criminal offence, the rights and safeguards provided by the international legal framework for child offenders should be fully respected and applied.

¹⁶⁴ J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 21-22

Best practice also dictates that genders should not be mixed at such facilities given that there are protection issues that relate particularly to females (for example, concerning gender-based violence), and as women have specific care needs. As such, no females have resided at Serendi since the RST assumed joint responsibility, one temporary exception aside.

A complaints mechanism was also established in March 2016 to allow residents and staff to report human rights abuses or concerns over potential abuses. This includes a confidential in-person channel to social workers or centre management, and complaint boxes for cases where anonymity is desired.

¹⁶⁵ Thomas Renard And Rik Coolsaet (editors), *Returnees: Who Are They, Why Are They (Not) Coming Back And How Should We Deal With Them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands* (Egmont Paper 101, February 2018) (http://www.egmontinstitute.be/content/uploads/2018/02/egmont_papers.101_online_v1-3.pdf), 38 (in relation to Belgium):

Whether detained or not, children who are linked to terror organisations should be provided with all necessary social and psychological care necessary to ensure their well-being and the protection of their rights.¹⁶⁶

4.3 Transparency and publicity

The outline of alternatives to detention for terrorists and terror suspects should be clear, transparent and made available to the public. Particularly important is transparency in regard to the conditions under which a person would be entitled to be considered for an alternative to detention and the conditions that he or she would have to fulfill to benefit from it.¹⁶⁷ This is critical to creating the associated incentive for potential candidates and also to fulfill an important outreach function that will ensure greater acceptance of any such program.

For teenagers, there is the possibility to send them to juvenile detention within the child protection institutions, if there are indications of a security risk. In this regard, the staff of these facilities has been trained and officers for radicalism appointed (“référénts radicalisme”).⁴⁶

¹⁶⁶ HM Government, Contest - The United Kingdom’s Strategy for Countering Terrorism (June 2018) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf), 51, para 172:

172 Only a very small number of travellers have returned in the last two years and most of those have been women with young children. Managing the risks from travellers combines interventions from our Prevent and Pursue work strands. We use the expertise built up through Prevent to mitigate the risk they may pose by challenging their views or tailoring our response as appropriate. This can include mandating attendance on the Desistance and Disengagement Programme. Many will be subject to post-traumatic stress, which may impact their future behaviour if not addressed. Children may meet statutory thresholds for social care, or new born children may have experienced poor care after being born in Daesh controlled territory. In order to ensure that their needs and risks are addressed, the Home Office and Department for Education have been working with local authorities and external organisations to ensure support is available to local authorities dealing with this small number of returning families, including that suitable advocates are available for children to act in their best interest and ensure there are responsible adults engaged in their lives.

¹⁶⁷ Mara Redlich Revkin, ‘Iraq Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 74

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.

Vanda Felbab-Brown, ‘Nigeria Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 87

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.

And, *ibid*, 106:

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.

4.4 Evaluating success and effectiveness of program

Important to the success of any such program is its ability to collect, review and analyse data relevant to assessing its own performance with a view to improving and meeting the goals that the program has set for itself. Such an analysis can be complicated by difficulties associated with the collection of reliable and relevant data.¹⁶⁸

¹⁶⁸ Tinka Veldhuis, *Designing Rehabilitation and Reintegration Programmes for Violent Extremist Offenders: A Realist Approach*, ICCT Research Paper March 2012 (<https://icct.nl/wp-content/uploads/2015/05/ICCT-Veldhuis-Designing-Rehabilitation-Reintegration-Programmes-March-2012.pdf>), 1 (footnote omitted):

attempts to measure the effect of these programmes are confronted by substantial barriers and to date few if any rehabilitation initiatives have been subjected to in-depth evaluation. However, for governments and prison authorities to know whether and how investing in the rehabilitation of violent extremists is worthwhile or a waste of resources requires a clear understanding of what these policies aim to achieve and how, and whether they succeed in doing so or not.

And, *ibid.*, 1617-:

Firstly, in order to measure the impact of the intervention, the policy theory has to be translated into concrete indicators for success and failure. A clear conceptualisation of the relevant terms and objectives is absolutely crucial in this respect. Ambiguity about what it exactly is that the programme aims to achieve will hamper attempts to evaluate its success. How can we assess whether a rehabilitation programme has achieved its outcomes, if it is unclear what is meant by 'rehabilitation' (i.e. disengagement or de-radicalisation)? When is a person 'sufficiently' rehabilitated? Does 'proper' de-radicalisation require the inmate to explicitly and publicly renounce violent extremism, or would the judgment of staff members suffice? Rehabilitation, disengagement and de-radicalisation are intangible ideas, without concrete definitions. As a result they may be understood or interpreted differently by different people. To measure the programme's impact, such terms need to be defined in more concrete, measurable indicators.

Ultimately, the central objective of rehabilitation programmes is to reduce recidivism (see Figure 1 for a flow-chart). The concept of recidivism can be translated into several standardised follow-up measures like re-arrest, reconviction, and re-incarceration.⁶⁸ However, these criteria have limitations and they raise important questions which are particularly relevant in dealing with violent extremist offenders, and which have to be answered in advance.

For example, with what percentage (e.g. ten, twenty, hundred?) should recidivism be reduced in order for the rehabilitation programme to be deemed a success? This is especially relevant given the fact that not all re-offenders will be caught or prosecuted, and some individuals might travel abroad and be caught for terrorist activities there, without being included in the recidivism statistics in the country of rehabilitation. Moreover, it is possible that ex-inmates reoffend upon release by committing a crime unrelated to terrorism, such as violent assault or robbery. They might have disengaged from violent extremism, but not from 'regular' crimes. It should be explicated before the programme commences whether and why these or similar cases are considered success or not.

An important feature of rehabilitation efforts is that they are multi-faceted and are designed to induce improvement on several outcome variables other than recidivism, including institutional adjustment (fewer disciplinary problems), improved vocational skills, educational achievement, personality and attitude change, and community adjustment. There are different ways to view such changes. On the one hand, these results can be seen as necessary sub-objectives to achieve reductions in recidivism. On the other hand, they can also be seen as extra beneficial effects beyond a decline in recidivism. They may be of secondary importance but must nevertheless not be overlooked when assessing the impact of rehabilitation interventions. Either way, such secondary outcomes (improved skills, motivation and attitudes) reflect the workings of the policy mechanisms; measuring them with accuracy is an important step in identifying why the programme was or was not successful. These examples illustrate that it is crucial to develop unambiguous and quantifiable indicators of the programme's goals, objectives and sub-objectives, in order to test the underlying mechanisms of the programme. These criteria are crucial in isolating programme effects from exogenous effects and can help reveal whether any changes that occurred are attributable to the implementation of the instrument (i.e. that the change was *caused* by the intervention instead of by an unrelated factor).

[...]

The programme theory should also include a rationale about the conditions that might lead rehabilitation programmes to fail. Broadly speaking, the reasons for failure fall into two categories. Firstly, rehabilitation programmes may fail when the underlying policy is ill-conceived. Programmes that are poorly thought through, do not account for confounding contextual factors, are poorly planned and not based on existing experience or criminological theory are likely to fail or, even worse, do more harm than good. The policy instruments need to be accurately and logically aligned with the programme's objectives.

[...]

Secondly, programmes fail when they lack therapeutic integrity, i.e. when they are not implemented as designed. Therapeutic integrity of a programme can be corrupted by several factors, including incompetent or inadequately trained staff, lack of resources to implement the programme, disturbances in the institutional or correctional context, or when personnel interpret the programme theory in a wrong way or fail to adhere to the procedures and principles that are required to change the inmate's attitudes and behaviours.

As has been pointed out, ‘[h]ow reintegration programs can help bring about disengagement or deradicalization most effectively is still poorly understood.’¹⁶⁹

That is in part because accessing relevant data is particularly hard.¹⁷⁰

Even where data can be collected, assessing a program’s success can be a complicated process. First, success can be hard to define.¹⁷¹ Second, data can sometimes give an overly optimistic image based on a variety of factors, including the short timespan that

¹⁶⁹ Liesbeth van der Heide and Bart Schuurman, Reintegrating Terrorists in the Netherlands: Evaluating the Dutch approach, *Journal for Deradicalization*, Nr 17, Winter 2018/19, 198.

¹⁷⁰ K. Ramakrishna, ‘A Holistic Critique of Singapore’s Counter-Ideological Program, Combating Terrorism Center at West Point, CTC Sentinel, JANUARY 2009, VOLUME 2, ISSUE 1 ([HTTPS://CTC.USMA.EDU/A-HOLISTIC-CRITIQUE-OF-SINGAPORES-COUNTER-IDEOLOGICAL-PROGRAM/](https://ctc.usma.edu/a-holistic-critique-of-singapores-counter-ideological-program/))

There is also some tentative empirical evidence of the effectiveness of the RRG approach. Some sources indicate that in the six years since 2002, 73 individuals have been detained for terrorism-related activity ⁴⁰. As of September 2008, however, only 23 detainees remained incarcerated while 41 have been released, albeit on restriction orders⁴¹. Other observers point to the lack of “JI activity” in Singapore since the major ISD swoops in 2001 and 2002 ⁴². Terrorism expert Rohan Gunaratna has declared that Singapore’s detainee rehabilitation program is “working” and that the rate of recidivism has been exceptionally low ⁴³. Nevertheless, some caution is warranted. To date, the RRG and its government partners have yet to come up with a set of objective, standardized metrics to determine with scientific rigor the extent to which an individual detainee has been genuinely rehabilitated. The process is still largely subjective, depending on a joint risk assessment by the RRG counselor, ISD case officer and the psychologist in attendance ⁴⁴.

See also J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 5ff.

¹⁷¹ See J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 23

Such provisions are also offered in Serendi, and with this in mind the second RST outcome was articulated as: ‘Beneficiaries at the centre maximise their likelihood of successful reintegration at the point of departure through developing appropriate knowledge, skills and attitudes, and (re)establishing suitable connections to reintegration locations’.⁴⁸ The three subordinate outputs were stated as: • ‘Beneficiaries attend and participate in classes in education and vocational training, and participate in life-skills initiatives, appropriate to existing livelihood opportunities and tailored to individual needs and ambitions’. • ‘Beneficiaries participate in reconnection activities that are appropriate to individual needs and ambitions’. • ‘Beneficiaries receive focused, non-specialised psychosocial and mental health support as required, and receive tailored and responsive case management support spanning the rehabilitation process’.⁴⁹

has been considered to make that assessment.¹⁷²

Making such an assessment based on ‘recidivism’ estimates can be particularly problematic.¹⁷³

¹⁷² See, e.g., C. Boucek, “Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare,” Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 21

Thus far, the program has produced promising results, with Saudi authorities claiming a success rate of 80 to 90 percent. Included in the 10 to 20 percent failure rate acknowledged by Saudi officials are detainees who refused to participate in the program, as well as those who failed the rehabilitation program. It is difficult to independently measure the relative success of the counseling program, especially so soon after the program started. Typically five years are needed to properly gauge recidivist rates. However, according to Prince Muhammad, as of November 1, 2007, only 35 individuals have been rearrested for security offenses since their release through the counseling program, equating to a recidivist rate of 1 to 2 percent. Officials admit that other transgressions may have occurred that they are not yet aware of.

[...]

Thus far, those who have been released through the counseling program have been relatively minor offenders. On the spectrum of domestic security offenders, they are not among the hard-core, ultra-committed violent jihadis. They have largely been support personnel and sympathizers, such as individuals caught with extremist propaganda or those involved in using the Internet to promote extremism. Such people have typically been the easiest for the authorities to interact with. Also participating in the program have been individuals who were looking for a way out. Many of these people found themselves unwittingly involved with terrorists, and when they discovered who they were working with, sought to cooperate with the authorities. These offenders have more often gone through the two-hour study sessions, as opposed to the long study sessions described above.

Although there is reason to believe that some senior militants have participated in the Saudi rehabilitation program, its relative success to date is no doubt boosted by the involvement of the minor offenders, who are more likely to participate than are higher-level, committed extremists. Thus, it remains to be seen how effective this program will be in the long run with regard to security in Saudi Arabia. While the program shows promise, it has yet to face the difficult test of being applied to more committed militants—including those who have carried out violence within the kingdom.

See also Middle East Institute, *Deradicalization Programs in Saudi Arabia: A Case Study* (2015) (<https://www.mei.edu/publications/deradicalization-programs-saudi-arabia-case-study>).

¹⁷³ See Noor Huda Ismail and Susan Sim, “From Prison to Carnage in Jakarta: Predicting Terrorist Recidivism in Indonesia’s Prisons,” Brookings Op-Ed, January 28, 2016 (suggesting that in Indonesia, domestic jihadist terrorist recidivism rate is approximately 15%); Jessica Stern, *Deradicalization or Disengagement of Terrorists: Is It Possible?* (Hoover Institution Taskforce on Security and Law, Stanford University, 2010) and Christopher Boucek, Saudi Arabia’s “Soft” Counterterrorism Strategy, Carnegie Papers 97, 2008 (reporting on Saudi Arabia’s claim of 10–20% ratio of recidivism for graduates of its deradicalization program). See also David Malet & Rachel Hayes (2018): *Foreign Fighter Returnees: An Indefinite Threat?*, *Terrorism and Political Violence*, DOI: 10.1080/09546553.2018.1497987 (noting that much of the data about the claimed effectiveness of deradicalization programs internationally is not available for independent verification and must therefore be accepted with caution; and suggesting that ‘among foreign fighter returnees who do become or attempt to become domestic terrorists, the median lag time between return and plot or arrest is less than six months for most returnees, the majority of attacks occur within one year, and nearly all attempts occur within three years’); Thomas Hegghammer, “Should I Stay or Should I Go? Explaining Variation in Western Jihadists’ Choice between Domestic and Foreign Fighting,” *American Political Science Review* 107, no. 1 (February 2013): 1–15 (suggesting that among returned jihadis between 1980 and 2010, 11 % became involved in domestic terror plots again, and that their attacks were both significantly more likely to be carried out successfully and significantly more likely to result in fatalities); Home Affairs Committee, “Foreign Fighters,” Item 39, Seventeenth Report—Counter-terrorism, House of Commons, 30 April 2014 (reporting that an “average” of one in nine returnees become domestic terrorists that served as a basis for stripping citizenship from Britons who traveled to Syria). See also J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 5

Therefore, any assessment of the success of any such program should be a) fact-based, b) ongoing, c) objective, and d) ideally conducted by independent experts with the requisite expertise and access to all relevant information.

5. NARROWING THE SCOPE OF THE DETENTION CHALLENGE

5.1 General considerations

In order to narrow down the scope of the challenge posed by captured terrorists, states could adopt a number of measures that would help reduce that problem. First, addressing the root causes of terrorism would go a long way in ensuring that the problem can be managed more effectively. Steps taken to avoid recruitment would also help such a purpose. Two other steps are the main focus of the present report: (i) narrowing the scope of what is criminalized as terrorism; and (ii) guaranteeing and protecting due process safeguards at all stages of the process, from capture, arrest, prosecution and detention of suspected terrorists. These two steps combined would not eliminate the threat of terrorism, but they would go some way ensuring that prosecution- and detention-based response to terrorism is limited to a narrow set of cases that call for a substantial response to a grave threat or serious crimes.

5.2 Limiting the scope of what constitutes terrorism

5.2.1 General considerations

States are generally free to decide what should be criminalized and what should not in their internal legal order. In addition, they are sometimes bound by international law to criminalise certain types of acts, which is the case for a variety of terror-related activities that are recognized as criminal either under certain conventions or pursuant

to resolutions of the UN Security Council.¹⁷⁴ Beyond these international obligations, states enjoy a large degree of autonomy to decide what should be criminalized and what should not. They also have a large degree of discretion regarding what must be prosecuted and what can be subject to alternative courses of action. Considerations of deterrence and retribution must therefore be balanced against considerations of reconciliation, rehabilitation and return to non-violence.

A particular challenge in this context when it comes to terrorism is a tendency to criminalize acts associated with a terror group broadly and collectively. Even *secondary* or remote types of involvement with a terror organization could be enough to fall foul of national criminal laws. And *membership* – sometimes defined loosely and imprecisely – could be enough to pass that threshold.

A strategy that looks at finding alternatives to detention for terrorists or terror suspects should therefore pay close attention to the nature of the crimes imputed to the individual(s) concerned and whether they are such as to warrant a terror labelling and the associated penal response. This, in turn, will enable the state to tailor the response to the actual and concrete risk posed by an individual and also evaluate more precisely the need and justification for detention vs its alternatives.

Box 1: Problems with Recidivism Rates as an Indicator

The RST is unaware of any beneficiaries who have completed the rehabilitation process at Serendi who have subsequently returned to Al-Shabaab. However, while many commentators pinpoint recidivism rates as an important indicator of success for programmes with violent extremists, the authors of this report argue that this metric is highly problematic, at least in the case of Serendi. More precisely, while high rates of return to violent extremism may demonstrate programme failure, low rates do not necessarily indicate success. First, this is because the rate would be expected to be minimal irrespective of the services offered at Serendi as the centre is designed for ‘low-risk’ individuals. Second, recidivism data is highly unreliable in locations such as Somalia, with the prospect of false negatives being particularly pronounced. In other words, the relevant security agencies may simply be unaware of former Serendi residents having returned to Al-Shabaab. Finally, recidivism rates would also be misleadingly deflated in cases where former residents return to violence only after the relevant reporting periods.

And Cameron Sumpter, Yuslikha K. Wardhani & Sapto Priyanto (2019): Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610/X.2018.1560666, p. 10:

Despite the difficulties of post-release surveillance and broad skepticism over the effectiveness of prison-based de-radicalization experiments, recidivism among individuals convicted of terrorism charges in Indonesia over the past fifteen years or so is roughly ten percent, which is considerably lower than for regular criminals in nations that record such data.⁵⁹ This figure comes from the Institute for Policy Analysis of Conflict (IPAC), who stress its approximation given differing definitions of recidivism.⁶⁰ Around sixty-five Indonesians who have spent time in prison for terrorism offenses have either been re-arrested, killed in police operations at home, or in conflict in Syria.⁶¹ There have been three attacks over the past three years involving former prisoners: a firearm and crude improvised explosive device assault in Central Jakarta that killed eight people, including four assailants, in January 2016; the attempted bombing of a church in Samarinda that killed a toddler and left three others with severe burn injuries in November 2016; and a botched pressure cooker bomb operation in Bandung that killed only the perpetrator in February 2017.⁶²

¹⁷⁴ See, *supra*, dd/legal framewkr.

5.2.2 Defining terrorism and terrorist offences

There is no single, generally accepted, definition of terrorism under international law.¹⁷⁵ Instead, there is a variety of competing definitions, many of which are overlapping.¹⁷⁶

Absent an international definition of the crime of terrorism, it is crucial that definitions adopted by national authorities are clear and confined to conduct that might, in the words of the UN Special Rapporteur on counter-terrorism, be of a “genuinely terrorist nature”.¹⁷⁷ Consistent with the fundamental principle of legality, the definition of that

¹⁷⁵ <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>. See E/CN.4/2006/98, para. 42.

¹⁷⁶ Particularly significant among these is the definition laid out by the UN Security Council in Resolution 1566, which includes cumulative criteria of (i) intent; (ii) purpose; and (iii) specific conduct:

- i. Criminal acts, including against civilians, committed with the intent of causing death or serious bodily injury, or the taking of hostages;
- ii. Regardless of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, with the purpose of provoking a state of terror in the general public or in a group of individuals or particular individuals, intimidating a population or compelling a government or an international organization to carry out or to abstain from carrying out any act; and
- iii. Which constitute offences within the scope of, and as defined in, the international conventions and protocols relating to terrorism.

Resolution 1566 (2004) adopted by the UN Security Council at its 5053rd meeting, on 8 October 2004 (S/RES/1566 (2004)). The resolution is not legally binding. The Special Rapporteur on counter-terrorism and human rights has suggested the following definition of terrorism, which may provide guidance to States:

1. The action: (a) Constituted the intentional taking of hostages; or (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and
2. The action is done or attempted with the intention of: (a) Provoking a state of terror in the general public or a segment of it; or (b) Compelling a Government or international organization to do or abstain from doing something; and
3. The action corresponds to: (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or (b) All elements of a serious crime defined by national law.”

A/HRC/1651/, para. 28. For a proposed model definition of terrorism, see also UN Special Rapporteur on counter-terrorism, Report to the UN Human Rights Council (“Ten areas of best practices in countering terrorism”), UN Doc. A/ HRC/1622 ,51/ December 2010, para. 28. On the definition of terrorism see: Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community Policing Approach, (Vienna: OSCE, 2014), pp. 2730-, (hereafter, Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism, OSCE). See also Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-1101-I, 16 February 2011:

(i) the volitional commission of an act; (ii) through means that are liable to create a public danger; and (iii) the intent of the perpetrator to cause a state of terror. Considering that the elements of the notion of terrorism do not require an underlying crime, the perpetrator of an act of terrorism that results in deaths would be liable for terrorism, with the deaths being an aggravating circumstance; additionally, the perpetrator may also, and independently, be liable for the underlying crime if he had the requisite criminal intent for that crime.

NATO, ‘NATO Glossary of Terms and Definitions’ (2017) NATO Doc No AAP-06, 114:

“the unlawful use or threatened use of force or violence, instilling fear and terror, against individuals or property in an attempt to coerce or intimidate governments or societies, or to gain control over a population, to achieve political, religious or ideological objectives.”

And A/HRC/16/51, Practice 7.

¹⁷⁷ UN Special Rapporteur on counter-terrorism, Report to the UN Commission on Human Rights, UN Doc. E/ CN.4/2006/98, 28 December 2005, para. 42.

crime should be clear, accessible and foreseeable.¹⁷⁸ So should associated offences (including those linked to “membership”).¹⁷⁹

Clear and strict delineation of the scope of criminal liability should ensure that the contours and limits of criminal law are clearly defined and kept only as means to

¹⁷⁸ OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 30:

“Terrorism” and associated offences should be formulated in domestic legislation with clarity, precision and in a non-discriminatory and non-retroactive manner. The relevant laws and regulations should be accessible to the public and lawfully applied by public authorities, including the police and the judiciary, in a transparent manner. This is a prerequisite for people to understand the law and adapt their behaviour accordingly. It is also indispensable for providing the basis for effective and accountable action against terrorism, including that taken by the police, in compliance with the rule of law and international human rights standards.

See also Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, “Ten areas of best practices in countering terrorism”, UN General Assembly, Sixteenth Session of the Human Rights Council, 22 December 2010, Doc. A/HRC/1651/; and OSCE/ODIHR, *Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework* (2018) (<https://www.osce.org/odihr/393503?download=true>), 34:

- Recognize the crucial role of criminal law, in conformity with fundamental rule of law principles, in countering terrorism and FTF-related threats, and that overreaching approaches that operate outside of a rule of law-based criminal justice framework, with its established legal procedures and safeguards, are counter-productive;
- Define the scope of criminality concerning FTF-related offences consistently with the basic principle of legality (no punishment without law), requiring certainty, clarity and specificity of legal provisions;

¹⁷⁹ OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 42:

Preventing terrorism should be based on a legislative framework that provides for the appropriate criminalization of preparatory offences.³³ Definitions of such offences in national legislation, similar to defining acts of terrorism,³⁴ should be clear, precise, non-discriminatory, non-retroactive and accessible to the public. The Council of Europe Convention on the Prevention of Terrorism³⁵ has been identified as an international good practice.³⁶ It defines the criminal offences of “public provocation to commit a terrorist offence”, “recruitment for terrorism” and “training for terrorism”.

UN Security Council resolution 1373 obliges states to suppress terrorist recruitment, and resolution 1624 (2005) calls on states to prohibit, by law, incitement to commit terrorist acts.³⁷ To comply with international standards, the criminalization of incitement to terrorism must be accompanied by adequate safeguards in line with the principle of legality, and should uphold fundamental rights, including the freedom of expression.³⁸ In particular, the offence of incitement to commit a terrorist act will be human rights-compliant if it focuses on direct incitement, with an intention to promote terrorism, and if it establishes an evidence-based causal link between the incitement and the likely realization of a terrorist act.³⁹

Simply holding views or beliefs that are considered radical or extreme, as well as their peaceful expression, should not be considered crimes. “Radicalization” and “extremism” should not be an object for law enforcement counterterrorism measures if they are not associated with violence, or with another unlawful act (e.g., incitement to hatred), as legally defined in compliance with international human rights law. Extremist individuals or groups who do not resort to, incite or condone criminal activity and/or violence should not be targeted by the criminal-justice system.

See also, *infra*, xx/scope of liability.

sanction conduct that strictly warrants the application of the criminal law.¹⁸⁰ The High Commissioner for Human Rights has also noted in this context that –

“the reference made by the Council in resolution 2178 (2014) to ‘terrorism in all forms and manifestations’ as one of the most serious threats to international peace and security, without qualification or further definition, has prompted well-founded concerns that the resolution may fuel the adoption of repressive measures at the national level against otherwise lawful, non-violent activities of groups or individuals. The lack of an explicit exemption for acts that otherwise may be lawful under international humanitarian law is also a cause for concern.”¹⁸¹

The High Commissioner also noted that “particularly in view of the legally binding nature of Security Council resolution 2178 (2014), concerns also have been raised at the lack of definition of the terms ‘terrorism’ or ‘extremism’, as well as to references in the resolution to ‘terrorists’ as a category of individuals in addition to specific acts to be sanctioned”.¹⁸²

Clarity of relevant legal standards is intended to ensure adequate normative specificity, and protection against arbitrariness. It is also intended to ensure that the criminal law – one of the bluntest instruments of social order – is only used when absolutely justified and necessary and that there is no over-usage of it.

¹⁸⁰ See also UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters (2018), para 66-67:

66. Resolution 2178 (2014) calls upon States to implement the resolution in compliance with international human rights law. Any national definitions of terrorism must therefore be precise and in accordance with the principle of legality. The General Assembly has urged States to ensure that their laws criminalizing acts of terrorism are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international law, including human rights law.¹⁴¹ The Counterterrorism Committee has recommended that States ensure that terrorist acts are defined in national legislation in a manner that is proportionate, precise and consistent with the international counter-terrorism instruments, and ensure that measures taken to stem the flow of foreign terrorist fighters comply with all obligations under international law, in particular international human rights, refugee and humanitarian law.¹⁴²

67. While calling for human rights compliance, resolution 2178 (2014) does not specify how its provisions are to be incorporated into national legislation. States must therefore be diligent in ensuring that measures they adopt are clear and precise concerning to whom they are to be applied; that the standard for enforcement is precise, adequate and lawful; and that terms such as “terrorist” and “fighters” are applied on the basis of clear and established legal procedures, rather than in an arbitrary, discriminatory or indiscriminate manner”.¹⁴³ Concern has also been expressed that the criminalization of offences, such as receiving training for terrorism or travelling abroad for the purpose of terrorism, would rely on national definitions of terrorism that are sometimes overly broad or vague. In criminalizing the conduct that supports terrorist acts, as required by paragraph 6, States should pay particular attention to respecting the principle of legality, and particularly the requirement that provisions establishing offences must be formulated with sufficient precision so as to give “fair notice” of what conduct is prohibited as a criminal offence.

¹⁸¹ A/HRC/28/28, paras. 46–47.

¹⁸² Ibid. See also A/HRC/29/51.

5.2.3 Scope of individual liability

As noted above, criminal law is a blunt instrument. It should be used only as a last resort where no reasonable and safe alternatives are available. This is particularly important in the context of terrorist activities, which raise fear and concern in many societies. That fear has led and contributed to the adoption of counter-terrorism legislation that potentially reach far and deep and could catch within its net a lot of individuals – e.g., relatives of terrorists; people compelled to join a terrorist organisations; children – who might not warrant being dealt with through the criminal law. This risk of excessive criminalization of terror-related acts was further heightened by UNSC Resolution 2178 (2014), which drew up a long list of state obligations to criminalise certain types of actions without clearly drawing up without any effort to define or limit the categories of persons who may be identified as ‘terrorists’.¹⁸³

Overly broad application criminal law is generally ineffective in that it will often make only a limited contribution to protecting society. If applied blindly and indiscriminately, it might instead generate resentment and contribute to a perception of discrimination

¹⁸³ OSCE/ODIHR, Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework (2018) (<https://www.osce.org/odihr/393503?download=true>), 16ff (footnotes omitted):

UNSC Resolution 2178 (2014) sets down a far-reaching framework of obligations on states, which provided the impetus for further international, regional and national normative developments from other sources. In particular, the resolution imposed obligations on states to prevent and suppress the recruiting, organizing, transporting or equipping of FTFs and to establish serious criminal offences to prosecute and penalize a range of conduct. This includes: travel or attempts to travel by individuals to states other than their states of residence or nationality for the purpose of the perpetration, planning, preparation or participation in terrorist acts, or to provide or receive terrorist training; the willful provision or collection, by any means, directly or indirectly, of funds to finance such travel; or the willful organization, recruitment or “other facilitation” of such travel. It also requires states to prevent entry to their territory or transit of FTFs and calls upon them to co-operate, for example, in preventing radicalization to terrorism, and developing and implementing prosecution, rehabilitation and reintegration strategies for returning FTFs. Furthermore, it calls on states to take a number of additional measures to enhance international co-operation, including in sharing information to identify FTFs and countering violent extremism in order to prevent terrorism. Resolution 2178 (2014) also demands that “all foreign terrorist fighters disarm and cease all terrorist acts and participation in an armed conflict.”

The former UN Special Rapporteur on counter-terrorism observed in strikingly critical terms that UNSC Resolution 2178 (2014) “imposes upon all Member States far-reaching new legal obligations without any effort to define or limit the categories of persons who may be identified as ‘terrorists’ by an individual state,” and that “[t]his approach carries a huge risk of abuse, as various states apply notoriously wide, vague or abusive definitions of terrorism, often with a clear political or oppressive motivation.” The lack of a definition of terrorism in UNSC resolutions or international law more broadly, has been well recognized, while associated concerns are greatly intensified in the context of the added layers of ambiguity around each of the elements of the phrase “foreign terrorist fighters”, as discussed further in section 3.1, below. UNSC Resolution 2396 (2017) has been described as going significantly further than its predecessor in several respects. It requires states to “strengthen their efforts in border security, information-sharing, and criminal justice in ways that have serious implications for domestic legal regimes”, for human rights and the rule of law. In particular, its call to member states to develop “watch lists or databases” of persons suspected of engagement in or support for FTFs, and to share a broad range of relevant information, including personal biometric data with other states, necessitates careful attention as to whether and how human rights are being protected in co-operating states. Echoing commentary on its predecessor, Resolution 2396 (2017), has been criticized for its breadth and lack of precision, increasing the risk that the “Security Council dictate may be used by states to nefariously target those who disagree with them”.

and unfairness. Stretched too far, criminal law could come to resemble collective punishment that is directed in discriminatory fashion at a category of individuals rather than being an adequate response to the commission of a crime.¹⁸⁴ Overt reliance on criminal law in response to terrorism would also contribute to mass incarceration, as has happened in Iraq.¹⁸⁵ There is also the risk that over-stretched criminal legislation could end up criminalizing opinion and very remote connections to a terror organization.

There is therefore a need for criminal law to strike the right balance between the legitimate need for society to protect itself and the need for that society to use criminal law for that purpose only where alternatives are not reasonably available. The law's and

¹⁸⁴ Regarding the need to act in a manner consistent with relevant human rights standards, see, *infra*, xx/compliance with HR. See also OSCE/ODIHR, Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework (2018) (<https://www.osce.org/odihr/393503?download=true>), 16ff:

The challenge for states is to define and approach the problem in a manner that avoids these pitfalls. In this context, it is crucial to underline that UNSC Resolutions 2178 (2014) and 2396 (2017) explicitly note (in several operative paragraphs and the preamble) that the obligations enshrined therein must be applied consistently with human rights, international humanitarian law and refugee law. Echoing the UN’s 2006 Global Counter-Terrorism Strategy, UNSC Resolution 2178 (2014) also stresses the complementarity of effective counter-terrorism measures and the protection of human rights by:

*“Underscoring that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort” and noting “the importance of respect for the rule of law so as to effectively prevent and combat terrorism”.*⁵⁵

See also UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters (2018), para 68 (footnote omitted):

In order to facilitate prosecutions, legislation that may fall short of human rights standards has been adopted. The Special Rapporteur on counter-terrorism and human rights has recommended that, in criminalizing training for terrorist purposes or travelling abroad for the purpose of terrorism, the specific intent to carry out, contribute to or participate in an act of terrorism should be an element of the crime. He also noted that:

“Some jurisdictions have enacted as offences the entering or remaining in a ‘declared area’ in which a ‘listed organization is engaging in hostile activity’ or travelling to a ‘country designated to be a terrorist training country’. The offence is considered to have been committed regardless of whether there was any terrorist purpose to the travel, that is, it is sufficient that the individual entered the area or the country without being able to show that the purpose of the travel was covered by one of the exceptions. Those provisions reverse the burden of proof, placing the onus on individuals to prove that their travel falls within an exception. Such legislative techniques may conflict with the right to a fair trial, in particular the respect for the presumption of innocence under article 14 of the International Covenant on Civil and Political Rights, which is a non-derogable right”.

See also A/71/384, para. 50.

¹⁸⁵ Mara Redlich Revkin, ‘Iraq Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, The Limits of Punishment – Transitional Justice and Violent Extremism (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 60 (footnotes omitted):

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,⁷¹ and at least 4,000 individuals have been detained on IS-related charges by Kurdish Regional Government (KRG) authorities.⁷² 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.”⁷³

prosecutors' focus should be strictly placed on those who caused harm or represent a real and potent threat to society.¹⁸⁶ Criminalization of *mere* membership or association with a terror organization should be cautiously approached as it could cover a very large range of individuals, many of whom might have little or no connection to the commission of crimes or present little threat to their community.¹⁸⁷ Criminalized forms of membership should at the very least involve proof of the fact that the individual in question joined voluntarily and of proof of a material contribution to the organization that can be linked to the commission of a crime.¹⁸⁸ Remote or secondary connections – such as providing food, administrative aid or medical support – should be carefully consider with a view to assessing whether non-penal means are a more appropriate

¹⁸⁶ See, generally, https://www.americanbar.org/content/dam/aba/migrated/natsecurity/counterterrorism_detention_alternatives_finalrpt.authcheckdam.pdf:

- In order to avoid the negative and potentially severe drawbacks of a sweeping counterterrorism detention policy, the United States should define narrowly the classes of individuals that are subject to its detention authority. In determining who to detain, the United States should focus its detention efforts on (i) non-fungible terrorist personnel and (ii) terrorist personnel who pose an imminent threat to the safety or security of the United States, its citizens, or interests. A suspect's membership in a known terrorist organization or intelligence value may be important factors in determining whether to detain, but neither of these factors on its own is necessary or sufficient to prove that an individual is a threat to the security of the United States justifying detention.
- Any contemplated administrative detention regime for terrorist suspects should include articulable criteria describing who may be detained and specifying under what circumstances and conditions a detainee will be released. Furthermore, the government should bear the burden of proving that each detention is necessary, meaning that there is no other lawful means available for achieving the government's asserted detention interest.

¹⁸⁷ OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>).

¹⁸⁸ See Vanda Felbab-Brown, 'Nigeria Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 102

The expansive definition of terrorism and of material and non-violent support have been criticised by Nigerian legal experts.¹¹⁴ 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.

response than the full force of the law.¹⁸⁹ And criminal responsibility should ever only

¹⁸⁹ International Center for the Study of Radicalisation (ICSR), *Reintegrating ISIS Supporters in Syria: Efforts, Priorities and Challenges* (2018) (<https://icsr.info/wp-content/uploads/2018/08/ICSR-Report-Reintegrating-ISIS-Supporters-in-Syria-Efforts-Priorities-and-Challenges.pdf>), 18

Concerns are also growing for civilians caught up in anti-ISIS hunts. Locals feel that the SDF is dealing with those who lived in ISIS-controlled areas under the assumption that they are affiliated with the group until proven otherwise.⁶¹ This is largely due to the fact that ISIS thoroughly embedded itself in the local social structure, requiring residents to attend mosques and small businesses to pay taxes. As such, it is difficult today to distinguish between ISIS sympathizers and civilians who were forced to collaborate against their will, or were merely trying to survive.⁶² But the guilty-until-proven-innocent approach is deeply problematic. Local residents have expressed alarming concerns about the waves of arbitrary arrests based on people's appearance and without any prior information about them.⁶³ Some arbitrary detainees might be released after a few days or weeks, based on the ability for people to vouch for them, while others remain imprisoned for longer periods until proven innocent.⁶⁴

See also Mara Redlich Revkin, 'Iraq Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 61

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?"⁸⁴

And, *ibid*, 62:

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.⁸⁹ 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."⁹⁰ 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."⁹¹ 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."⁹² 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, "De-baathification is a large-scale and affiliation-based dismissal mechanism. The process was not only ineffective and incoherent but also violated some fundamental rights such the freedom of association and access to public office."⁹³ 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.⁹⁴ 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.⁹⁵

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.⁹⁶

be based on one's own conduct, not that of family members, relatives or friends.¹⁹⁰

Similarly, alternatives to prosecution and detention should be carefully considered for those who are connected to a terrorist organization indirectly or loosely.¹⁹¹ In some countries, broad interpretations of the notion of membership in a terrorist organization has led to association by proxy where individuals with no substantive association to a terrorist group other than a family connection to one of its members has become enough

In a 2017 trial, a woman was sentenced to prison on the motive that her help, as a housewife, constituted a support and encouragement to the activities of a terrorist group (ISIS). See Thomas Renard And Rik Coolsaet (editors), *Returnees: Who Are They, Why Are They (Not) Coming Back And How Should We Deal With Them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands* (Egmont Paper 101, February 2018) (http://www.egmontinstitute.be/content/uploads/2018/02/egmont.papers.101_online_v1-3.pdf), 25 (footnote omitted). See also Criminal Court Liège, 16 June 2017.

¹⁹⁰ UNSG, *Key Principles For The Protection, Repatriation, Prosecution, Rehabilitation And Reintegration Of Women And Children With Links To United Nations Listed Terrorist Groups*, April 2019 (https://www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/key_principles-april_2019.pdf), 7:

Criminal responsibility is individual. Nobody should be detained or prosecuted for crimes committed by family members. Many women and children come into contact with United Nations listed terrorist groups through family links and should be treated in accordance with the principle of the presumption of innocence. It should not be assumed that such women and children are members of these groups or have carried out acts in support of such groups, and such a determination should be made on a case-by-case basis.

¹⁹¹ Letter dated 18 February 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2015/123, and Annex ('Bringing terrorists to justice: challenges in prosecutions related to foreign terrorist fighters'), 23 February 2015, PARA 41

41. One other dilemma regarding prosecution strategies relates to situations where family members are joining the would-be foreign terrorist fighter in travel. Questions arise as to whether all family members commit an offence simply by travelling and whether they should be prosecuted even if in some cultures a woman must follow her husband. The question of offences committed by parents against their children by taking them to conflict zones also arises. Participants noted that, in such cases, authorities had administrative and criminal justice options. Indeed, some countries have protection mechanisms available under family law to prevent foreign fighters from taking their family members with them to conflict zones. It was noted, however, that even family law tools, such as taking children away from their parents and placing them under supervised care, might have unintended consequences.

See also UNSC Resolution 2396, S/RES/2396 (2017), 21 December 2017:

Recognizing, in this regard, that foreign terrorist fighters may be travelling with family members they brought with them to conflict zones, with families they have formed or family members who were born while in conflict zones, underscoring the need for Member States to assess and investigate these individuals for any potential involvement in criminal or terrorist activities, including by employing evidence - based risk assessments , and to take appropriate action in compliance with relevant domestic and international law, including by considering appropriate prosecution, rehabilitation, and reintegration measures, and noting that children may be especially vulnerable to radicalization to violence and in need of particular social support, such as post-trauma counselling, while stressing that children need to be treated in a manner that observes their rights and respects their dignity, in accordance with applicable international law,

to associate that individual by knock-on effect.¹⁹² This state of affair is unfortunate and has been described in one case as being the result of a simplistic, binary, view of a much more complex reality in which individuals are either with the terrorists or with the state, missing the nuances of coercion, duress and helplessness that might have led one to be associated with a terror organization.¹⁹³

For the same reason, ‘[i]t should not be presumed [...] that every individual travelling to an area of conflict has criminal intent or is supporting or engaging in criminal terrorist activity. This consideration is fundamental to ensuring respect for due process and the presumption of innocence.’¹⁹⁴

A clear distinction must therefore be drawn between those who drove or actively pursued the criminal goals of a terrorist organization and those who “tagged along” without making a material contribution to the organisation or those who were caught

¹⁹² Mara Redlich Revkin, ‘Iraq Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 63-64

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.¹⁰² 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 Hussein¹⁰³ – 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.¹⁰⁴ 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.”¹⁰⁵ 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.¹⁰⁶

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.

¹⁹³ Mara Redlich Revkin, ‘Iraq Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 73.

¹⁹⁴ A/HRC/28/28, para. 49.

up without themselves taking part in any form of criminal violence.¹⁹⁵ Dealing with both types in a similar way blurs our moral compass and arguably makes excessive use of the power of criminal law.

5.3 Effective protection of basic fair trial guarantees

5.3.1 General considerations

In its 2016 review of the Global Counter-Terrorism Strategy, the United Nations General Assembly expressed serious concern at the occurrence of violations of human rights and fundamental freedoms committed in the context of countering terrorism. The General Assembly stressed that, when counter-terrorism efforts neglected the rule of law and violated international law, they not only betrayed the values they sought to uphold, but they might also further fuel violent extremism that could be conducive to terrorism.¹⁹⁶ Addressing and combatting terrorism effectively can therefore only be done if the measures taken are consistent with and comply with basic standards of human rights. Human rights are therefore a necessary pre-requisite to any counter-terrorism strategy. Not only does that result from states' international law obligations and from a general principle of respect for the rule of law. It also is a fundamental pre-conditions to creating an environment in which counter-terrorism strategies might flourish and succeed.

¹⁹⁵ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 17

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.

¹⁹⁶ A/72/316. See also UN CTITE, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters (2018), para 3 (referring to: General Assembly resolution 70/291, para. 16.

A human rights compatible counter-terrorism strategy should go hand in hand with efforts to improve the quality and forensic effectiveness of counter-terrorism measures. This would help reduce the risk of torture and unlawful means being used to elicit evidence.¹⁹⁷

5.3.2 Presumption of innocence, right to confront incriminating evidence and absolute prohibition on torture

One of the most basic human rights safeguards to be guaranteed in the context of combatting terrorism is the requirement of presumption of innocence.¹⁹⁸ It means, *inter alia*, that one should be presumed until proven guilty of a crime. It also means that criminal responsibility must be established beyond reasonable doubt and that no lowering of that standard is acceptable and proof of one's involvement in the commission of a crime cannot be replaced by mere legal presumptions.

Closely associated with this right in the penal context is the right of the accused to confront or challenge the (incriminating) evidence presented against him. In the context of terrorism this guarantee is particularly important in setting limitations to the ability of prosecuting authorities to use secret or anonymous sources to obtain a conviction or other measures constraining of a person's fundamental rights.¹⁹⁹

Great weariness should also be shown towards evidence based on alleged 'confessions' as they may be the fruit of coercive methods, which in some cases might amount to torture. The prohibition against torture is absolute and unqualified. The fruit of such acts cannot under any circumstances be admitted as evidence of a crime in a criminal tribunal.

¹⁹⁷ See also Vanda Felbab-Brown, 'Nigeria Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 115-16:

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.

¹⁹⁸ OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>):

- Strictly respect the fairness of criminal proceedings and the presumption of innocence in accordance with international fair trial standards;

¹⁹⁹ Mara Redlich Revkin, 'Iraq Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 66:

5.3.3 Impartiality and independence of the judiciary

The impartiality and independence of judges is a basic and fundamental safeguard in any criminal trial. It is a particularly important protection in the context of terror trials where there is typically a lot of prejudicial assumptions drawn about the accused. Judges themselves might come from communities affected by terrorism,²⁰⁰ so that the preservation of this guarantee is fundamental not just to the fairness of proceedings but to the appearance thereof.

5.3.4 Respect for the fundamental right to personal freedom and exceptions thereto

The principle of liberty and protection from arbitrary detention constitutes a fundamental human rights safeguard. Freedom should be the principle and detention the exception.²⁰¹ Detention would only be permitted when a valid legal basis exists for it and that there are good grounds that are provided by law that demands that an exception be made to that principle of freedom, in compliance with the dual requirements of necessity and proportionality.²⁰²

The gravity of the allegations – including allegations of terrorism – do not undermine or erode these guarantees. Detention in such cases should therefore not be automatic but a necessity and, arguably, a last resort. And it should be based on credible evidence rather

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.¹³⁰ 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.”¹³¹ 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.”¹³² 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.¹³³ Iraq’s CounterTerrorism Law allows for the conviction of defendants based solely on testimony provided by secret informants whose statements they are unable to challenge.¹³⁴ Iraq has been accused of imposing the death penalty based on testimony of secret informants.¹³⁵ There have been some efforts to combat false denunciations by secret informants.

²⁰⁰ Mara Redlich Revkin, ‘Iraq Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 62

A concern raised by an Iraqi lawyer, Ziyad 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.

²⁰¹ See also, *supra*, dd/legal framework and discussion of art 9 iccpr.

²⁰² *Ibid.*

than flimsy and unverified allegations.²⁰³ Mass, indiscriminate, arrest and arbitrary detention is unlawful and must be prevented.

This calls in every case for a careful consideration of the need for detention, including pre-trial detention and what alternatives there might be to a measure of incarceration. The issue is to be considered from the moment of arrest, to a decision whether to take the matter to trial, through pre-trial, trial, sentencing and post-sentencing. At all stages, detention should be a necessity with no safe and reasonable alternative. If one exists, it should normally be preferred to detention.²⁰⁴

Furthermore, wherever recourse is had to detention, this should and could only be done in compliance with relevant legal safeguards, in particular those outlined international

²⁰³ See Mara Redlich Revkin, 'Iraq Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 65

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.¹²¹ Release was conditional on passing a lengthy and arbitrary “screening” process.¹²² 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.¹²³ 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.¹²⁴

²⁰⁴ United Nations Standard Minimum Rules for Non-custodial Measures (The *Tokyo Rules*), Adopted by General Assembly resolution 45/110 of 14 December 1990, para 2.5:

Consideration shall be given to dealing with offenders in the community avoiding as far as possible resort to formal proceedings or trial by a court, in accordance with legal safeguards and the rule of law.

human rights treaties and instruments.²⁰⁵ And it should last only as long as it is based on a valid legal basis and continues to be necessary and proportionate to the justification given for it in the first place.

The effective protection of rights is not limited, of course, to issues of detention but would concern the entire panoply of human rights guaranteed by international law. Particularly important in the present context is the ability of any person accused of a terror offence to benefit from an effective defence.²⁰⁶ This implies, not just that he or she

²⁰⁵ See, generally, United Nations Standard Minimum Rules for Non-custodial Measures (The *Tokyo Rules*), Adopted by General Assembly resolution 45/110 of 14 December 1990, paras 3.1ff:

- 3.1 The introduction, definition and application of non-custodial measures shall be prescribed by law.
- 3.2 The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, background of the offender, the purposes of sentencing and the rights of victims.
- 3.3 Discretion by the judicial or other competent independent authority shall be exercised at all stages of the proceedings by ensuring full accountability and only in accordance with the rule of law.
- 3.4 Non-custodial measures imposing an obligation on the offender, applied before or instead of formal proceedings or trial, shall require the offender's consent.
- 3.5 Decisions on the imposition of non-custodial measures shall be subject to review by a judicial or other competent independent authority, upon application by the offender.
- 3.6 The offender shall be entitled to make a request or complaint to a judicial or other competent independent authority on matters affecting his or her individual rights in the implementation of noncustodial measures.
- 3.7 Appropriate machinery shall be provided for the recourse and, if possible, redress of any grievance related to non-compliance with internationally recognized human rights.
- 3.8 Non-custodial measures shall not involve medical or psychological experimentation on, or undue risk of physical or mental injury to, the offender.
- 3.9 The dignity of the offender subject to non-custodial measures shall be protected at all times.
- 3.10 In the implementation of non-custodial measures, the offender's rights shall not be restricted further than was authorized by the competent authority that rendered the original decision.
- 3.11 In the application of non-custodial measures, the offender's right to privacy shall be respected, as shall be the right to privacy of the offender's family.
- 3.12 The offender's personal records shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the offender's case or to other duly authorized persons.

See also UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 117.

²⁰⁶ See Mara Redlich Revkin, 'Iraq Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 66

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.¹³⁷ 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.¹³⁸ 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.¹³⁹

should have access to counsel and to all relevant evidence, but that adequate resources be put at the disposal of the defence – financial and non-financial – to ensure that it can perform its mandate safely, effectively and diligently. Strengthening the defence bar and ensuring adequate legal aid are among the measures necessary to fulfill such a purpose. So is a regime of effective investigation and access to relevant information for those concerned.

Use of ‘confidential’ or ‘secret’ information should be kept to a minimum compatible with relevant standards of human rights. And, as noted above, evidence obtained through torture should be absolutely excluded.

6. JUDICIAL ALTERNATIVES TO DETENTION FOR SUSPECTED TERRORISTS

6.1 General considerations

There are judicial and non-judicial alternatives to the prosecution-detention of terrorists. This chapter will deal with the former and the next chapter with the latter.

Judicial alternatives are those that use the existing judicially system albeit not to the full extent that it could be used. It balances the need for retribution and rehabilitation slightly differently and gives greater weight to purposes other than retribution. Instead of focusing primarily on ‘putting away’ those who could present a risk to society, it considers mid- and long-term goals of reinsertion and social reintegration. In a context where terrorism has caused much concern and hardship, opting for less than the full force of the law (and detention) might be practically and politically challenging. For reasons outlined above, however, this might be both desirable and unavoidable.

As a basic premise to these judicial alternatives, one should give consideration to the relevant legal framework applicable in a given country and what discretion it gives the authority to adopt alternatives. This would require consideration of both domestic laws and international law norms arising from a state’s international obligations. Where the relevant normative framework provides little or too little flexibility for a state to consider alternatives to prosecution and detention, consideration might have to be given to the possibility of adopting new procedures, laws and institutions for the state to give itself that flexibility. It is worth reiterating in this context that no one situation is like another so that there is no pre-set model that would fit all states or circumstances.

Instead, individual factors and circumstances should determine what model works best for a state, with enough flexibility for that model to change over time to adapt to new circumstances.

As a starting point for reflection, consideration should be given to a *twice* two-tiered system. First, consideration should be given to the creation of a ‘filtering’ mechanism to review all pending cases and identify and distinguish among those between a) cases warranting a *judicial* response and b) those which do not. For those falling in the first category, further consideration should be given to their respective ‘priority’ level to determine which cases a) should be subjected to the full force of the law (through prosecution and, as the case may be, the ordering of prison sentences) and b) which cases could be subject to *lesser* or alternative judicial measures. Regarding cases that have been identified as not warranting a judicial response, they should be evaluated individually for the purpose of determining which non-judicial or transitional measure would be most adequate for them. This is considered below.²⁰⁷

6.2 Pre-conditions to alternatives

6.2.1 Necessary legal framework and legal certainty

A core pre-condition to the possibility of judicial alternatives to detention is a valid legal basis allowing for it. Depending on the jurisdiction concerned, the nature and depth of that basis might differ. What is necessary in all cases, however, is that the legal basis relied upon for those alternatives should be compatible with human rights expectations of legality, legal clarity and certainty.

In terms of its substance, it should also give enough flexibility to the authorities concerned – judicial, non-judicial, or prosecutorial – the ability to make informed decisions on the subject. In particular, conditions of eligibility and requirements should be clearly outlined to ensure the fairness and even-handedness of the system and so as to avoid accusations of selectivity and discrimination. Where it involves sentencing discretion, the discretion should be properly set out to avoid arbitrariness and to provide judges with the requisite level of guidance. Similar legal certainty should be guaranteed where

²⁰⁷ See, *infra*, Chapter 7.

alternatives to prosecution-detention are non-judicial in character.²⁰⁸

6.2.2 Policy of case-selection

An important element of filter between those cases that warrant a full (i.e., prosecution-detention) response and those that might not is to consider the gravity and seriousness of what is at stake. The authorities should establish clear guidelines regarding the prioritization of cases. Such documents have been established by various international jurisdictions (including the ICTY and the ICC) to identify the sort of cases that should warrant the exercise of their jurisdiction.²⁰⁹ This has also been done at the domestic level where investigative and judicial authorities have to deal with large-scale criminality, most recently in Colombia in the context of the Justice and Peace Agreement. More generally, such practice exists in those jurisdiction where there is no general, universal, obligation to prosecute but instead a great deal of discretion left to prosecuting authorities. Among the most relevant considerations regarding the identification and *prioritization* of cases for the purpose of prosecution are these:²¹⁰

- Involvement in violence;
- Gravity and scale of the crimes in which the individual concerned was – directly or indirectly - involved;

208. See, *a contrario*, for a negative illustration: Vanda Felbab-Brown, ‘Somalia Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 126, 147:

If defectors are lucky enough to be classified as low-risk, they can volunteer to be placed in one of three small-scale DDR-like⁸¹ 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.

²⁰⁹ See, generally, ICC OTP Policy on case selection and prioritization (https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf); ICTY Best Practices (http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf).

²¹⁰ See also UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 118:

Potential criteria to be taken into account for assessing alternative measures for those charged with or convicted of having committed terrorism-related offences, as suggested in the Recommendations on Alternative Measures,³⁴⁶ include:

- The severity of the offence charged
- The level of radicalization to violence and commitment to violent extremism
- The offender’s receptiveness to intervention and treatment
- The likelihood of the person re-offending.

- Nature of the crimes and manner of participation;
- Position and role of suspect in the terrorist organisation;
- Relationship (including length and nature) to terror organization;
- Number, nature and effect of his actions and those of associates on victims;
- Impact of the crime (on victims and relevant communities);
- Symbolic nature of the crime;
- Quality and reliability of evidence;
- Acts of repentance and ability and willingness to contribute to reconciliation and truth;
- Known associates and relationship to known ‘active’ terrorists;
- Age, gender and other factors regarding chances of re-integration;
- Nature and depth of religious commitment;
- Nature of grievance against state/authorities;
- Motivation(s) for joining the group;
- Dangerosity, i.e., risk of re-offending;
- Available resources and capacity of the relevant investigative, prosecutorial and judicial authorities.

These non-exhaustive factors should help the authorities identify a) cases warranting prosecution, b) those warranting a judicial response falling short of full prosecution and c) those that might be ventilated away to non-judicial mechanisms (where available).²¹¹ It would also help the authorities prioritise the treatment of cases, with those considered the most serious being given priority.

6.2.3 Resources

Ultimately, the scope and scale of what can be done in response to a terrorist threat depends on the resources available to the authorities – both in terms of magnitude and

²¹¹ For a practical example, see International Center for the Study of Radicalisation (ICSR), *Reintegrating ISIS Supporters in Syria: Efforts, Priorities and Challenges* (2018) (<https://icsr.info/wp-content/uploads/2018/08/ICSR-Report-Reintegrating-ISIS-Supporters-in-Syria-Efforts-Priorities-and-Challenges.pdf>), 19. See also Letter dated 18 February 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2015/123, and Annex (‘Bringing terrorists to justice: challenges in prosecutions related to foreign terrorist fighters’), 23 February 2015, para 42; and Mara Redlich Revkin, ‘Iraq Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 73; Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 5, 22-23.

nature.²¹² The availability of those will determine, in particular, the scale and amount of prosecution that could reasonably be undertaken and what other form of measures could be adopted in relation to terrorists or suspected terrorists.

Multi-agency cooperation should also be strongly incentivized, in order to both reduce expenses and to ensure that all available resources are used and no duplicated.²¹³ A multi-disciplinary approach should also be favored, in particular where the alternative to detention is non-judicial in nature.²¹⁴

Resources are to be understood as referring not just to amounts or quantity thereof, but

²¹² See Global Counter-Terrorism Forum (GCTF), Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders, 14:

Developing these types of programs can be quite costly, as they may require new facilities and extensive training for the professionals involved in the program, among other expenses. In addition, the capacity building itself can be expensive, because the technical assistance teams could potentially have experts from a range of disciplines, and be on site for an extended period of time. As the GCTF has already demonstrated, it can help in raising funds for these types of efforts.

Regarding a state's lack of legal expertise and manpower as a factor limiting the ability of that state to investigate and prosecute acts of terrorism effectively, see also Mikael Ekman, 'ILAC Rule of Law Assessment Report: Syria 2017', ILAC, 2017, <http://www.ilacnet.org/wp-content/uploads/201704/Syria2017.pdf> (accessed 12 March 2018). See also International Center for the Study of Radicalisation (ICSR), *Reintegrating ISIS Supporters in Syria: Efforts, Priorities and Challenges* (2018) (<https://icsr.info/wp-content/uploads/201808/ICSR-Report-Reintegrating-ISIS-Supporters-in-Syria-Efforts-Priorities-and-Challenges.pdf>), 18; UNODC, Handbook on strategies to reduce overcrowding in prisons (CRIMINAL JUSTICE HANDBOOK SERIES, 2013) (https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf), pp. 137ff.

²¹³ S. V. Mardsen, *Reintegrating Extremists – Deradicalisation and Desistance* (Palgrave Pivot, 2017), 120-121.

²¹⁴ GCTF, Initiative to Address the Life Cycle of Radicalization to Violence Recommendations on the Effective Use of Appropriate Alternative Measures for Terrorism-Related Offenses (<https://theij.org/wp-content/uploads/English-Effective-Use-of-Appropriate-Alternatives.pdf>):

Recommendation 10: States should seek to use a multi-stakeholder approach when implementing alternative measures.

While courts may play the central role in imposing alternative measures as well as safeguarding offender's rights, a multi-disciplinary approach to pre-trial detention and post-conviction incarceration efforts may help ensure that these measures are tailored to the offender.²⁵ To achieve the best results possible, a range of different stakeholders should play a role in the implementation of alternative measures, especially interventions that have rehabilitative and reintegration components. Potential stakeholders who may also be engaged in alternative measures include probation officers, social workers, psychologists, defense lawyers, community leaders, prosecutors, law enforcement officers, and correctional officers.

Liesbeth van der Heide and Bart Schuurman, *Reintegrating Terrorists in the Netherlands: Evaluating the Dutch approach*, Journal for Deradicalization, Nr 17, Winter 2018 200-199 ,19/

Second, whether working towards deradicalization, disengagement or both, programs should have at their disposal a wide array of interventions spanning ideological, social and practical dimensions so that each participant may be approached in a way that increases their likelihood of actually ceasing involvement in terrorism (Barrelle, 2011; Mullins, 2010; Neumann, 2010).

OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 74

Countering terrorism, and in particular countering VERLT, requires a multidisciplinary approach and, therefore, the co-ordinated efforts of a broad range of public authorities beyond the security and criminal justice sectors, each within their own remit.

also of quality.²¹⁵ Adequately trained personnel (judicial and non-judicial alike) will be critical to the success of any program based on alternatives to detention.²¹⁶ Public-private partnerships should also be considered where resources are available in the private sector that complements those available to the state.²¹⁷

6.2.4 Filtering mechanism

6.2.4.1 General considerations

Distinguishing between the various categories of cases – those warranting prosecution-detention and those not (necessarily) warranting such a response – is the critical question to be answered by any process that offers to provide an alternative to the first course. Among the central issues to be addressed in that context are (a) eligibility criteria, (b) risk assessment and (c) responsibility to make a decision based on the first two considerations.

Eligibility could be defined broadly or narrowly depending on the scope of the challenge sought to be addressed, the policy priorities of the state concerned and the resources

²¹⁵ See, e.g., Liesbeth van der Heide and Bart Schuurman, Reintegrating Terrorists in the Netherlands: Evaluating the Dutch approach, *Journal for Deradicalization*, Nr 17, Winter 2018/19, 210

A core principle underpinning the team's work is their dedication to building a strong working relationship with clients. Establishing a bond of trust is seen as a prerequisite to an effective analysis of the client, their social network and ideological views, and thus as essential to any attempt at recidivism-risk reduction, disengagement or deradicalization. A good working relationship is also seen as enabling team TER to effectively inform partners in the police, public prosecution service and local government. While the dedication to building a good professional bond between staff and clients matches a frequently found recommendation in the literature, putting theory into practice has sometimes proven difficult.

²¹⁶ See, e.g., France, Ministère de la Justice, « Prévenir Pour Protéger » Plan national de prévention de la radicalization (2018), 21ff; Adrian Cherney (2018): *The Release and Community Supervision of Radicalised Offenders: Issues and Challenges that Can Influence Reintegration, Terrorism and Political Violence*, DOI: 10.1080/09546553.2018.1530661, 3-4; J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 21.

²¹⁷ OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 71-72

The key factors for the success of public-private partnerships include:⁸⁷

- Recognition from the outset by all parties of their different roles, status and resources;
- Commitment of all parties to dialogue, transparency and openness to achieve a common understanding of the issues at stake and the concerns and expectations of all;
- Genuine commitment by all parties to developing a partnership based on equality, mutual trust and respect for the independence of each party; and
- Readiness of all parties to identify shared objectives and interests, find alternatives and compromises to reach consensus and agree on actions that are beneficial to all parties.

at its disposal.²¹⁸ Predictability, transparency and consistency are important element of the implementation of those factors of eligibility. Clarity of purpose(s) would also help apply those consistently. The credibility and reliability of the filtering system could be bolstered by its membership and expertise involved in that process. Avoidance of politicization would be essential to its credibility and independence. Basic due process safeguards should also be built in the system to ensure trust in the system and fairness of application.

6.2.4.2 Separating cases warranting a judicial response from those which do not (or not necessarily)

Separating cases warranting a judicial response from those which do not (or not necessarily) is not an easy task. Every case involving suspicion of involvement with or membership in a terror organization should be carefully reviewed with a view to ascertaining whether a judicial or non-judicial response is in order. For cases involving suspicion of involvement in the commission of serious criminal offences or atrocities, those cases should be classified *prima facie* as warranting a judicial response. Cases of membership or general association with such an organisation could instead be passed on the non-judicial path or be considered for alternatives to imprisonment.

²¹⁸ See, e.g., Vanda Felbab-Brown, ‘Nigeria Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 113-114

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.”¹⁹⁰ 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.¹⁹¹

To determine what cases require a *prosecution-detention* response and which might not, the criteria outlined above (and potentially others²¹⁹) (Involvement in violence; Gravity and scale of the crimes in which the individual concerned was – directly or indirectly - involved; Nature of the crimes and manner of participation; Position and role of suspect in the terrorist organisation; Relationship (including length and nature) to terror organization; Number, nature and effect of his actions and those of associates on victims; Impact of the crime (on victims and relevant communities); Symbolic nature of the crime; Quality and reliability of evidence; Acts of repentance and ability and willingness to contribute to reconciliation and truth; Known associates and relationship to known ‘active’ terrorists; Age, gender and other factors regarding chances of re-integration; Nature and depth of religious commitment; Nature of grievance against state/authorities; Motivation(s) for joining the group; Dangerousity, i.e., risk of re-offending; Available resources and capacity of the relevant investigative, prosecutorial

²¹⁹ Vanda Felbab-Brown, ‘Nigeria Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 103-104

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.”¹²² 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.”¹²³ 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].”¹²⁴

and judicial authorities) should be evaluated individually and collectively.²²⁰ Consistent with the principle that freedom should be the principle and detention the exception, a presumption of an alternative to detention should be favored and guide this evaluation. Particularly central to that assessment will be the authorities' evaluation of the risk posed by the individual(s) concerned if they are not detained. This is addressed next.

6.2.4.3 Dangerosity assessment

In Resolution 2178, the UN Security Council called upon Member States to develop and implement risk assessment tools to identify individuals who demonstrate signs of radicalization to violence and develop intervention programs, including with a

²²⁰ For an illustration, see Vanda Felbab-Brown, 'Somalia Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 126, 144-145:

However, thanks to extensive input from international partners, the Ministry of Internal Security has since drafted standard operating procedures (SOPs) to guide intelligence agencies 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.⁶⁷ Thus, a lack of transparency regarding the screening of defectors persists. The SOPs⁶⁸ 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.

[...]

Other significant problems remain with the draft SOPs. The stated goal of the assessment is to evaluate “the likelihood that disengaged al Shabaab combatants will engage in any of the following activities:”⁶⁹ 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.

gender perspective, as appropriate, before such individuals commit acts of terrorism.²²¹ Similar mechanisms would be necessary to distinguish cases that require prosecution and detention from those that might warrant a lesser response.²²² However, making an assessment of the risk posed by the individual(s) concerned is fiendishly difficult.²²³ And there is a great deal of dispute regarding methods and reliability of existing

²²¹ UNSC Resolution 2178 (2014), S/RES/2178 (2014), 24 September 2014, para 38.

²²² Global Counter-Terrorism Forum (GCTF), “Foreign Terrorist Fighters” (FTF) Initiative The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon,

Good Practice #16 – Build and use evidence-based, individual-level risk assessment frameworks for returnees, evaluate their condition and establish appropriate engagement approaches accordingly. Robust risk assessments based on a variety of factors, including an individual’s motivation for traveling to fight, behavior while traveling and in a certain area—which may be obtained from interviews with family and friends—enables authorities to build tailored responses. Such responses could range from prosecution to monitoring to referral to violence prevention and/or reintegration programs. Risk assessments can also help authorities ensure responses are commensurate with the threat and do not further radicalize returnees or members of their communities. Risk assessment frameworks should be shared between partner States, where appropriate, to help ensure a comprehensive approach that reflects good practices.

See also UNODC, *Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia* (2018), 31

Where prosecution and custody of the individual are not possible or not considered an appropriate strategy for other reasons, a full risk assessment needs to be undertaken on a case-by-case approach as to the level of threat posed by the returning FTF. All available options need to be explored in an attempt to ensure returning FTFs do not cause a danger to the community.

²²³ See E. Pressman and J. Flockton, *Calibrating risk for violent political extremists and terrorists: the VERA 2 structured assessment*, 14(4) *British Journal of Forensic Practice* 237 (2012); Adrian Cherney (2018): *The Release and Community Supervision of Radicalised Offenders: Issues and Challenges that Can Influence Reintegration, Terrorism and Political Violence*, DOI: 10.1080/09546553.2018.1530661, 3 (footnotes omitted):

While specific risk assessment tools for radicalised offenders have been developed, such as the Extremism Risk Guidance 22 + (ERG 22 +) and Violent Extremist Risk Assessment Version 2 Revised (VERA 2R), their predictive value is still unclear, particularly given the lack of validation studies. Other important issues are the applicability of these tools across different jurisdictions and terrorist groups and their consistent application by practitioners, which are essential to their validity. It is unknown whether these tools can help to improve the accuracy of any current assessments of risk and needs that are already being conducted by authorities.

See also Monica Lloyd and Christopher Dean, “The Development of Structured Guidelines for Assessing Risk in Extremist Offenders,” *Journal of Threat Assessment and Management* 2, no. 1 (2015): 40–52; E. Pressman, N. Duits, T. Rinne, and J. Flockton, *VERA–2R Violence Extremism Risk Assessment – Version 2 Revised: A Structured Professional Judgment Approach* (Netherlands: Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2016); Kiran M. Sarma, “Risk Assessment and the Prevention of Radicalization from Nonviolence Into Terrorism,” *American Psychologist* 72, no. 3 (2017): 278–88; M. Herzog-Evans, “A Comparison of Two Professional Judgement Tools for Violent Extremism and Their Relevance in the French Context,” *European Journal of Probation* (2018). See also Cameron Sumpter, Yuslikha K. Wardhani & Sapto Priyanto (2019): *Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society*, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610/X.2018.1560666, p. 8:

Appropriate prerelease risk assessment has been an ongoing saga in Indonesia for several years. Various consultants, including a United Nations agency, an Australian state prison service, and local academics have attempted to implement different versions, but the DGC has not been able to agree on one that they believe matches their needs, and particularly, their human resource capabilities. In fact, different national prison directors have apparently each championed a different instrument, with variations adopted experimentally and sporadically but no consistent approach taking hold. The exit interviews conducted by Densus 88 are not designed to be risk assessments per se, and the information is not shared with other relevant agencies such as the parole board and local government authorities. BNPT officers collect data through their interactions with convicted terrorists, but this is not distributed among stakeholders either, and the extent to which it informs the agency’s risk profiles is unclear.

The Global Counter-Terrorism Forum has suggested looking at the following factors when making that assessment:

the probability that a terrorist act might occur, the imminence of a terrorist act, the potential impact on society, the general threat level, the intent, and capabilities of the individual to carry out a terrorist act, direct connection with a terrorist network and – solely in combination with the previous factors – adherence to violent extremist ideology. The factors should have the following attributes: specificity, objectivity, and be individualized. In particular, a person poses a specific and current terrorist threat if there is a reasonable suspicion based upon substantiated facts that his or her behavior indicates such a threat, and even more so if the person has the capabilities to act upon it. Any evidence should, individually or in aggregate, have a direct connection to a threat. However, the actual site of a potential crime, the time it occurs, and the possible offence may not be known at the early stage of police intervention. A threat is considered current if it exists when administrative measures are under consideration. Evidence that is too far back in the past and is no longer

²²⁴ Thomas Renard And Rik Coolsaet (editors), *Returnees: Who Are They, Why Are They (Not) Coming Back And How Should We Deal With Them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands* (Egmont Paper 101, February 2018) (http://www.egmontinstitute.be/content/uploads/2018/02/egmont_papers.101_online_v1-3.pdf), 14-15:

The precise number of plots and returnees is contested among researchers using different data. The broadest studies have placed the number of veteran foreign fighters who have planned or attempted terrorist attacks in Western countries at more than 100, with the vast majority of them occurring in Europe. The most cited of these is Thomas Hegghammer's *Jihadi Plots in the West* (JPIW), which is frequently mentioned by policymakers calling for higher levels of security because it ostensibly indicates that 11 percent of all returned foreign fighters become domestic terrorists. However, Hegghammer's finding was a maximum likelihood that would be accurate only if all returnees had been identified in his data, and he clarifies that the actual percentage is likely significantly lower. While the study further indicates that foreign fighting is preferred to domestic terrorism because it is viewed as more heroic, returnees make particularly effective domestic terrorists, with veteran jihadis participating in half of all Western plots. In the original published JPIW data, returnees participated in 14 of 24 executed plots, and 8 out of 12 that produced fatalities.¹⁹ In a more recent, ISIS-era study, Hegghammer and Nesser found that "the blowback rate... from Syria is thus far very low indeed" – just 11 plotting returnees out of an estimated 4,000 by 2015, "a blowback rate in the order of one in 360."²⁰

Other studies have also indicated that returned European jihadi foreign fighters have not been as consequential to domestic terrorism as is often feared. Jeanine de Roy van Zuijdewijn argued that many returnees convicted of terrorism offenses were not involved in developed plots but were caught in "chatter" or in possession of terrorist propaganda material. According to her data, of the 10 lethal attacks in Europe during 1994-2007 by 61 terrorists, only seven involved returned jihadis, all of whom had gone abroad for terrorist training but none had served as foreign fighters. Aseem Qureshi identified 66 individuals in the United Kingdom who had engaged in domestic terror plots during 2001-2014, of whom just two had been foreign fighters while six others had gone for training. Daniel Byman and Jeremy Shapiro note that the returned jihadis who did commit domestic attacks used unsophisticated methods and did not display great prowess so the "value added" of their field training and foreign fighter experience is questionable.²¹

See also T. Hegghammer, "Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting." *American Political Science Review* 107(1), pp. 1-15; T. Hegghammer and P. Nesser, "Assessing the Islamic State's Commitment to Attacking the West," *Perspectives on Terrorism* 9(4) 2015, p. 20.

relevant to a current security threat ordinarily would not in itself justify a threat. There should be evidence indicating a possible continuing, present or future danger.²²⁵

All relevant agencies should be involved and have the ability to provide input. All relevant information should be collected, from the individual concerned, but also from known associates and family. The extent of cooperation received by the individual concerned and his willingness to provide verifiable information about his own actions would normally constitute an important factor in the assessment to be conducted by the authorities.

The standards and method used to carry out such an evaluation should be as clear as possible and free of discriminatory elements. Ambiguous standards and arbitrariness in application could create disincentive for members to disengage and a sense of

²²⁵ Global Counter-Terrorism Forum (GCTF), *Glion Recommendations on the Use of Rule of Law-Based Administrative Measures in a Counterterrorism Context*, 6-7, General principles 7-8.

unfairness that could further rather than dilute existing grievances.²²⁶ The Global Counter-Terrorism Forum has suggested the following criteria:

The risk assessment tool should contain a clear set of risk indicators. These could include 1) motivational factors, 2) capabilities to carry out a terrorist attack, 3) ties to a terrorist network, 4) level of radicalization to violence, and 5) the level of receptiveness to intervention and/or treatment. The specific risk that is being addressed needs to be clearly identified and incorporated into any assessment tool. States should not overly rely on broadly-defined indicators; they should also ensure adequate protection against inappropriate use of data mining tools and consider privacy rights when using data sets.²²⁷

²²⁶ See, e.g., Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 10:

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.

See also Vanda Felbab-Brown, 'Nigeria Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 103

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."¹¹⁹

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 nongovernmental 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]."¹²⁰ 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.¹²¹

²²⁷ Global Counter-Terrorism Forum (GCTF), *Global Recommendations on the Use of Rule of Law-Based Administrative Measures in a Counterterrorism Context*, 6-7, General principles 7-8.

6.2.5 Exit process

For those engaged in a rehabilitation/disengagement process, conditions and general timing of exit from that process should be sufficiently predictable. A degree of due process and the ability to request release from the program should be built into any such regime.²²⁸

Upon release,²²⁹ or in case of an alternative to detention, effective supervision and follow-up should be guaranteed as a way to ensure the safe re-integration of the

²²⁸ For an illustration, see Vanda Felbab-Brown, ‘Somalia Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 126, 149

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.⁸⁸ 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 handing 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.

And, *ibid*, 150:

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.¹⁰⁰

²²⁹ United Nations Standard Minimum Rules for Non-custodial Measures (The *Tokyo Rules*), Adopted by General Assembly resolution 45/110 of 14 December 1990, paras 10.1-10.4:

- 10.1 The purpose of supervision is to reduce reoffending and to assist the offender’s integration into society in a way which minimizes the likelihood of a return to crime.
- 10.2 If a non-custodial measure entails supervision, the latter shall be carried out by a competent authority under the specific conditions prescribed by law.
- 10.3 Within the framework of a given non-custodial measure, the most suitable type of supervision and treatment should be determined for each individual case aimed at assisting the offender to work on his or her offending. Supervision and treatment should be periodically reviewed and adjusted as necessary.
- 10.4 Offenders should, when needed, be provided with psychological, social and material assistance and with opportunities to strengthen links with the community and facilitate their reintegration into society.

individual(s) concerned into society.²³⁰ If necessary, this should be accompanied by a power to re-arrest in cases where individuals concerned fail to meet the requirements and conditions of the program.²³¹

6.3 Select alternatives to detention

6.3.1 General considerations

This chapter will consider a number of alternatives to detention that are judicial or quasi-judicial in character in the sense of being fitted into the existing legal and institutional order. Although it might require certain normative adaptation, it is generally possible to implement such measures in the existing structure.

²³⁰ See, e.g., regarding Colombia: J. Horgan and K. Braddock, 'Rehabilitating the Terrorists?: Challenges in Assessing the Effectiveness of De-radicalization Programs', *Terrorism and Political Violence*, 22:267–291, 2010, 271-272

The Colombian initiative is often known as the Reincorporation Program. The process works as follows. The first step involves paramilitary commanders supplying the Office of the High Commissioner with a list of names of those seeking to demobilize.³² The Office of the High Commissioner then verifies the number of names on the list with the Ministry of Defense. Those on the list are moved to a geographic location chosen by the government where they are questioned and registered with Colombia's Technical Investigative Body. The government registrar supplies them with identification classifying them as "demobilized individuals" to ensure receipt of government benefits. Afterward, each demobilized guerrilla surrenders his or her weapon to government representatives during a ceremony.³³ The Organization of American States (OAS) verifies transfer of weaponry.³⁴ Following the demobilization ceremony, ex-fighters are allowed to return to a place of their choice from where they must frequently check in at government "reference centers."³⁵ Once formally associated with one of these centers, former paramilitaries can receive health care, shelter, clothing, and vocational support.³⁶ Third parties that include the OAS, European Union, and Microsoft Corporation underwrite the provision of such benefits.

And, *ibid*, regarding Saudi Arabia, 277:

According to Boucek, the Security Subcommittee is responsible for monitoring program detainees during and after their participation.¹¹⁴ In coordination with the Religious and Psychological=Social Subcommittees, the Security Subcommittee makes recommendations on which prisoners are safe to release. Furthermore, the Security Subcommittee advises program participants about how to avoid repeating the actions that got them into trouble. Although the Security Subcommittee informs program participants that they will be monitored after they complete counseling, Boucek claimed that "not all [functions of the Security Subcommittee] are publicly known" (p. 13), suggesting that monitoring activities transcend what officials publicly claim.

²³¹ J. Horgan and K. Braddock, 'Rehabilitating the Terrorists?: Challenges in Assessing the Effectiveness of De-radicalization Programs', *Terrorism and Political Violence*, 22:267–291, 2010, 270-271

In May of 2003, the British and Irish governments released a statement calling for the establishment of the Independent Monitoring Commission (IMC). To assist in maintaining relative peace, the IMC to this day supervises and reports on the actions of paramilitary groups in Northern Ireland. In so doing, the IMC is able to (a) confirm that the signatories of the GFA honor their commitments to abandon violence and (b) verify that security measures in Northern Ireland are being normalized.²¹ In a 2008 report, the Commission reported all incidents of politically-motivated violence from March 2003 through August 2008.

[...]

McEvoy reported that of the 450 prisoners released early under order of the Belfast Agreement, 20 have had their release licenses revoked. Of these 20, 16 were re-arrested for participating in terrorist-related activity²³—roughly one-fifteenth the recidivism rate for "ordinary prisoners" in Northern Ireland.

In many ways, the challenge of doing so is of a *policy* sort, rather than a legal one. Where detention is in most cases punitive or protective, in the counter-terrorism context it often takes a more preventive character. Detention is seen in this context as a way to protect society from a potential risk. Seen in that way, any alternative to detention is perceived as creating and contributing to such a risk becoming a reality. It is therefore essential that any such measure should be clearly outlined in law and that necessary tools to ensure their *safe* usage have been built into the regime (including as regards resources).

The various measures will be considered below in the procedural order in which they would become relevant: pre-trial; trial; sentencing; post-sentencing.

6.3.2 Pre-trial

The phase that precedes trial is particularly important in relation to the question of detention. This is the stage where the normal course of things towards prosecution and possibly detention could be diverted towards an alternative – judicially-led or not. It is also a time when the question of the need and justification for detention will first arise. It is therefore an important phase in the process of discussing and implementing alternatives to detention for terrorists and terror suspects.

6.3.2.1 Diversion and non-prosecution

In order to ensure that detention and the risk of detention is a measure limited to those who warrant it, *diversionary* measures should be implemented by the authorities dealing with criminal cases wherever appropriate and possible.²³²

The decision to adopt such measures should take into account the protection of society, crime prevention, the promotion of respect for the law and the rights of the victim.³⁵⁰ Decisions on diversionary measures should take into account that depriving women with caretaking responsibilities of their liberty also has a harmful impact on children and other family members within their care.³⁵¹

²³² United Nations Standard Minimum Rules for Non-custodial Measures (The *Tokyo Rules*), Adopted by General Assembly resolution 45/110 of 14 December 1990:

5.1 Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.

See also UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 118 (regarding specifically women).

Depending on the legal system in which the issue arise, the power to use diversion strategies will be with the prosecutor, the police or other authorities. This might involve prosecutorial discretion, judicial involvement or both. The procedure should in all cases be clear, fair and transparent. Arbitrariness and discrimination must be avoided.

6.3.2.2 Use of pre-trial detention

Particularly problematic in the context of allegations of terrorism is the often systematic use of pre-trial detention and of mandatory sentences, which are discussed below. Both of these contribute to lengthy detention periods and overcrowding of detention facilities. They also tweak the balance between freedom and detention in favor of the latter, in contradiction to the fundamental principle of human rights outlined above. Pre-trial detention is not unusual and is in fact known to many and most legal systems. Detention can thus normally be ordered prior to the commencement of trial if and where there are valid grounds for it, in particular, risk of flight or another sort of interference with the course of justice.

In the context of terror cases, however, there is in some instances a quasi-presumption that pre-trial detention is necessary.²³³ This results in undermining associated human rights safeguards and means that individuals who could and should be free pending their trial might be detained instead. Rule 6.1 of the *Tokyo* Rules clearly states the relevant principle: “Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.” GCTF’s Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector (Rabat Memorandum) notes that “pre-trial detention must conform to fundamental due process, be limited to cases in which the necessity for detention has been established, and be fairly administered and not affect the presumption of innocence and the procedural rights of the individual being detained”.²³⁴ Along similar lines, the Human Rights Council has noted the following:

²³³<https://www.libertyhumanrights.org.uk/sites/default/files/comparative-law-study-2010-pre-charge-detention.pdf>; National Association of Pre-Trial Service Agencies, “Promising Practices in Pre-Trial Diversion” <https://netforumpro.com/public/temp/ClientImages/NAPSA/20b9d126-60bd-421abcbf-1d12da015947.pdf> ; National Association of Pre-Trial Service Agencies, “Pretrial Diversion in the 21st Century – A National Survey of Pretrial Diversion Programs and Practices” <https://netforumpro.com/public/temp/ClientImages/NAPSA/18262ec2-a77b-410cad9b-c6e8f74ddd5b.pdf> ; Radicalisation Awareness Network (RAN), Collection of Good Practices http://ec.europa.eu/dgs/home-affairs/what-wedo/networks/radicalisation_awareness_network/ran-bestpractices/docs/ran_collection_approaches_and_practices_en.pdf.

²³⁴ GCTF’s Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector (Rabat Memorandum).

52. Since excessive recourse to pretrial detention is one of the major causes of over-incarceration and overcrowding around the world, strict adherence to relevant international norms and standards will go a long way in addressing these phenomena. Pretrial detention should only be a measure of last resort.

53. Furthermore, as stressed by the Human Rights Committee in its general comment No. 35, “[d]etention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime”. This means that pretrial detention should not be mandatory without regard to individual circumstances, a practice common in some States, and that alternatives to pretrial detention must be duly considered also when deciding upon continued pretrial detention. The time limits imposed for pretrial detention must be strictly observed. Moreover, if the length of time that the defendant has been detained for reaches the length of the longest sentence that could be imposed for the crimes charged, the defendant should be released.²³⁵

Consistent with the principle of liberty and presumption of innocence, alternatives to pre-trial detention shall be employed at as early a stage as possible and should only be used when demonstrably necessary and proportionate.²³⁶ Alternatives to pre-trial detention should therefore be carefully considered where the risk of flight is inexistent (or low) and the risk of criminal conduct inexistent (or low) so that pre-trial detention remains a last resort. Depending on the legal order in question,

²³⁵ <http://undocs.org/A/HRC/30/19>, pars 52-53 (footnotes omitted).

²³⁶ W. Schabas, *U.N. International Covenant on Civil and Political Rights – Nowak’s CCPR Commentary* (3rd revised edition, N.P. Engel, 2019), 260, 51:

Stemming from a British draft in the Commission on Human Rights, Art. 9(3) contains the principle, not set down in Art. 5 ECHR or Art. 7 ACHR, that pre-trial detention may not become the general rule. It is thus to be limited to essential reasons, such as danger of suppression of evidence, repetition of the offence and absconding, and should be as short as possible. Release pending trial is also consistent with the presumption of innocence set out in Art. 14(2). Art. 9(3) contains an indirect entitlement to release from pre-trial detention in exchange for bail or some other guarantee. This results from the principle that pre-trial detention is the exception, together with the authority to make release dependent on the necessary guarantees.

See also United Nations Standard Minimum Rules for Non-custodial Measures (The *Tokyo Rules*), Adopted by General Assembly resolution 45110/ of 14 December 1990:

6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

alternatives could include these: restriction of movement; supervision; payment of bail; house arrest; electronic tagging; conditional release that may require checking in with law enforcement or other criminal justice authorities, and diversion.²³⁷ And detention regularly reviewed to verify its continued necessity and proportionality.

Particular care should be paid to the need to avoid detention of children for whom rehabilitation and reintegration should normally prevail.²³⁸ As for women, their gender and the particular impact which detention might have on them should be duly factored in the decision whether to detain them or not.²³⁹

²³⁷ T. Lappi-Seppala, *Techniques In Enhancing Community-Based Alternatives To Incarceration — A European Perspective*, 64:

Restriction of movement. In this case the suspect is required to stay within a certain area or within certain premises, most commonly his or her home. (“Home arrest”). Another, a less restrictive form, would be to forbid the suspect from travelling from certain locations (MK). Observance of the conditions is generally enforced through constant monitoring by the local police. Such monitoring can also be carried out electronically.

Supervision. A less restrictive measure requires that the suspect awaiting trial submits to supervision primarily in order to ascertain that he or she is not going to disappear. The suspect may be required to report to the police or another agency (or even private citizens) at fixed intervals, or a representative of such an agency will make random checks on whether or not the suspect has adhered to the conditions.

The payment of bail. “Bail” is usually understood as the posting of property or money as a surety that a person released from custody will appear in court at the appointed time. Bail is in common use in most countries throughout the world. It is not used in the Scandinavian countries, but the use of bail has been reported in Asia in countries like Indonesia, Korea, Philippines and Thailand (Joutsen 1990), and the practice in the USA is well known. Bail’s primary drawback is that it can be discriminatory, since the poorer suspects cannot afford bail and often do not succeed in having a bondsman post the bail for them.

²³⁸ See, *supra*, dd/children.

²³⁹ See, *supra*, dd/women. See also UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 118-119 (footnotes omitted):

Alternatives to pretrial detention should be employed as early as possible, and may include measures such as bail, house arrest, electronic monitoring, conditional release that may require checking in with law enforcement or other criminal justice authorities, and diversion. It has been observed that decisions on alternatives, both pretrial and at the sentencing stage, often overlook the typical background of women offenders, their caring responsibilities and the typically lower risk they pose to society. The availability of alternatives should, therefore, take into account the implications for employment, accommodation and child custody that may disproportionately affect women, especially in a female-headed household, and also the fact that women may be less aware of their legal rights and their entitlement to free legal aid, if applicable, as discussed above and in chapter 6.

The forms and conditions of alternative measures to pretrial detention, as with all other forms of alternatives, must be gender-sensitive. Mechanisms determining fines and bail amounts may fail to account for the economic disadvantage and lack of financial autonomy that women face in many contexts. Further, women may be disadvantaged by gender-neutral conditions set by authorities, such as bail conditions requiring regular reporting to authorities. Women may be at a particular disadvantage in situations where women cannot leave home without being accompanied by male relatives, because transport to the respective police station is not affordable, or feasible, or because reporting times would jeopardize caretaking responsibilities.

In determining the conditions to be observed by the offender in connection with the alternative measures, the Tokyo Rules provide that the competent authority should take into account both the needs of society and the needs and rights of the offender and the victim. The conditions to be observed shall be practical, precise and as few as possible, and be aimed at reducing the likelihood of an offender relapsing into criminal behaviour and of increasing the offender’s chances of social integration, taking into account the needs of the victim.

To enhance the likelihood of non-custodial measures being adopted (safely and effectively) at this stage of the proceedings, appropriate action, including training, should be taken vis-à-vis the prosecutorial and judicial authorities with a view to eliminating unnecessary recourse to pretrial custody.²⁴⁰

6.3.3 Trial

The next stage in the process would be a potential trial. The question that arises at that stage is whether there should be a trial or not. And, where one is to take place, whether the accused should be detained during trial. That last question will generally depend on the law of the country in question and will not be considered here. As for the first question, consideration should be given to alternatives to a trial or, at least, to a full trial.

Plea agreement schemes, where permitted by local laws, should be considered as it could combine an important saving of resources for the state and the possibility of setting (strict) conditions to a non-custodial sentence. Where this occurs, consideration should be given to the rights and interests of victims, in particular as regards reparation. Transactional justice should fully account for the need and the right to truth of the victims and the value of this to a process of reconciliation.

In some jurisdictions, a judge could also order the conditional stay of proceedings by which proceedings are suspended under certain conditions.

6.3.4 Sentencing

6.3.4.1 General considerations

If and when the case has gone to trial and a conviction for a terrorism offence has been entered, there are a number of alternatives to imprisonment that can be envisaged in many cases including, where appropriate, a) warnings, b) conditional discharges, c) status penalties, d) pecuniary fines, e) compensation orders, f) suspended sentences, g) probation and judicial supervision, h) community service, i) house arrest or j) non-

²⁴⁰ See A/HRC/25/60/Add.1, para. 99, and Council of Europe document CPT/Inf (2015) 12, para. 44. See also www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, para. F(i).

institutional treatment.²⁴¹ In considering the alternative measures to imprisonment at the trial and sentencing stages,

the judicial authority should take into account the rehabilitative needs of the offender, the protection of society and the interests of the victim. Social inquiry reports on the offender's pattern of offending and current offences should also be taken into account, if they exist.²⁴²

In all cases,

[t]he selection of non-custodial measures shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, the background of the offender, the purposes of sentencing and the rights of victims.²⁴³

Courts could be encouraged to use alternatives to imprisonment with clear and adequate sentencing guidelines that prescribe the use of non-custodial sanctions in certain cases and/or by requiring that judges explain the decision of the court to impose a prison sentence where an alternative is available in law.

6.3.4.2 Non-custodial sentences

In the exercise of their discretion, judges generally have some room of manoeuvre in deciding what sentence fits the crime, including non-custodial sentences. The possibility of handing out non-custodial sentences must be provided for by law.²⁴⁴ Bespoke sentences not foreseen in the relevant legal regime are not in principle acceptable.²⁴⁵

²⁴¹ UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 119. See also United Nations Standard Minimum Rules for Non-custodial Measures (The *Tokyo Rules*), Adopted by General Assembly resolution 45/110 of 14 December 1990, Rule 8.2; and United Nations Standard Minimum Rules for Non-custodial Measures (The *Tokyo Rules*), Adopted by General Assembly resolution 45/110 of 14 December 1990

2.3 In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of noncustodial measures, from pre-trial to post-sentencing dispositions. The number and types of noncustodial measures available should be determined in such a way so that consistent sentencing remains possible.

2.4 The development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated.

²⁴² UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 119 (footnotes omitted).

²⁴³ *Tokyo Rules*, art 3(2).

²⁴⁴ *Tokyo Rules*, Rule 3.1.

²⁴⁵ https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf, p. 33.

Judicial discretion should enable judges to hand non-custodial sentences where warranted and adequate as a way to avoid detention. The *Tokyo* Rules provide for a variety of alternatives to custodial sentences: (a) Verbal sanctions, such as admonition, reprimand and warning; (b) Conditional discharge; (c) Status penalties; (d) Economic sanctions and monetary penalties, such as fines and day-fines; (e) Confiscation or an expropriation order; (f) Restitution to the victim or a compensation order; (g) Suspended or deferred sentence; (h) Probation and judicial supervision; (i) A community service order; (j) Referral to an attendance centre; (k) House arrest; (l) Any other mode of non-institutional treatment; (m) Some combination of the measures listed above.²⁴⁶

In particular, consideration should be given to enabling Judges to order the following measures and similar ones:

- i. **Non-custodial sentences** (in particular, for children or those with only a remote proven connection to a terror organisation) and **deferred sentences** (decision is taken not to pass sentence on condition that the offender undertakes some action, such as undergoing treatment or receiving counselling);
- ii. **Suspended sentences** accompanied, where necessary, by certain obligations and conditions, which could include, for instance, a) compulsory attendance of de-radicalisation schemes, b) civic work, c) limitations on movement, d) duty to report to police on a regular basis, or e) participation in truth-telling schemes. The conditional nature of this sort of sentence might help increase communal support for it and might create a genuine incentive by those concerned to comply.
- iii. **Limitation of freedom orders** (requiring the offender to live in a certain place under the supervision of a specialized agency); and

²⁴⁶ United Nations Standard Minimum Rules for Non-custodial Measures (The *Tokyo* Rules), Adopted by General Assembly resolution 45/110 of 14 December 1990, Rule 8.2.

- iv. **Community service order**, where both the individual concerned and the community in question would benefit from such a measure and where the necessary resources for it are available (including regarding supervision, the needs of the local community).²⁴⁷

Trials could be in two phases: a) guilt/innocence, b) sentence – with the second phase the defendant could offer to contribute to reconciliation process and be eligible for certain types of non-custodial sentences (or a sentence reduction).

In order to facilitate the work of judges when deciding an appropriate sentence and in order not to place the entire burden of showing leniency to terrorists onto them, consideration could be given to setting up an independent body or individual which would be responsible to make sentencing recommendations in each case. Whilst a judge should always have the discretion to depart from such recommendation, the effectiveness of the system by requiring a judge to provide detailed reasons for departing from such recommendations in a given case.

²⁴⁷ United Nations Standard Minimum Rules for Non-custodial Measures (The *Tokyo Rules*), Adopted by General Assembly resolution 45/110 of 14 December 1990, paras 17.1ff. See also Council of Europe Committee of Ministers Recommendation, No. R (92) 16, Rule 35

The consent of an accused person should be obtained before the imposition of any community measure to be applied before trial or instead of a decision on a sanction.

Lappi-Seppala, T. (2003). Enhancing the community alternatives—Getting the measures accepted and implemented (UNAFEI Annual Report for 2002 and Resource Material Series No. 6) (Fuchu, Japan):

The success of a community sanction depends heavily on the availability of resources for their implementation. Probation requires a suitable infrastructure for the arrangement of supervision, and community service requires not only a suitable organisation but also designated places of work. In addition, the general economic and political circumstances in a country may have a role in determining the extent to which community sanctions are used in general.

A community service order requires an offender to do unpaid work for a specified number of hours or to perform a specific task. The work should provide a service to the community.²⁶⁵ In addition to making a convicted person take responsibility for his or her actions, community service provides compensation to society for harm done. The effectiveness of community service as an alternative has been reported widely as has the satisfaction of local communities with this form of penalty for a convicted person.²⁶⁶ The attraction of community service as an alternative to imprisonment is largely because offenders undertake some action as punishment for the offence committed, while also paying back the community which they have harmed. However community service is not a simple sanction to implement. The following factors need to be taken into account when considering the introduction of community service programmes: • Before imposing such an order, the court needs reliable information that work is available under appropriate supervision; • Community service requires close supervision to verify that the offender does the work required and that he or she is not exploited in any way. In many jurisdictions, the probation services or officials performing an equivalent function bear primary responsibility for ensuring that these requirements are met; • Effective cooperation mechanisms need to be established between courts, institutions that will provide work and the body responsible for supervision.

This system has obvious resource implications which should be considered prior to implementing legislation on community service measures. Adequate staff, premises and funding are necessary for the body responsible for supervising the community service programme.²⁶⁷ This option may be appropriate for post-conflict environments but only when sufficient resources for supervision are available.

6.3.4.3 Mandatory sentences, sentencing discretion and detention regime

6.3.4.3.1 Mandatory sentences

Many domestic criminal law systems operate impose mandatory minimum terms of imprisonment for certain offences without further consideration of the facts of a case. This might result in sentences that are disproportionate to the crime committed and which are entirely unnecessary and contribute to overcrowding of prisons. Instead, the law should provide for judicial discretion and enable judges to tailor the sentence to the gravity of the crimes so that the sentence is not any longer than necessary and justified. ‘Proportionate sentencing is an essential requirement of an effective and fair criminal justice system. This requires that custodial sentences are imposed as measures of last resort and applied proportionately to meet a pressing societal need.’²⁴⁸

6.3.4.3.2 Sentencing discretion

Sentencing should in every case correspond to the gravity of the conduct imputed to the convict, including where the offence is linked to terrorism.²⁴⁹ Determining what sentence is adequate and proportionate to the crime and the accused’s part therein is not an easy task, let alone in situation where communal and political resistance to

²⁴⁸ <http://undocs.org/A/HRC/30/19>, par 57. See also See E/CN.4/2006/7, para. 63, and CAT/OP/MDV/1, para. 220.

²⁴⁹ Letter dated 18 February 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2015/123, and Annex (‘Bringing terrorists to justice: challenges in prosecutions related to foreign terrorist fighters’), 23 February 2015, in particular, para 39:

Security Council resolution 2178 (2014) requires Member States to “ensure that their domestic laws and regulations establish serious criminal offences sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offence”. Participants questioned the appropriateness of some of their criminal legislation from the perspective of the penalties carried by those offences. Some noted that where prosecutions relied on conventional offences to deal with foreign terrorist fighters, specifically before they travel, judges may tend to provide lenient punishments. It has become clear that often judges do not share the opinion of prosecutors regarding the seriousness of the risk posed by foreign terrorist fighters. Some participants suggested that judges needed to be educated about the risks that the phenomenon of foreign terrorist fighters poses to national security.

See also OSCE/ODIHR, Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework (2018) (<https://www.osce.org/odihr/393503?download=true>), 34:

- Punish FTF-related offences in a manner commensurate with the crime and according to individual culpability, based on conduct and criminal intent. Also, guarantee humane and dignified treatment of detainees suspected or convicted of FTF-related offences at all times, with due regard to the specific risks and needs of female FTFs in detention.

any form of leniency is strong.²⁵⁰ And the view of the community affected by terrorist violence might be quite different in that regard from the view of those associated with or supportive of terror organizations.²⁵¹ Sentencing should in all cases be proportionate and duly reasoned. It should also account for the need for rehabilitation and reintegration.

In some jurisdictions, terror legislation has placed a sort of sentencing premium upon the ‘terrorist’ nature of the offence. The terror label operates as a sort of implied aggravating factor. Other jurisdictions provide for automatic, mandatory, sentences for terror crimes. This type of approach might not assist the process of rehabilitation and reintegration of former terrorists who will eventually serve their sentence and come out of prison. Furthermore, the assumption of gravity that is built into such legislation might not necessarily be warranted:

General presumptions as to the gravity of FTF-related offences may not, however, be appropriate in light of the expanded reach of such offences and the fact that they sometimes also embrace minor forms of contribution without clear criminal intent. Furthermore, if the conduct in question is unconnected or very remote from eventual or planned terrorist

²⁵⁰ Regarding average sentences handed out for terror offences in various jurisdiction, see Thomas Renard And Rik Coolsaet (editors), *Returnees: Who Are They, Why Are They (Not) Coming Back And How Should We Deal With Them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands* (Egmont Paper 101, February 2018) (http://www.egmontinstitute.be/content/uploads/2018/02/egmont.papers.101_online_v1-3.pdf), 45; Amirault, Joanna/Bouchard, Martin (2015): “Timing is everything: The role of contextual and terrorism-specific factors in the sentencing outcomes of terrorist offenders”, *European Journal of Criminology* 14(3): 269-289; Centre d’analyse du terrorisme (CAT), *La Justice Pénale Face Au Djihadisme - Le Traitement Judiciaire Des Filières Syro-Irakiennes (2014-2017)* (<http://cat-int.org/wp-content/uploads/2018/05/Rapport-Justice-p%C3%A9nale-face-au-djihadisme.pdf>), 4 (finding that terrorists linked to the Syrian-Iraqi situation received an average sentence of 6 years and 6 months, and served on average 5 years and 2 months).

²⁵¹ Mara Redlich Revkin, ‘Iraq Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 58

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.⁶¹

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.

acts, heightened sentences may not be proportionate to the gravity of the offence. States must ensure that punishment is commensurate not only with the crime, but also with the individual's role in the crime.²⁵²

In order to ensure fair and adequate sentencing that accounts for all relevant circumstances, including the need for reintegration of those concerned, it is important that compulsory, minimum, sentences and exceedingly harsh sentencing regime be replaced by normative regimes that give judges the requisite discretion to determine a sentence that fits the crime and account for the fact that rehabilitation and reintegration of such individuals will ultimately need to be addressed.²⁵³ Relevant legislation would thus have to provide for that possibility.

Furthermore, there should be an expectation that the prosecuting authorities would fulfill their burden of proof in relation to any consideration that they regarded as aggravating. The *mere* fact of the offence being 'terroristic' in nature should not, without more, warrant and justify a lengthy sentence. Furthermore, individual risk-assessment should systematically be prepared for the benefit of the court in order for it to arrive at the appropriate sentence.²⁵⁴

²⁵² OSCE/ODIHR, Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework (2018) (<https://www.osce.org/odihr/393503?download=true>), 44.

²⁵³ See, in relation to Iraq, Mara Redlich Revkin, 'Iraq Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, The Limits of Punishment – Transitional Justice and Violent Extremism (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 61

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.⁷⁷ 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.⁷⁸ 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."⁷⁹ 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.⁸⁰ 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.⁸¹ However, the lack of publicly available data on terrorism trials makes it difficult to assess the prevalence of reduced sentences.

See also Berkell, K. (2017). Risk reduction in terrorism cases: sentencing and the post-conviction environment. *Journal for Deradicalization*(13), 276-341.

²⁵⁴ See also "Foreign Terrorist Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response, Fourth Eurojust Report, Summary of Main Findings", Eurojust, 19 April 2017, p. 5.

6.3.4.3.3 Detention regime

The detention regime in which a convict will be placed might determine his/her chances of rehabilitation and reintegration. It is essential in this as in other contexts that the regime should best contribute to the need and possibility of reintegration of those convicted of terrorist offences.²⁵⁵

²⁵⁵ See Thomas Renard And Rik Coolsaet (editors), *Returnees: Who Are They, Why Are They (Not) Coming Back And How Should We Deal With Them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands* (Egmont Paper 101, February 2018) (http://www.egmontinstitute.be/content/uploads/2018/02/egmont_papers.101_online_v1-3.pdf), 65ff (in relation to The Netherlands):

Suspects of terrorism crimes as well as convicted terrorists, including women and minors, are placed in the Terrorist Ward (TA), a high-security (supermax) detention centre. The Ministry of Justice has issued this policy, which is not without criticism, so the court, the prosecutor or the defence lawyer do not have a say in this decision. The main objective of this regime is to isolate these individuals from other inmates in order to prevent influencing and recruiting. The regime is very tough and very strict. The rights of the inmates are very limited; they spend 20 hours a day in their cell alone (in an ordinary prison this is 17,5 hours a day); they are physically searched after each visit; and visitors need to be screened. Defence councils in most cases argue their clients need to be released or otherwise transferred to a regular detention regime. However, the courts have so far upheld the policy of the Ministry of Justice, while deciding that the fact that the regime is very tough should be taken into consideration when they have to decide on a possible release (under conditions) of the suspect during the pre-trial detention. Meanwhile, the Terrorist Ward is introducing a diversification policy, allowing differentiation between, for instance, “leaders”, “followers” and “troublemakers” in order to place them under a more or less strict regime. Irrespective of the background of the individual (returnee or right-wing extremist) the strictness of the regime might be adjusted. While incarcerated, a team of caretakers has regular interaction with the inmates. This team includes spiritual leaders/scholars, psychologists and medical specialists. The imams working with the prisoners are civil servants. The objective is to disengage them from the violent aspect of their extremist ideology. So focus is on changing behaviour instead of thoughts, which would be the objective of deradicalisation programmes, as the latter is very difficult and hard to measure. After completing their sentence and upon release, the individual is handed over to the Probation Service. The Probation Service, however, might also fall back on the multistakeholder/multidisciplinary case deliberations system (‘veiligheidshuis-overleg’) that also plays a crucial role in the prevention policies implemented at the local level. This multistakeholder/multidisciplinary case deliberation, chaired by the mayor, has the objective of sharing as much information as possible within the limits of the mandates and confidentiality rules that apply, with the purpose of obtaining the most complete information possible regarding the state of mind of the individual, and the best assessment on what the possible impact of the variety of intervention measures available might be on them. The goal is to come to the most effective tailor-made approach for that individual. In addition to the stakeholders already mentioned, representatives of the municipality, the school, the probation services, the youth care, a representative of the mosque and mental health caretakers could also take part in this case deliberation. Another important actor is the Exit Facility, which was established in October 2015, and which has the objective to reintegrate the individual into society. The Exit Facility offers individuals that want to reject the jihadist ideology a voluntary programme based on a buddy system that offers coaching through intensive conversations. The focus of the reintegration programme is to assist in finding a house, work, and “healthy” social network. Mentoring programmes and psychological assistance remain available in this period. The Family Support network Radicalisation furthermore offers assistance to the family of radicalised individuals to help them cope with the situation and to offer guidance on the interaction the family has with the radicalised individual. This Family Support network Radicalisation also plays an important role in facilitating the reintegration into society of the radicalised individual.

See also Thomas Renard And Rik Coolsaet (editors), *Returnees: Who Are They, Why Are They (Not) Coming Back And How Should We Deal With Them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands* (Egmont Paper 101, February 2018) (http://www.egmontinstitute.be/content/uploads/201802/egmont_papers.101_online_v13-.pdf), 3031-:

6.3.5 Post-sentencing stage

6.3.5.1 General considerations

The *Tokyo* Rules envisage a number of post-sentencing dispositions to assist reintegration of offenders into society, which should be considered at the earliest possible stage, and should be subject to judicial review.²⁵⁶ Such dispositions, which are relevant to those convicted of terror offences, include work or education release, parole, remission and pardon.²⁵⁷ Decisions regarding early conditional release (parole) shall favourably take into account the caretaking responsibilities of women prisoners, as well as their specific social reintegration needs.²⁵⁸

As in many other countries, there has been debate about which penitentiary regime should be applied to so-called radicalised detainees. Options include regimes of isolation (solitary confinement), separation (grouping in dedicated units), or dispersal among the general prison population (“ordinary” regime). In Belgium, the preferred option for the detention of FTF and returnees remains the “ordinary” regime in one of the country’s 32 prisons, although such a regime is often complemented with individual security measures. Such measures can include more stringent searches of the detainee’s cell, more limitations in the detainee’s activities, visits and communications, as well as measures of confinement. It is, however, acknowledged that such measures, especially regarding inmates with minor sentences, carry the inherent risk of producing the opposite effect of that desired. The detention regime of returnees is decided by the penitentiary authorities based on a generic law of 2005 concerning the rights and duties of prisoners. The individual situation of radicalised detainees is evaluated at regular intervals, possibly leading to adjustments in the detention regime. Returnees and other detainees subject to radicalisation are mostly directed to the so-called “satellite prisons”, which offer better observation and monitoring capacity due to the training of their staff (there are five of them: Andenne, Lantin, Saint-Gilles, Bruges and Ghent). For the most challenging individuals, two additional options exist. If the FTF engages actively in proselytising or recruitment activities, and based on an individual screening performed by the federal penitentiary administration’s Cell Extremism (CelEx) jointly with the central psychosocial service (CPSDEX), he can be sent to one of the two so-called “D-Rad:Ex” units, separated from other inmates (in a regime of separation rather than isolation). The prisons of Hasselt and Ittre have 20 places available each in these specialised units. In spite of some political pressures to fill these units, only 22 places were used in January 2018. Finally, if an individual is considered a security threat to himself or for others, he can be detained at the highsecurity facility in Bruges (where Salah Abdeslam, Mohamed Abrini and Mehdi Nemmouche were or still are detained), possibly in solitary confinement.

²⁵⁶ The Tokyo Rules, rules 9.1- 9.4:

- 9.1 The competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society.
- 9.2 Post-sentencing dispositions may include: (a) Furlough and half-way houses; (b) Work or education release; (c) Various forms of parole; (d) Remission; (e) Pardon.
- 9.3 The decision on post-sentencing dispositions, except in the case of pardon, shall be subject to review by a judicial or other competent independent authority, upon application of the offender.
- 9.4 Any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage.

²⁵⁷ *Ibid.*, rule 9.2. See also, *infra*, dd/amnesties and pardons.

²⁵⁸ See, *infra*, dd/conditiona, and early release. See also The Bangkok Rules, rule 63; and UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 120.

6.3.5.2 Early and conditional release

The *Tokyo Rules* provide for a variety of post-sentencing dispositions which include these: (a) Furlough and half-way houses; (b) Work or education release; (c) Various forms of parole; (d) Remission; (e) Pardon.²⁵⁹

Most important in the present context is the possibility of early release, in particular where a detained convicted person has shown signs of reform and rehabilitation, and conditional release where a detainee is released early albeit under certain conditions.²⁶⁰

In the present context, this might involve monitoring, reporting obligations or counselling obligations, limited access to internet or certain locations or people (such as de-radicalisation program).²⁶¹

The conditional nature of these measures would enable the authorities to keep a degree of control – compatible with relevant human rights standards – once a convicted terrorist goes out of prison.²⁶²

²⁵⁹ Tokyo Rules, art 9.2.

²⁶⁰ Human Rights Committee, General Comment No 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, para 20. For an illustration of its effective use, see: J. Horgan and K. Braddock, ‘Rehabilitating the Terrorists?: Challenges in Assessing the Effectiveness of De-radicalization Programs’, *Terrorism and Political Violence*, 22:267–291, 2010, 271 (footnote omitted):

Generally, it is understood that the Early Release Scheme, despite some setbacks, played a pivotal and successful role in bringing peace to Northern Ireland. Former Northern Irish Secretary of State Peter Mandelson conceded that some ex-prisoners would be guilty of wrongdoing, but defended the Early Release Scheme against being represented as a failure on the basis of recidivism. He claimed that ex-prisoners were generally supportive of the peace process and have “overwhelmingly” avoided re-offending. This claim was reiterated, and the argument followed that a) recidivism among released terrorists had been low, and b) that among those that have benefited from the Good Friday Agreement, recidivism was virtually “negligible.”

²⁶¹ C. Jones, ‘Managing extremist offenders: The TACT-ics of policing thought?’, *Probation Journal – The Journal of Community and Criminal Justice*, 2015, 1, 7-8. See also J. Morton and M. D. Silber, *When Terrorists Come Home - The Need for Rehabilitating and Reintegrating America’s Convicted Jihadists* (https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf), 32-33.

²⁶² For a domestic illustration, see Cameron Sumpter, Yuslikha K. Wardhani & Sapto Priyanto (2019): *Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society*, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2018.1560666, p. 4-5:

When prisoners convicted of terrorism charges reenter society in the United Kingdom, a risk management tool called Multi-Agency Public Protection Arrangements (MAPPAs) is used to prevent recidivism. Initially designed for sexual and violent offenders, MAPPAs are now employed to handle terrorist prisoners, with additional restrictions such as limiting the use of communications technology, prohibitions on contact with certain persons and organizations, and the attendance of only pre-approved places of worship.²⁹ According to Benedict Wilkinson, MAAPAs have been “reasonably successful in preventing serious recidivism among terrorism offenders” in the United Kingdom, but have not been conducted in conjunction with disengagement efforts.³⁰

Dutch authorities have also implemented constraints on former extremist inmates, particularly regarding access to financial services and insurance. Several respondents in Weggemans and De Graaf’s study regarded these sanctions to be “a major, if not the biggest obstacle to reintegration,” as they compel dependence on others and impede the possibility of normalcy.³¹ While most governments will take a safety first approach to confronting threats of terrorism, focusing solely on the stringent risk management of former prisoners may fail to address personal issues critical to successful transitions. In order to strike the right balance between the social services and autonomy required for individual reform on one hand and ensuring public safety and security on the other, risk assessments should ideally be conducted regularly from remand to release, with evaluative input from varied perspectives, from social to security, and state to civil society.

6.3.5.3 Amnesties and pardons

6.3.5.3.1 General considerations

The granting of amnesties and pardons for terrorists or suspected terrorists could help the process of their reintegration and, at the same time, facilitate a peaceful return to democracy.²⁶³ At the same time, such measures contain an element of impunity or lack of accountability that is likely to be rejected by some. In particular, victims might not see positively measures that appear to have little concern for the need for retribution. The balance between these considerations is therefore always and necessarily a hard one to find.

6.3.5.3.2 Amnesties

Amnesties have been considered on a number of occasions as alternatives to prosecutions. The United Nations has taken the general position that such amnesties could not apply to international crimes – genocide, crimes against humanity and war crimes. State practice suggests a slightly more nuanced and qualified reality.²⁶⁴ In any case, international law does not appear to prohibit amnesties where the underlying act constitute or is alleged to constitute a terrorist offence.²⁶⁵ In other words, amnesties

See also Benedict Wilkinson, “Terrorism-Related Offenders on Licence in the UK,” in Andrew Silke, ed., *Prisons, Terrorism and Extremism: Critical Issues in Management, Radicalisation and Reform* (Oxon: Routledge, 2014), 262–263; and France, Prime Minister, *PLAN D’ACTION CONTRE LE TERRORISME* (13 July 2018), 21, Action 7:

Action 7 : Renforcer le contrôle judiciaire. Le respect des obligations et interdictions qui pèsent sur les personnes mises en examen pour des faits de terrorisme et placées sous contrôle judiciaire ou assignées à résidence sous surveillance électronique (ARSE) revêt une importance majeure. Le non-respect de ce type de contrôle nécessite une réponse judiciaire systématique. Un groupe de travail associant des représentants des juridictions, du ministère de la justice et du ministère de l’intérieur est chargé d’identifier et de proposer les voies d’amélioration des circuits de diffusion et d’échange de l’information, avec une modernisation des fichiers de suivi existants. Ces préconisations feront l’objet d’une instruction interministérielle en septembre. Il conviendra, par ailleurs, d’identifier les conditions d’un recours plus fréquent à l’assignation à résidence sous surveillance électronique mobile (ARSEM).

²⁶³ See, e.g., J. Horgan and K. Braddock, ‘Rehabilitating the Terrorists?: Challenges in Assessing the Effectiveness of Deradicalization Programs’, *Terrorism and Political Violence*, 22:267–291, 2010, 271

Demobilization at both the individual and group level in Colombia has been greatly facilitated by the application of Law 418 (1997) and its amendment, Law 782 (2002).³⁰ Generally, these laws assert that individuals who were involved with armed groups may be eligible to receive amnesty for their “political crimes.” Law 418 states, however, that those who partake in “atrocious acts of ferocity or barbarity, terrorism, kidnapping, genocide, homicide committed outside of combat or putting the victim in a state of defenselessness” are not eligible to receive a pardon. I

See also Human Rights Watch, “Smoke and Mirrors: Colombia’s Demobilization of Paramilitary Groups,” Human Rights Watch, (<http://www.hrw.org/en/reports/2005/07/31/smokeand-mirrors?print>).

²⁶⁴ See, generally, Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (University of Ulster 2013); and Louise Mallinder, ‘Amnesties’ in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011), 419–34.

²⁶⁵ See also ICRC Customary Law Study, Rule 159. See also S. Krähenmann, “The Obligations under International Law of the Foreign Fighter’s State of Nationality or Habitual Residence, State of Transit and State of Destination” in FFILB, pp. 229-258.

covering terrorist acts are not prohibited by international law and could therefore be provided under relevant domestic law.

This does not mean that states are free to grant such amnesties irrespective of international law. Firstly, states have obligations under international law to investigate and prosecute certain categories of human rights violations, in particular where they involve an interference with the right to life or the prohibition against torture and other inhuman treatment. Secondly, victims too have rights – including a right to truth; a right to reparation and access to justice – which states must account for when deciding how to approach cases of serious violations of human rights. And a number of treaties and resolutions of the Security Council resolutions impose obligations to investigate and prosecute certain types of terrorist offences.

Furthermore, an amnesty should not be an end in itself. Instead, because they constitute an exception to the normal and general application of the law (and create a gap of accountability), they must be tailored to serve one or more important public purposes: either they should help society move on from a situation of armed conflict or extreme violence; and/or help the process of reintegration of those involved in associated acts of violence.²⁶⁶ Slye and Freeman say the following in that regard:

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.²⁶⁷

²⁶⁶ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 25

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

²⁶⁷ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 5.

[...]

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 kidnapers, 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.²⁶⁸

Well-crafted amnesties could also constitute a particularly important incentive for individuals to decide to leave a terrorist organisation. This was said, for instance, to have been the case with quite a number of members of Al-Shabab in Somalia,²⁶⁹ as well as members of ISIS in Syria.²⁷⁰ An amnesty adopted in Uganda was similarly said to

²⁶⁸ Ibid, 11.

²⁶⁹ See, e.g., J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 17

More than two-thirds of the respondents claimed that amnesty proclamations by successive Somali presidents substantially motivated their decision to exit (see Box 3). Box 3: Amnesty Proclamations Current efforts to rehabilitate voluntarily disengaged members of Al-Shabaab within the National Programme framework rest upon the amnesty proclaimed by then newly sworn-in President Mohamed in April 2017, the most recent of a string of such appeals announced by the FGS. Yet, such declarations are unclear in terms of scope, and at the time of writing have only been verbally communicated by the Office of the President, rather than precisely defined within Somali policy and legal frameworks. The informal nature of these amnesty proclamations is problematic, at the very least as a lack of precise details creates difficulties in communicating both the eligibility criteria and the entitlements associated with this process to potential defectors, security-force actors, and other relevant stakeholders. Indeed, expectation management has been a challenge at Serendi for this precise reason, with certain beneficiaries assuming they would be entitled to continued education and employment post-exit. At the time of writing, RST advisors are supporting the FGS in advocating for and drafting an amnesty policy and legal framework. Source: The authors, 2018.

²⁷⁰ International Center for the Study of Radicalisation (ICSR), *Reintegrating ISIS Supporters in Syria: Efforts, Priorities and Challenges* (2018) (<https://icsr.info/wp-content/uploads/2018/08/ICSR-Report-Reintegrating-ISIS-Supporters-in-Syria-Efforts-Priorities-and-Challenges.pdf>), 19-20

In an unusual statement, one of the SDF officials confirmed that they gave amnesty to some ISIS members who switched allegiances while they were still with ISIS. As a result of their cooperation with the SDF to defeat ISIS, those members were released immediately, without being questioned about the crimes they committed.⁷³

have significantly eroded the ranks of the Lord Resistance Army.

Amnesties are not, however, innocuous and they raise serious legal and more issues: they might create the appearance of crime being rewarded; they might be perceived as unfair from the point of view of victims; they might undermine the public trust and confidence in the legal and judicial system; unless reintegration of the beneficiaries is accompanied by necessary social and political measures, they might fail to serve their purpose of reconciliation and reintegration; they undermine to a degree the principles of retribution and deterrence.²⁷¹

To be effective instrument of peace, reconciliation and reintegration, amnesties must therefore be tailored very carefully. First, their purpose or purposes must be clearly laid out.²⁷² They should not simply be a way to empty prisons, but should serve the interests

²⁷¹ See also UNODC, Handbook on strategies to reduce overcrowding in prisons (CRIMINAL JUSTICE HANDBOOK SERIES, 2013) (https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf), pp. 60-61. See also Vanda Felbab-Brown, 'Nigeria Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, The Limits of Punishment – Transitional Justice and Violent Extremism (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 100

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.⁸⁸ 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.⁸⁹ 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."⁹⁰ 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'."⁹¹ 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.⁹² Many Christian groups also expressed doubts and rejections of an amnesty as ignoring victims' rights and needs, and encouraging impunity.⁹³ Some even called it "an act of wickedness."⁹⁴ The abduction of the Chibok girls also hardened some opposition to amnesty.⁹⁵ 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.⁹⁶

²⁷² Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), pp 36ff:

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.

of the community. They should be conditioned to the need of the would-be beneficiary contributing something in return (truth; reparation; amend; or a combination thereof). They should not be perceived as a free ticket out of jail, but should instead form part of a broader effort of truth-seeking and record making. For them to be useful for that purpose, relevant affected communities should be given an opportunity to discuss their use and to be heard in relation to any concern they might have in their regard.

Secondly, the most effective types of amnesties have systematically been those that are *conditional*, i.e., those that come ‘in exchange’ of the beneficiary having fulfilled certain conditions.²⁷³ This can consist in his/her participation in a truth mechanism; in efforts of reconciliation; in voluntary involvement in disengagement or educational processes; etc. In all cases, the conditions that must be met to be eligible for an amnesty

²⁷³ See, again, Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), pp 36ff

B. Amnesty

[...]

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.

must be clear and transparent and applied in a credible and consistent manner.²⁷⁴ A credible oversight mechanism is generally necessary for that purpose. The vetting process of Boko Haram fighters was criticised, for instance, for lacking in transparency and clarity.²⁷⁵ Careful consideration should be given to the question of who should be in charge of such a process and what powers they should be given to enforce it fairly and consistently.

²⁷⁴ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), pp 36ff

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.

²⁷⁵ See, generally, B. Bukarti, *Making Peace With Enemies: Nigeria's Reintegration Of Boko Haram Fighters* (27 MARCH 2019) ([HTTPS://WARONTEROCKS.COM/2019/03/MAKING-PEACE-WITH-ENEMIES-NIGERIAS-REINTEGRATION-OF-BOKO-HARAM-FIGHTERS/](https://warontherocks.com/2019/03/making-peace-with-enemies-nigerias-reintegration-of-boko-haram-fighters/)); and Vanda Felbab-Brown, 'Nigeria Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83; J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf).

Third, strict sanctions should be provided for and enforced against those disregarding the conditions set by the terms of the amnesty. Amnesties are exceptions to punishment, which could be harsh and involve many years in jail. The conditions set an amnesty should therefore reflect the seriousness of the exception that is made to the full-force of the law and the gravity of the crime(s) being amnestied. Those who fail to abide by their conditions (which should not be overly technical or overly onerous) should be promptly dealt with and, where necessary, brought to justice. This also means that benefits should come after and upon the fulfillment of the conditions set by the amnesty. Benefits and advantages given prior to the fulfillment of any of these conditions or prior to any demonstration of commitment to a peaceful return to peace should only be provided after the most careful of evaluation. Adequate supervision and monitoring of the conditions of amnesties should be built into any regime providing for the possibility of amnesties. A degree of judicial oversight over such a process as well as some involvement of relevant local communities are likely to bring credibility to the process.²⁷⁶

Fourth, as noted above, criteria for eligibility must be clearly drawn up and be carefully policed. Among the factors of potential relevance to the possibility of gaining an amnesty, the following should be regarded as important considerations: i) voluntary involvement in a truth-seeking mechanism; ii) recognition of responsibility for any crime committed; iii) voluntary involvement in a deradicalization/disengagement

²⁷⁶ Under the Colombian Justice and Peace process, the possibility and granting of an amnesty is subject to judicial review. Regarding the involvement of local communities, see for an illustration International Center for the Study of Radicalisation (ICSR), *Reintegrating ISIS Supporters in Syria: Efforts, Priorities and Challenges* (2018) (<https://icsr.info/wp-content/uploads/2018/08/ICSR-Report-Reintegrating-ISIS-Supporters-in-Syria-Efforts-Priorities-and-Challenges.pdf>), 20-21

The involvement of local communities in such amnesty deals is not only limited to reintegration, but also includes the vetting process that determines who is and is not guilty. Since the SDF and its affiliated security agencies are not familiar with the Arab-majority areas, such as Raqqa, they depend mainly on locals to vet the local population and identify potential threats.⁷⁸ This vetting process is done on two different levels. The first is on the community-level through security committees [lijan amnia], which include different security agencies, local notables, and other officials. The role of local notables inside such security committees is limited to vouching that their fellow community members are not affiliated with ISIS. This process of social surveillance usually takes place when a new area is captured by the SDF or before internally displaced people are allowed to go back to their areas. Similarly, local notables are sometimes able to free some detained locals who are suspected of having ties with ISIS.⁷⁹ The second is on the individual level through a network of local informants who share intelligence on whether individuals had worked with ISIS, and to what extent. Depending on the credibility of sources to verify the extent of people's affiliation with ISIS, the process is sped up so the chance of having innocent people caught in anti-ISIS efforts is limited. This process can also help lift some of the burden off local authorities to allow them to focus on dealing with confirmed ISIS members.⁸⁰ However, the relatively unstructured and random nature of this vetting process—which often relies on anyone who is willing to cooperate, without paying much attention to the intentions behind such a decision—is extremely prone to abuse. People could easily use such structures to pursue grudges and vendettas, which may dissuade refugees from returning to former ISIS areas and triggering revenge attacks, given the high level of personal grievances among locals.⁸¹ The seeming ease with which the vetting process facilitates personal acts of retribution could also undermine the legitimacy of any local authority attempting to exert control and enforce stability.⁸²

process; iv) voluntary engagement with victims' groups; and v) nature of the crimes in which the individual was involved and nature of his involvement/contribution to the crime(s).

Fifth, communication or 'outreach' will generally be essential to ensuring that amnesties serve their communal and reconciliatory function. Communities affected by terrorist violence will not normally welcome the idea of perpetrators of atrocities and violence 'getting off' or receiving less than a stiff punishment.²⁷⁷ Absent an open and public discussion of amnesties, their use could end up being blocked by popular or political

²⁷⁷ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 37:

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.

opposition as was the case in Iraq.²⁷⁸ It is therefore essential that local communities and victims groups should be involved in the process of drawing up and applying amnesty schemes. The nature and degree of this involvement might vary from one case to another but it must in every case be credible and effective in allowing them to voice their concerns and expectations. Also important is the delivery of the amnesty, in the sense that it should not merely be perceived as perpetrators having been bought-off by the government.²⁷⁹

²⁷⁸ See Mara Redlich Revkin, 'Iraq Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 64-65

Until recently, Iraq had a General Amnesty Law (No. 272016/) 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.¹⁰⁷ 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.¹⁰⁸ 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).¹⁰⁹ Even without this provision, reports of prisoners – including convicted IS members – paying bribes to get out of prison are rampant.¹¹⁰ 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 2017,¹¹¹ 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.¹¹² 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.¹¹³ 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.”¹¹⁴ 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).¹¹⁵ 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.¹¹⁶ 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.”¹¹⁷ 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.¹¹⁸ 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.

²⁷⁹ Vanda Felbab-Brown, 'Nigeria Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 86-87

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

Amnesties are particularly well suited to the transitional justice context where they can serve as rewards and incentive for participation in truth-seeking and reconciliation mechanisms. Demanding participation of beneficiaries of an amnesty in such a process is a way to counter-balance the effect that the absence of prosecution might have on victims.²⁸⁰ The structure and procedure put in place in Colombia under the *Justice and Peace* framework provides inspiration for such a course.²⁸¹

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.

And, *ibid*, 98ff.

²⁸⁰ J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf).

²⁸¹ REF. See also REF:

The new regulatory framework contemplates a differentiated regime of sanctions as follows:

Sanctions of the JEP: for those who recognize truth and exhaustive, detailed and full responsibility early (before the Recognition Chamber), regarding certain very serious infractions, they will have an effective restriction of freedom and rights, such as freedom of residence and movement necessary for its execution, lasting between 5 and 8 years. These sanctions have restorative and restorative content and must guarantee non-repetition. (Statutory Law, Article 126)

The JEP (Court of First Instance Recognition Section) will determine the conditions of effective restriction of liberty that are necessary to ensure compliance with the sanction, conditions that in no case will be understood as jail or prison or adoption of equivalent assurance measures. To this end, suitable monitoring and supervision mechanisms must be in place to ensure compliance in good faith with the restrictions ordered by the Court, so that it is in a condition to timely monitor compliance, and certify if it was complied with. (Statutory Law, Art. 127).

Alternative sanctions: for those who recognize truth and responsibility late, before sentencing (before the Prosecution Section), with respect to very serious infractions, they will have a custodial sentence between 5 and 8 years, which must be complied with in the regime of ordinary seclusion. These sanctions have an essentially retributive function. (Statutory Law, Article 128).

Ordinary sanctions: for those who do not recognize truth and responsibility, and are found guilty by the Court, in respect of very serious infractions, they will have a prison sentence between 15 and 20 years, which must be complied with in the ordinary seclusion regime. These sanctions will fulfill the functions foreseen in the penal norms, notwithstanding that they obtain redemptions in the deprivation of liberty due to resocialization through work, training or study. (Statutory Law, Art. 130)

Sanctions of less than five years: the regulations also provide for the imposition of own and alternative sanctions of less than five years for those who have not had a decisive participation in the most serious and representative behaviors, even intervening in them. These sanctions will have a minimum duration of two years and a maximum of five years. (Statutory Law, Art. 129).

Prison for State agents: with respect to the execution of sanctions of State agents, it is established that the prison jurisdiction will be applied subject to the system's own monitoring. Thus, alternative and ordinary sanctions for members of the Public Force will be carried out in their own detention facilities, subject to the surveillance and monitoring mechanism provided for them. (Statutory Law, Art. 131)

See also IACHR 2016, http://www.oas.org/en/iachr/media_center/PReleases/2016/178.asp [Accessed 10 September 2018]. See also UN Chief Welcomes New Peace Deal between Colombian Government and FARC-EP, UN News 2016, <http://www.un.org/apps/news/story.asp?NewsID=55643#.WfGc2iOLSt9> [Accessed 10 September 2018].

The effectiveness of the carrot (i.e., the amnesty) will only ever be as useful as the stick (prosecution) is and remains credible.²⁸² Therefore, those who do not come within the scope of the amnesty or does who have failed to abide by its terms should be fully and effectively prosecuted where there is evidence of their involvement in the commission of a terrorist offence.

6.3.5.3.3 Pardons

Pardons come after a conviction has been entered. Depending on the country, they may come from various authorities or just one (e.g., the country's President). The law will generally provide for certain limitations or conditions to that possibility (regarding, for instance, the category of crimes to which it could apply or conditions under which it could be granted). This is, in effect, an act of political mercy, which could prove of some value in the present context insofar as it demonstrate the authorities' willingness to contribute to a peaceful return of terrorists to society.²⁸³

7. NON-JUDICIAL ALTERNATIVES

7.1 General considerations

In addition to those alternatives to detention that can be built into the existing judicial system, alternatives also exist outside of it. In particular, there has been an increasing use of rehabilitation, de-radicalisation and disengagement mechanisms in relation to suspected terrorists. These do not have a pre-set structure or procedure. They are adapted to the needs and capacities of the states concerned.

These non-judicial mechanisms have a number of benefits compared to the more traditional judicial (prosecution+detention) response to crimes. First, they are generally less costly and time-consuming than more traditional means of delivering justice. This would be a particularly relevant consideration for states with limited resources. Second, this sort of mechanism can focus more on society, community concerns and victims than on the accused as is typically the case in criminal trial. This allows the process to have a broader scope than would typically be the case in a criminal law context. Third,

²⁸² See, again, Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), pp 36ff

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.

²⁸³ See, generally, UNODC, *Handbook on strategies to reduce overcrowding in prisons* (2010), 58-59.

they can look at violent events with a broader lens, considering not just the question of the responsibility of the accused, but broader causes and circumstances that might be relevant to addressing certain grievances and understanding the use by some of extreme violence (including terrorism). They are an opportunity for truth seeking and public discussion and avoid the risk of re-traumatisation often involved in criminal trials. Such mechanisms could also be combined with (conditional) amnesties, which would create an incentive for perpetrators of crimes to participate and contribute to the process in exchange for a full or partial amnesty for their crimes.

Such mechanisms also have their drawbacks too. First, it is hard to assess their true effectiveness and the data on that point is known to be generally unreliable.²⁸⁴ Secondly, victims might find the compromise involved (in terms of retribution) to be unappealing. For that reason, it will be important that victims be engaged in any discussion regarding the possibility of creating such mechanisms, in their design, and in their implementation so that they (and relevant communities) participate in them and find benefits in them. Third, their success and effectiveness might depend on the good will of certain communities that have little or no interest in participating so that they might end up achieving little. In order to guarantee their effectiveness, a combination of carrot (e.g., amnesties) and stick (e.g., the threat of prosecution or a higher sentencing regime) might need to be built into such mechanisms.

All such mechanisms are highly context specific so that care should be exercised in drawing lessons from one situation for the purpose of another. These are instead to be understood as part of a tool-kit that should be fitted onto and tailored to the circumstances of the case in question. In other words, what has worked in one context might not necessarily work in another. And any discussion regarding alternatives to detention for individuals convicted or suspected of committing serious crimes (including terrorism) should take into account the specificities of the country and communities concerned.

It should be pointed out, furthermore, that the use of non-traditional judicial mechanisms does not exclude the use in parallel or, in addition, of the more traditional judicial

²⁸⁴ See, e.g., J. Morton and M. D. Silber, *When Terrorists Come Home - The Need for Rehabilitating and Reintegrating America's Convicted Jihadists* (https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf), p 12; John Horgan and Kurt Braddock. 2010. Rehabilitating the terrorists? Challenges in assessing the effectiveness of de-radicalization programs. *Terrorism and Political Violence* 22 (2): 267-291. Available at: <https://goo.gl/D4J1f5>; and <https://crestresearch.ac.uk/comment/marsden-reintegrating-extremists-deradicalisation-and-desistance/>.

means.²⁸⁵ Instead, the two can be very well combined either as incentives to one another or as alternatives depending on a range of factor (e.g., gravity of the crime; role and position of the accused; etc). Consideration should therefore also be given to the best possible way to combine their respective advantages and strengths. Amnesties, for instance, can constitute a way to make non-judicial mechanisms more attractive and more effective in delivering justice, some form of accountability and truth without the need of relying upon the full force of the law. Furthermore, the approach should be holistic in nature, trying to combined the various elements of justice, accountability, disengagement and all that would as a whole serve the overall purpose of peaceful reintegration into society.²⁸⁶

Finally, when looking at possibilities of non-judicial alternatives to prosecution/detention, one should account for the fact that anything less than the harshest of treatment is likely to be considered by parts of the population as unjustified and unacceptable.²⁸⁷ Addressing such concerns will require much pedagogical and outreach investment on the part of the authorities to explain the reasons for such a course of action.

²⁸⁵ See also Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 31-32:

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.

²⁸⁶ See also Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 4

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.

²⁸⁷ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 31

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.

Some – but by all means not all – non-judicial mechanisms that have been used in relation to (suspected) terrorists will be considered here.

7.2 Traditional justice mechanisms

One type of non-judicial mechanism used in the context of both terrorism and international crimes are so-called traditional justice, i.e., justice mechanisms that rely on local traditions and customs rather than on the judicial system built into the state apparatus. In Rwanda, for instance, recourse was had to so-called ‘Gacaca’ courts, traditional means of delivering justice at local level, to deal with a large number of *génocidaires*.²⁸⁸ In East Timor, a truth commission was set up to oversee local reconciliation procedures that addressed cases involving less serious crimes (those being addressed by more standardized means of justice).²⁸⁹ Tribal justice mechanisms

²⁸⁸ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 13

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.

See also http://users.soc.umn.edu/~uggen/NysethBrehm_Uggen_Gasanabo_JCCJ_14.pdf

Under Gacaca, communities elected local judges to hear genocide cases against suspects in their area. Those accused of planning genocide were tried either in national and international courts. Lesser sentences were often given to convicts who showed remorse, while those who confessed often went home without further penalty or got community service orders. This gave victims the opportunity to learn the truth about the deaths of their family members and relatives and to forgive those who had shown genuine signs of remorse and sought mercy and reconciliation.

²⁸⁹ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 13:

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.

were also relied upon in Iraq, including in relation to acts of terrorism.²⁹⁰ And customary

²⁹⁰ Mara Redlich Revkin, 'Iraq Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 67:

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 1921.¹⁴⁰ Estimates of the percentage of Iraqis who identify with one of the country's approximately 150 tribes range from 75 to 100 percent.¹⁴² 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.¹⁴³ 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.¹⁴⁴ 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."¹⁴⁵ 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.¹⁴⁶ 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."¹⁴⁷ 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.¹⁴⁸

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.

[...]

Additionally, some Iraqis fear that tribal governance has the potential to undermine the constitutional principle of equal rights among Iraqi citizens.¹⁵³

[...]

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."¹⁶⁰ 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").¹⁶¹ 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.¹⁶²

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.

justice xeer councils were used in Somalia in relation to former al Shabaab defectors.²⁹¹

This sort of justice has practical advantages. It is close to the local communities and mindful of its concerns and priorities. It is generally much less demanding of resources and can address large number of cases at a fraction of the cost and time. It is also less technical and time-consuming than a criminal trial. On the other hand, they sometimes fall short of basic due process. They can be difficult to apprehend and could be regarded as unfair if assessed against generally accepted due process minima. There might also be issues of equality of treatment if some categories of individuals are processed through such mechanisms while others are put through regular trials for essentially the same type of acts. Therefore, at the very least, there should be clear guidance as to the sort

²⁹¹ Vanda Felbab-Brown, 'Somalia Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 126, 153:

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.¹¹³ 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.¹¹⁴

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.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ 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.

of cases that would be relevant to such mechanisms and basic due process safeguard similar to or equivalent to those required by international human rights law.

7.3 Internment, rehabilitation, de-radicalisation and disengagement programs

7.3.1 General considerations

A variety of non-judicial alternatives to the prosecution-detention equation have been tried in relation to terrorists or suspected terrorists. They come under different labels and have slightly different aims: internment; rehabilitation; de-radicalisation; and disengagement, to name a few. They can be distinguished both in regards to their aim (change the mind *vs* change the attitude; contain *vs* reintegrate), their methods and means, as well as in relation to the resources they rely upon. But all of them ultimately seek to bring back terrorists (or suspected terrorists) into the civic fold and to ensure that they renounce the use of violence though not necessarily all of their radical beliefs. The differences between them is often a matter of degree rather than substance and they should be considered not as hermetically closed notions, but as tools that can be combined and adapted to the peculiarities of a situation.

A lot of factors are conditions relevant to each and all of these mechanisms and these will be considered first before considering the various categories of non-judicial alternatives to prosecution-detention mentioned above.

7.3.2 Overarching factors

7.3.2.1 Family

A critical factor in the possibility of terrorists disengaging from terrorist activities is the possibility for them to create or re-create a family and social network that enables them to move away from and stay away from the draw of fundamentalist ideologies or groups. A contrario, taking them away from their communities, homes and families

could prove counter-productive to the process of rehabilitation and reintegration.²⁹²

Reconnecting with family might help the process of disengagement and deradicalisation, if the family milieu did not of course contribute such radicalization in the first place.²⁹³ Helping the family of (suspected) terrorists would also help create or strengthen their bond to the state instead of alternative support mechanisms linked to terror organisations.²⁹⁴ Assisting with the process of re-integration is therefore an important element of any such effort. In the Malaysian context, Ahmad Zahid Hamidi has noted the following in this respect:

An important aspect of the deradicalisation programme is the emphasis on the welfare of the detainees and their families. In most cases, the detainees are the bread winners of the family, and their detention would certainly affect the livelihood of their families. Through RMP, the government has ensured that assistance is extended to the families involved to ease

²⁹² See, e.g., M. Crowell, What Went Wrong With France’s Deradicalization Program?, The Atlantic, 28 September 2017:

The French deradicalization model was also unlike any other. Germany, Britain, and Belgium have developed programs that focus on further integrating radicals into their community. Saudi Arabia, on the other hand, focuses on finding jobs and wives for recruited jihadists. But in France, the idea was to take subjects *away* from their home environments.

[...]

Esther Benbassa, a French senator of Val-de-Marne, told me the French program was a “total fiasco.” The problem, she explained, was not the government’s method but the model from the outset. “It’s a stupid idea to take young people from their homes. The problem is you need to re-socialize these people, not make them a bourgeois model.”

“Several errors were made,” Amelie Boukhobza, a clinical psychologist for Entr’Autres, an association that manages the state’s deradicalization cases, told me. “The issue of volunteering was very problematic.” But to Boukhobza, the “full-frontal” approach of “flag raising in the morning, courses in secularism, etc.,” was too aggressively nationalistic. “They’ve built a program in total opposition to the particular mental universe of the individuals. I don’t think it’s the right solution. Rather, they should propose not a counter-truth but something that can coexist.”

²⁹³ See, e.g., Adrian Cherney (2018): *The Release and Community Supervision of Radicalised Offenders: Issues and Challenges that Can Influence Reintegration, Terrorism and Political Violence*, DOI: 10.1080/09546553.2018.1530661, 3 (footnotes omitted):

These challenges include the need to reconnect offenders with their families, who can help in the process of reintegration. However, family members themselves may be struggling with the fact that they have had a son or daughter charged with a terrorist act and hence can face their own sense of stigma and social isolation. For these reasons, families in some cases may have limited capacity to assist in the process of reintegration

See also Daan Weggemans and Beatrice de Graaf, *Reintegrating Jihadist Extremist Detainees: Helping Extremist Offenders Back Into Society* (London, UK: Taylor & Francis, 2017); Surinder Guru, “Under Siege: Families of Counter-Terrorism,” *British Journal of Social Work* 42, no. 6 (2012): 1151–73; Cameron Sumpter, Yuslikha K. Wardhani & Sapto Priyanto (2019): *Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society*, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2018.1560666, p. 12-14;

²⁹⁴ S. V. Mardsen, *Reintegrating Extremists – Deradicalisation and Desistance* (Palgrave Pivot, 2017), 15

On a practical level, support for families of detainees replaces individuals’ or their family’s reliance on militant non-state actors, reducing the possibility they will return to them for support. It also aims to develop an alternative set of allegiances, redirecting existing commitments towards the state and away from militant networks. In this way, state support for families reflects a wider effort to integrate the entire family into a more mainstream set of social structures through material incentives.

their burden. This has proven to be one of the vital factors that have contributed to the success of the deradicalisation initiatives. Besides that, other interposing factors include effective engagement between the programme officers and the detainees and their family members. Professional and methodical approach is employed in counselling the radicals in order to reverse their misconstrued ideologies, and these sessions are conducted by capable and selected religious clerics.²⁹⁵

Addressing the issue of the financial and social needs of the family environment in which the individual concerned would be expected to be reintegrated is therefore essential. Saudi Arabia's disengagement programs thus focuses strongly on the need to create a solid social and financial basis on which the process of de-radicalisation can

²⁹⁵ Ahmad Zahid Hamidi, 'Malaysia's Policy On Counter Terrorism And Deradicalisation Strategy', *Journal of Public Security and Safety* Vol. 6 No. 2/2016, 13; and J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 18

While familial obligations provide a key individual incentive, family members themselves also often act as important enabling factors. For instance, one Serendi resident reported that his parents transported him on a one-way journey away from Al-Shabaab territory to receive treatment for a serious battle injury. The organisation was initially reluctant to authorise his departure, but eventually recognised his need for adequate care, and that he was in any case incapacitated. A former member of the Al-Shabaab police similarly claimed that his mother essentially berated his superiors over the course of several days until they granted his release. However, many others simply fled without familial assistance, including a former member of the military wing who walked for three days with the organisation in immediate pursuit before locating government forces to which he could surrender. An individual consulted in November 2017 also reported disengaging while on a reconnaissance mission with a comrade. He added that he attempted to encourage this comrade to also leave the group, but that this effort was unsuccessful, and that he thus saw no option other than to kill the comrade to give himself adequate time to escape before Al-Shabaab noticed his absence.

occur.²⁹⁶ Similar priorities have been identified in the Somali context.²⁹⁷

Counselling of family members could also help the process of return to normality and contribute to creating an environment conducive to positive changes for the individual

²⁹⁶ C. Boucek, “Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare,” Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 15

The attention given to a detainee’s social needs is also a critical element, not only of the counseling program, but also throughout many of the kingdom’s soft counterterrorism programs. The Psychological and Social Subcommittee evaluates each participant to determine how the Advisory Committee can best assist him and his family. For instance, when a breadwinner is incarcerated, the committee provides the family with an alternate salary. This amount of the replacement income varies on a case-by-case basis. Other needs, including children’s schooling and family health care, are also provided and facilitated. This aid is intended to offset any hardship and further radicalization brought on by the arrest and detention of family members. The government recognizes that if it fails to provide this support, it is very possible that extremist elements will move in and do so. Focusing on the social needs of a detainee’s family is not restricted to participants in the counseling program

And, *ibid*, 20:

The success of the program is further secured by the Advisory Committee’s involvement of a prisoner’s larger family network. The Ministry of Interior extends social support programs to the family and tribe, and thus marshals its support in keeping the detainee on the right path upon his release. The connection is not subtle; the ministry makes it known that it will hold the extended family responsible if a released detainee commits new offenses. According to interviews, the government uses the threat of withholding access to collective benefits, such as jobs or social advancement, to obtain a commitment from a detainee’s larger social network that he will stay out of trouble.

²⁹⁷ See, generally, J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 16

The category of individual incentives is again interpreted as referring to economic, security-related and psychosocial enticements that are contingent on specific actions – in this case disengagement. Economic motives were again prominent, with slightly over half of the respondents claiming that they were driven to leave Al-Shabaab partly because their income was inadequate. Put simply, their salaries often did not meet the expectations held at the point of enlistment, and these respondents felt that they could earn more outside the group.³³ However, a sense of familial obligation was perhaps the most important driver of disengagement, with a substantial majority of the respondents highlighting its relevance. In specific cases this manifested as families threatening to disown respondents, or alternatively promising to identify wives for them if they disengaged. A substantial number of respondents also highlighted a desire for improved living conditions. Many former members of the military wing claimed that they slept on plastic sheets while in the bush, with some formerly in the police unit asserting that they slept at their checkpoints (although others resided at home). It was also regularly maintained that the food provided by Al-Shabaab was of poor quality, with some respondents adding that they were only offered two meals per day.

concerned.²⁹⁸ In certain cases, financial support has also been extended to them and not just to the individuals concerned.²⁹⁹

7.3.2.2 Social environment

It is not only the family, but also the socio-economic environment in which those subject to rehabilitation is expected to transit back which matters to the possibility of effective disengagement.³⁰⁰ In the United Kingdom, for instance, the London Probation Trust's Central Extremism Unit encourages re-integration by developing more positive

²⁹⁸ See, e.g., K. Ramakrishna, 'A Holistic Critique of Singapore's Counter-Ideological Program, Combating Terrorism Center at West Point, CTC Sentinel, JANUARY 2009, VOLUME 2, ISSUE 1 ([HTTPS://CTC.USMA.EDU/A-HOLISTIC-CRITIQUE-OF-SINGAPORES-COUNTER-IDEOLOGICAL-PROGRAM/](https://ctc.usma.edu/a-holistic-critique-of-singapores-counter-ideological-program/)) (footnotes omitted):

By 2005, RRG counselors had begun talking to the families of the detainees as well. It was understood that the spouse of a detainee was likely either radicalized due to exposure to her husband's ideas, or confused and vulnerable to radicalization. The RRG dispatched female counselors to speak with detainee spouses who were willing to voluntarily subject themselves to counseling³³. RRG family counseling efforts were greatly aided by the formation of the Interagency-After Care Group (ACG), which focused "on the welfare of the families of detainees"³⁴. The ACG gradually overcame the understandable initial suspicions of detainee spouses in practical ways; for example, they provided financial assistance, as the "detainees were all sole breadwinners and the families" needed "financial support to stay on their feet"³⁵. The ACG helped the wives find work as "clerks, cleaners and other blue-collar jobs," and even taught them to read "utility bills or pay property taxes"³⁶. Importantly, the ACG ensured that the education of the detainees' children continued uninterrupted through various means such as enrolling them in tuition programs, securing school fee waivers and providing pocket money. The RRG also expanded its efforts to mitigate religious extremism in the wider Muslim community through public talks, forums, publications and establishing a website. The RRG website serves as a useful tool for public education as it provides readers access to a wide range of publications, news articles and media interviews that focus on effective responses to extremism³⁷. The ultimate aim of the RRG website is to help "immunize" the minds of Singaporean Muslims against JI or similarly violent radical Islamist ideologies³⁸.

²⁹⁹ In the Saudi context, generous support is provided to participants' families and provision is made to help participants pay for wedding and settle down with their family. See, generally, C. Boucek, "Saudi Arabia's "Soft" Counterterrorism Strategy," 18.

³⁰⁰ S. V. Mardsen, *Reintegrating Extremists – Deradicalisation and Desistance* (Palgrave Pivot, 2017), 10-11.

social networks away from their radical affiliations.³⁰¹ In the Indonesian context, the process of de-radicalisation now encompasses an element of re-socialisation of concerned individuals.³⁰² In Saudi Arabia, where resources are significant, steps are taken not just to create a suitable socio-economic environment in which the

³⁰¹ And Cameron Sumpter, Yuslikha K. Wardhani & Sapto Priyanto (2019): *Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society*, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2018.1560666, p. 3:

Research on the reintegration of formerly incarcerated terrorists has largely been pegged to the potential for individual disengagement from extremist networks, or even the de-radicalization of their convictions. Kate Barrelle argues that sustained disengagement is dependent on the degree of “proactive, holistic and harmonious engagement” an individual develops with the society he or she is re-joining.¹⁰ In the United Kingdom, the London Probation Trust’s Central Extremism Unit (CEU) encourages reintegrating ex-prisoners to develop more positive social networks away from their radical affiliations.¹¹ The CEU also puts emphasis on promoting healthier identities among ex-offenders—not by attempting to dismantle and reorder their sense of self, but through the broadening of individual identity beyond the narrowly defined extremist narratives that justified the initial offense.¹²

And, *ibid*, 56-

Another research project conducted extensive interviews with former combatants and extremist prisoners in Indonesia over several years, attempting to ascertain the reasons they had disengaged from violence.³⁷ Julie Chernov-Hwang spoke with over 50 former militants who fought in sectarian conflicts in Central Sulawesi and Maluku, trained in Afghanistan with the Mujahidin, participated in conflict or training in the Southern Philippines, and/or committed or supported acts of terrorism in Indonesia.³⁸ Findings revealed six principal reasons respondents decided to leave violence behind: Disillusionment with tactics and leadership; belief that costs outweigh benefits; the formation of new relationships; pressures from family; evolving personal and professional priorities; and benevolent treatment from authorities.³⁹ The “linchpin of successful disengagement and reintegration,” however, was found to be establishing a new social network of friends, family, and mentors.⁴⁰ Government programs aimed at deradicalization were cited as having little or no bearing on individual decisions to stop committing or supporting violence.

See also HM Government, *Contest - The United Kingdom’s Strategy for Countering Terrorism* (June 2018) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf), 51, para 172; Kate Barrelle, “Pro-Integration: Disengagement from and Life After Extremism,” *Behavioural Sciences of Terrorism and Political Aggression* 7, no. 2 (2015): 129; Sarah V. Marsden, “Conceptualising ‘Success’ with those Convicted of Terrorism Offences: Aims, Methods, and Barriers to Reintegration,” *Behavioural Sciences of Terrorism and Political Aggression* 7, no. 2 (2015): 155-156.

³⁰² See Cameron Sumpter, Yuslikha K. Wardhani & Sapto Priyanto (2019): *Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society*, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2018.1560666, p. 10-11:

In 2013, the BNPT published a document entitled the *Blueprint Deradikalisasi (De-radicalization Blueprint)*, which outlined four steps to the reform process: Identification; Deradicalization; Re-education; and Resocialization. Following coordinated suicide attacks in the city of Surabaya in May 2018, the Indonesian parliament passed into law updates to the nation’s antiterrorism legislation.⁶³ For the first time, articles are included on de-radicalization, which is described as a “planned, integrated, systematic, and continuous process implemented to eliminate or reduce and reverse” radical convictions through civic education, religious instruction, and entrepreneurship assistance. The four stages introduced in the Blueprint have been retained, with “resocialization” (*resosialisasi*) now referred to as “social reintegration” (*reintegrasi sosial*). While not specifically covered in the updated legislation, the proposed process of resocialization is described in the 2013 Blueprint. Former prisoners convicted of terrorism offenses should be given “psychological coaching” to help them build the confidence required for interacting with the public. This includes religious and personality development, as well as vocational training “according to interests and talents,” so the individual and his or her family can resume a normal life.⁶⁴ According to the Blueprint, resocialization also “means preparing the community to accept the presence of the former terrorist prisoners and their families.” It is therefore essential to “remove suspicion and fear on one hand and build empathy and mutual respect on the other.”⁶⁵ Unfortunately, whether due to human resource constraints or a reconsideration of priorities, the BNPT’s positive intention to involve community participation in the social reintegration process very rarely takes place.

See also David Lipson, “Indonesia Introduces New Anti-terror Laws in Wake of Surabaya Attacks,” *ABC News* (25 May 2018). <http://www.abc.net.au/news/2018-05-25/indonesia-introducesnew-anti-terror-laws-after-surabaya-attacks/9797820> (accessed 27 August 2018).

individual concerned can reintegrate,³⁰³ but also involves organizing social events to keep concerned individuals away from radicalism.³⁰⁴ Particularly important in this context is the ability for the individuals concerned to find remunerated employment,

³⁰³ See, generally, Middle East Institute, *Deradicalization Programs in Saudi Arabia: A Case Study* (2015) (<https://www.mei.edu/publications/deradicalization-programs-saudi-arabia-case-study>), 7-8:

Like rehabilitation efforts, Saudi aftercare programs draw on an established culture of prisoner reintegration programs in Saudi Arabia. A number of social programs and organizations exist, based on traditions in Islamic jurisprudence, to help convicts reintegrate into society after leaving prison. This work is done by several committees drawn from various government departments, including the General Directorate of Prisons and the Ministries of Labor; Social Affairs; Islamic Affairs; and Health. Several specialized organizations, such as the Committee for Supporting Prisoners and their Families; the National Committee for the Protection of Prisoners; the National Committee for the Care of Prisoners, Released Prisoners, and their Families; and the Family Reconciliation Committee also work with prisoners, ex-convicts, and their families. These organizations—some public, some quasi-public, and some private, voluntary groups—all provide essential rehabilitation and reintegration services for prisoners in Saudi Arabia. They operate programs to facilitate marriages (including institutionalized support to help find spouses for women convicted of immorality offenses) to increase the delivery of social services, and to support the families of incarcerated breadwinners. Other initiatives such as the Centennial Fund grant loans that allow released prisoners to start their own businesses. Charitable organizations often work with the government to establish schools and training programs to help prisoners gain employment, while other nongovernmental organizations frequently help released prisoners and their families with groceries, clothes, and toys for Ramadan. Another noteworthy program, the “Best Mother Award,” supports women who have children and whose husbands are serving time in prison.

C. Boucek, “Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare,” Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 1920-

Social support originally extended during incarceration continues upon a detainee’s release from the Care Rehabilitation Center. The continuation of these services is intended to prevent recidivism by addressing social concerns before they become grievances. Once an individual has satisfactorily renounced his previous beliefs, assistance is provided in locating a job and receiving other benefits, including additional government stipends, a car, and an apartment. The job assistance has included placement in both government jobs and the private sector. The former is noteworthy because many demobilized extremists had previously refused to work with the government, which they viewed as illegitimate and un-Islamic. The Ministry of Interior also helps individuals who previously held government jobs regain their positions.

In April 2007, the newspaper *al-Jazirah* reported that Prince Muhammad ordered the introduction of educational training outside prison for released detainees, repentant prisoners, and Guantánamo returnees. And recently, the Advisory Committee began working with local chambers of commerce and other certification organizations to establish training courses for program participants. Under this scheme, detainees would be able to learn skills and earn qualifications while in the rehabilitation program that would qualify them for better, more substantive, employment upon their release than they previously had. The government hopes that this training, when paired with government start-up funds, will empower released detainees to start their own businesses, such as travel agencies, automotive garages, and professional support offices.

³⁰⁴ C. Boucek, “Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare,” Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 8

To deter the radicalization and recruitment of young men, activities have been created to keep them busy and away from radicals. Research has shown that many young people have been drawn in with extremists during unsupervised free time, such as after school and during term breaks. This recruitment has been facilitated by a scarcity of social outlets for young Saudis. The government now supports a series of activities, such as sporting events, car racing, camel racing, and desert 4x4 excursions, to compete with the summer camps and questionable religious retreats that had been more frequently organized in the past by extremist groups to expose young men to their ideologies. Sporting clubs in particular have been identified by the Ministry of Islamic Affairs as playing an important role in impeding recruitment to extremism. Furthermore, the Ministry of Education ordered in July 2007 that outside volunteer seminar leaders with questionable credentials be kept out of summer camps to prevent the propagation of “deviant” interpretations of Islam.

which can again be supported by the authorities.³⁰⁵

At the same time, efforts should be made to try and restrict access by those concerned to individuals, places, networks and information that could contribute to their continued or renewed radicalization.³⁰⁶

7.3.2.3 Worldview

Rehabilitation and disengagement should not be understood as brain-washing or rebooting of the mental software. Rehabilitation and re-engagement with an individual who has been connected to a terror organization should instead focus on two core purposes when it comes to such an individual's mindset: a) help them challenge their

³⁰⁵ See, *infra*, xx/vocational training. See also Cameron Sumpter, Yuslikha K. Wardhani & Sapto Priyanto (2019): Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2018.1560666, p. 3-4:

Among the most pressing problems for all former prisoners reentering society is finding legal employment, which may be more acute for those convicted of serious crimes such as terrorism offenses. Irish Republican Army militants released from prison from the late 1990s experienced discrimination in the labor market, including ineligibility for certain jobs because of restrictions on travel and obtaining public service vehicle licenses.¹³ Equivalent obstacles exist for those exiting prison today after serving sentences for involvement with jihadi militancy.¹⁴ A recent study by Weggemans and De Graaf, which interviewed ten recently released extremist inmates in the Netherlands, encountered significant difficulties in securing jobs. Most participants believed their background would never again allow them to find stable employment and felt they could face an idle life of endless welfare.¹⁵ Aimless days clearly fail to create optimal conditions for reintegration. Paid work not only provides income but also forms structure, purpose, and potentially even dignity, which may facilitate the positive evolution of an individual's identity.

See also Neil Ferguson, "Impact of Imprisonment on Prisoners in Northern Ireland," in Andrew Silke, ed., *Prisons, Terrorism and Extremism: Critical Issues in Management, Radicalisation and Reform* (Oxon: Routledge, 2014), 274; Sarah V. Marsden, *Reintegrating Extremists: Deradicalisation and Desistance* (London: Macmillan, 2017), 117; Daan Weggemans and Beatrice de Graaf, *Reintegrating Jihadist Extremist Detainees: Helping Extremist Offenders Back into Society* (London: Routledge 2017), 97.

³⁰⁶ See, e.g., Liesbeth van der Heide and Bart Schuurman, *Reintegrating Terrorists in the Netherlands: Evaluating the Dutch approach*, *Journal for Deradicalization*, Nr 17, Winter 2018/19, 211

Simultaneously, prohibitions on meeting former extremist friends, visiting neighborhoods or cities where those networks were still active, or accessing extremist material online, were intended to prevent clients from being pulled back into a radical social milieu. Recognition of both the considerable attractions offered by participation in extremism, such as a sense of adventure and self-esteem, and the need to provide alternatives to those environments as well, corresponds with academic insights into disengagement processes.

own prejudice and belief; and b) help him/her build a (more) critical mind.³⁰⁷ This is done so as to ensure that they either abandon their radical ideas (de-radicalisation) or at least disassociate from those involved in the violent implementation of those ideas (disengagement).

Religious counselling has proved of some importance as a way to inform, educate and open a critical reflection over the individual's beliefs.³⁰⁸ In Saudi Arabia, for instance, religious counselling by recognized religious authorities lay at the core of its

³⁰⁷ See also Liesbeth van der Heide and Bart Schuurman, *Reintegrating Terrorists in the Netherlands: Evaluating the Dutch approach*, *Journal for Deradicalization*, Nr 17, Winter 2018/19, 211 (footnote omitted):

As such, the deradicalization approach does not necessarily focus on changing ideas per se, as the staff members all emphasized how difficult – and in some cases impossible – that is. Nonetheless, they view discussing client's worldviews as a way 'to focus on a (different) future perspective (...) with the hope is that someone ends up in a 'different flow'. The ideological aspect thus can be characterized as focusing on identity formation and critical thinking skills to enable clients to reflect on their own worldview. Through offering alternative or competing interpretations, the hope is that clients will, over time, begin to question the foundations of views that legitimize and encourage the use of violence. Team TER staff, particularly those who have been there since the initiative's 2012 start, have received specific training and on-the-job expertise in ideological matters, allowing many of them to engage in such discussions themselves. However, they usually defer to Islamic theologians; external experts brought in to engage with those clients deemed willing to discuss their worldviews. Whereas the use of such external experts attracted some skepticism when the team started in 2012, its members have since come to see the use of theologians as central to the initiative's overall efforts (Schuurman & Bakker, 2016).

³⁰⁸ See, generally, Vanda Felbab-Brown, 'Nigeria Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 108

Religious re-education is considered a vital part of the programming since Centre staff do not know "how hardened in their ideology" the beneficiaries are, even though they were assessed as low-risk. The Centre is also supposed to provide psychosocial support.

S. V. Mardsen, *Reintegrating Extremists – Deradicalisation and Desistance* (Palgrave Pivot, 2017), 7173-

Religion has played an interesting and often positive role in sustaining resilience against extremism. A leaked study of several hundred UK-based violent extremists conducted by the intelligence services concluded that 'there is evidence that a well-established religious identity actually protects against violent radicalization' [...]. For those currently being released into the community, developing a more contextualized and deeper knowledge of Islam was therefore an important part of intervention work [...].

[...]

Ultimately, the aim was to gradually introduce the probationers to alternative ways of interpreting their religion and practice it in a way that strengthened their resilience to narratives that supported violence. This was not always successful, as considerable resistance is built into the process of engaging in extremist settings.

See also UNODC, *Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia* (2018), 91 (footnote omitted):

Religious education This interaction with education centres to reinforce a more moderate interpretation of Islam (as opposed to the extremist interpretation) is necessary and requires the involvement of other partners. A good example of this interaction in a religious environment is the project launched by the MOVE Foundation in Bangladesh: this is a deradicalization and civic education campaign for youths of different educational institutions and qawmi madrasas across the country. Its key components include: · Cultural and educational intervention · Dialogue · Leadership · Peace-building training

deradicalization efforts.³⁰⁹ So in Nigeria,³¹⁰ and Singapore.³¹¹

³⁰⁹ See Middle East Institute, *Deradicalization Programs in Saudi Arabia: A Case Study* (2015) (<https://www.mei.edu/publications/deradicalization-programs-saudi-arabia-case-study>), 8:

Hundreds of government-run programs in the kingdom are aimed at prevention, according to Abdulrahman al-Hadlaq, an adviser to Prince Muhammad. This includes activities to educate the public about radical Islam and the dangers of extremism, as well as programs designed to short-circuit radicalization by providing alternatives. Many of these programs, implemented through the “guidance department” at the Ministry of Interior, are designed to confront extremism through the promotion and propagation of a more judicious interpretation of religious doctrine—absent takfir, the accusation of another Muslim of being an apostate—and are focused on strict jurisprudence of recognized scholars and authorities. The primary audience is not extremists themselves, but the larger population that may sympathize with extremists and those who do not condemn the beliefs that lead to extremism.

See also Ahmad Zahid Hamidi, ‘Malaysia’s Policy On Counter Terrorism And Deradicalisation Strategy’, *Journal of Public Security and Safety* Vol. 6 No. 213 ,2016/

These deradicalisation programmes are based on the ‘Ahli Sunnah Wal Jamaah’ approach, an Islamic jurisdiction to counter the extremist interpretations of Islam. While the detainees are put into small groups, they are also subjected to individual counselling sessions which are conducted at custodial locations away from the detention centres.

And C. Boucek, “Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare,” Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 11ff (engaging in dialogues with prisoners, as well as in the religious debates and instruction that make up the counseling process and providing psychological, psychiatrist and social support and counselling).

³¹⁰ See, generally, Vanda Felbab-Brown, ‘Nigeria Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 107

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 reeducation, which seems easiest for Nigerian authorities to implement. Discussions are now under way to strengthen other aspects of the programming.¹⁵²

³¹¹ K. Ramakrishna, ‘A Holistic Critique of Singapore’s Counter-Ideological Program, Combating Terrorism Center at West Point, CTC Sentinel, JANUARY 2009, VOLUME 2, ISSUE 1 (<HTTPS://CTC.USMA.EDU/A-HOLISTIC-CRITIQUE-OF-SINGAPORES-COUNTER-IDEOLOGICAL-PROGRAM/>) (footnotes omitted):

Ustaz Ali and Ustaz Hasbi gathered together other Muslim scholars to discuss ways to “correct” the thinking of the JI detainees through a counter-ideological approach. There was no blueprint at that point ¹⁵. By April 2003, the two *asatizah* had quietly formed the Religious Rehabilitation Group (RRG), an unpaid, all-volunteer grouping of Islamic scholars and teachers serving in their personal capacities. RRG counselors possessed formal Islamic educational credentials from both local *madrasas* as well as respected foreign institutions such as al-Azhar University in Cairo, the Islamic University of Medina and the International Islamic University in Malaysia ¹⁶. In addition, the RRG counselors, who were a mix of younger and older scholars and clerics, were put through a diploma course in counseling skills to supplement their religious knowledge ¹⁷. By January 2004, the RRG boasted 16 male and five female counselors ¹⁸. By April 2004, a full year after the formation of the RRG, and armed with a religious rehabilitation or “Jihad Manual” to alert each RRG counselor to JI ideological distortions, the actual counseling sessions with the JI detainees began. Typically, one RRG counselor worked with an ISD case officer and a government psychologist on a particular detainee. The RRG counselor confined himself solely to religious matters, although he was kept informed by the case officer of other issues pertaining to the detainee’s state of mind and relevant personal circumstances ¹⁹.

Initially, the JI detainees viewed the RRG counselors with great suspicion. They abused the counselors, calling them *munafiq* (hypocrites) and “puppets of the government” ²⁰. Over time, the RRG counselors developed a good understanding of their charges. Several detainees had been incensed by issues such as the government ban on wearing the *tudung* by Muslim schoolgirls in national schools and the compulsory national education policy ²¹. Moreover, the detainees possessed a “feeling of hatred toward America” much more than the average Singaporean Muslim, and they had been upset with the Singapore government for allying too closely with the United States ²². These issues, however, were not decisive but rather “cumulative” and “links in a chain” of factors leading to eventual

It is important that the process should not be understood as seeking to convert the individual concerned to another religion or set of belief, but as a way to inform, educate him and open the individual's mind to others' beliefs and interpretations. Re-pluralisation of such individual's worldviews indeed lay at the core of such efforts.³¹² Particularly central to that process is the renouncing of violence as a way to advance one's religious beliefs.³¹³

radicalization²³. What did seem common to most of them was a desire for “spiritual revival.” Not particularly well-versed in the fundamentals of Islam, the majority were seeking to atone for past sins and wished to turn over a new leaf, which led them to seek out religious teachers to guide them on the right path. This is how they came into contact with the Singapore JI leaders who “presented an extremist interpretation of Islam imbibed from Afghanistan that included a strong, anti-American, jihadist streak”²⁴.

It became clear that a number of overly literal JI ideological themes needed “extricating” and “negating” from detainee minds, as phrased by the RRG²⁵. These were the notions that Muslims must hate and disassociate themselves from non-Muslims and Westerners; that jihad only means perpetual warfare against infidels; that the *bay`a*, or oath, to the JI leadership was inviolable; that martyrdom through suicide operations was to be sought and celestial virgins awaited them in the afterlife; and that Muslims could practice an authentic faith only within an Islamic state²⁶. Between April 2004 and September 2006, the RRG conducted more than 500 counseling sessions with the JI detainees²⁷. Although the “hard core”²⁸ detainees—such as Singapore JI spiritual leader Ibrahim Maidin and others “deeply involved in the movement for more than a decade”—apparently remain unmoved by RRG counseling efforts, other detainees evinced discernible changes in beliefs and behavior between six months to a year after the RRG sessions began²⁹. These were typically the less committed members who had decided to take the *bay`a*, or oath of allegiance, to the JI leaders primarily to satisfy their friends' requests. They eventually showed remorse for their involvement with JI, were “receptive” to RRG efforts to instill in them more balanced Islamic teachings and were appreciative of government efforts to rehabilitate rather than prosecute them outright. Some of these detainees were later released on restriction orders³⁰, but were still required to attend mandatory counseling with the RRG to prevent ideological backsliding³¹. The Singapore government made the existence of the RRG public in October 2005³².

³¹²B. Bukarti, *Making Peace With Enemies: Nigeria's Reintegration Of Boko Haram Fighters* (27 MARCH 2019) ([HTTPS://WARONTEROCKS.COM/2019/03/MAKING-PEACE-WITH-ENEMIES-NIGERIAS-REINTEGRATION-OF-BOKO-HARAM-FIGHTERS/](https://warontherocks.com/2019/03/making-peace-with-enemies-nigerias-reintegration-of-boko-haram-fighters/)):

Operation Safe Corridor clients undergo treatment such as psychotherapy, psycho-spiritual counseling, and art therapy. Imams conduct lectures aimed at refuting Boko Haram's religious narratives by highlighting Islamic textual authorities that forbid violence. This is intended to reverse Boko Haram's simplistic narrative, which frames the problem as unbelief (*kufr*), with the solution a return to a puritan Islamic community, and jihad the only means to that. In essence, Nigeria is implementing a version of Daniel Koehler's repluralization model of deradicalization, which seeks to repopulate the participants' worldview by providing alternative religious interpretations.

Nigeria's approach differs from that of EXIT Sweden or the French government's deradicalization program, which deliberately exclude religious ideology for a number of legal and practical reasons. These include difficulty in measuring change in behavior, skepticism about the role of ideology in radicalization, and concerns that such an effort may create perceptions of Islamophobia. By contrast, Middle Eastern and South Asian countries such as Malaysia, Saudi Arabia and Singapore, make tackling ideology a central thesis of their deradicalization programs, as Nigeria does.

³¹³ See, in the Somali context, J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 24-25

However, the CPR and orientation sessions not only aim to challenge remaining sympathies for Al-Shabaab, but also to drive positive attitudinal change regarding the FGS, the Somali National Army (SNA), the international community, democratic principles, the illegitimacy of violence, and other such topics. Certain residents from the sample of 37 interviewed in March 2017 also reported experiencing positive attitudinal change at Serendi regarding these themes. For instance, four asserted that they now held improved opinions of Somali political leaders, and six claimed they had developed a more positive perception of the SNA. Six residents also claimed to have become more supportive of elections and the broader notion of democracy, with two adding that this change occurred partly as they had previously not understood these concepts. Similarly, three claimed to have become more patriotic while at Serendi, although it should not be overlooked that Al-Shabaab has also promoted patriotic sentiment, particularly to rally opposition to external forces from Ethiopia, Kenya and elsewhere.

[...]

The Saudi de-radicalisation efforts stand out in that regard as seemingly going further and seeking a clear change of religious positioning by those concerned.³¹⁴

Contrary to the perception that attitudinal change in such facilities may be driven exclusively by tailored programmes such as the CPR and orientation sessions, the March 2017 research revealed that the positive influences of family members, Serendi management and staff, and access to a wider range of media sources outside Al-Shabaab were of comparable importance.

314. See Middle East Institute, *Deradicalization Programs in Saudi Arabia: A Case Study* (2015) (<https://www.mei.edu/publications/deradicalization-programs-saudi-arabia-case-study>)

The first stage of the deradicalization program takes place inside prisons and consists of counseling (al-Munasahah) by Islamic clerics and religious re-education. It was initiated in 2004 by Assistant Interior Minister Prince Muhammad bin Nayef and is run by the Advisory Committee, which is based in Riyadh and has seven regional offices.[9] Inmates begin by explaining their ideological motivations to the Islamic clerics, who are employed by the program, before then embarking on a religious “academic course of study.”[10] The main objective of the course is to persuade the inmates that their jihadist interpretation of the Qur’an is incorrect.

[...]

In addition to the religious education, the counseling program increasingly contains a vital socio-psychological element.[20] Experts, who have often been educated in the West, analyze the behavior of the inmates and provide therapy accordingly. [21] This is particularly crucial for the prisoners who were previously held in Guantanamo Bay. In order to graduate from the program, the prisoners must pass an exam to demonstrate their abandonment of radical beliefs, as well as be deemed by the psychological and security subcommittees as no longer posing a threat. Regardless of whether they graduate the program, prisoners are still required to carry out their full sentences.

Before being allowed to reenter society, participants in the rehabilitation program spend a period of eight to twelve weeks in the Mohammed bin Nayef Center for Counseling and Advice, outside Riyadh. In this “halfway house,” which opened in 2007,[22] participants receive further therapy and are able to enjoy art and sport courses, vocational training, and even access to PlayStations.[23]

See also C. Boucek, “Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare,” Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 1

This Saudi strategy is composed of three interconnected programs aimed at prevention, rehabilitation, and postrelease care (PRAC).

And, *ibid*, 34-:

The indirect Saudi “soft” counterterrorism policy seeks to address the underlying factors that have facilitated extremism in the hope of preventing further radical violent Islamism. A central goal of the kingdom’s efforts has been to solidify the legitimacy of the ruling order and to eliminate violent opposition to the state by reinforcing the traditional Saudi interpretation of Islam, which stresses obedience and loyalty to the state and its leadership.

[...]

Through this focus on authority and an understanding of religious doctrine, the state aspires to help misguided believers return to the correct understandings of Islam. This strategy melds nicely with the Saudi concept of da’wah (call to faith) as a governmental obligation.

Central to the Saudi strategy is the message that the use of violence within the kingdom to affect change is not permissible. Only legitimate scholars and knowledgeable authorities, the government argues, can engage in such activities as authorizing a permissible jihad.

[...]

The Saudi “war of ideas” also stems from a recognition that violent radical Islamist extremism cannot be defeated by traditional security means alone. [...] Essential to victory is the defeat of the ideological infrastructure that supports and nurtures political violence.

[...]

The Saudi policy for tackling extremism and radicalization is outlined in a plan termed the PRAC strategy, which stands for Prevention, Rehabilitation, and Aftercare. The strategy outlines goals and challenges for Saudi authorities, and it identifies ways to combat the spread and appeal of extremist ideologies. The strategy is composed of three separate yet interconnected programs aimed at deterring individuals from becoming involved in extremism; promoting the rehabilitation of extremists and individuals who get involved with them; and providing aftercare programs to facilitate reintegration into society after their release from custody.

Most important to the value and success of such a process is the competence and credibility of those who are put in charge of it.³¹⁵ Religious scholars of some repute are therefore of primary importance. Also valuable in some circumstances have been former terrorists, who have been able to share their experience with other and bring with their experience the credibility of their own transition.³¹⁶ So with individuals who are not known to be independent or not aligned with the government.³¹⁷

To be effective, such educational opportunities will have to be available over a sufficiently significant period of time and with sufficient regularity.³¹⁸ Like other aspects of such programs, the individualized nature of religious counselling will be a critical factor, in

³¹⁵ C. Boucek, “Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare,” Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 7:

Religious figures frequently engage with prisoners in other ways as well to promote reform, repentance, and piety. Prison administrators, working with the Ministry of Islamic Affairs, organize Islamic lectures and Quranic recitation lessons, and prisoners have received early release for memorizing the Quran. In addition to these jailhouse ministering activities, Muslim clerics have been enlisted by Saudi security personnel during investigations to “intellectually interrogate” suspected militants by engaging them in theological remonstrance. Religious figures have successfully been used to encourage suspected Islamist militants to confess or to urge defendants to cooperate with authorities. This practice was employed before the May 2003 Riyadh compound bombings, and its use has increased since then.

³¹⁶ See, e.g., K. Ramakrishna, ‘A Holistic Critique of Singapore’s Counter-Ideological Program, Combating Terrorism Center at West Point, CTC Sentinel, JANUARY 2009, VOLUME 2, ISSUE 1 (<HTTPS://CTC.USMA.EDU/A-HOLISTIC-CRITIQUE-OF-SINGAPORES-COUNTER-IDEOLOGICAL-PROGRAM/>)

While the RRG itself is obviously quite powerless to do anything about the structural problem of the Singaporean Muslim community’s generalized angst, there are steps forward. Within these constraints, creative ways can be explored to further enhance its impact. One potentially important approach in this regard could be to deploy ex-JI detainees to support RRG efforts in convincing the more stubborn elements of the wider Muslim community that the JI threat is real and no government conspiracy is involved. Put bluntly, the “power to convince the public of the danger of JI ideology is greater if it comes from former JI members.” Their participation would “greatly enhance the credibility of the RRG’s substantive argument”⁵¹. It should be noted that the Indonesian police have been making active use of captured Indonesian JI militants—such as Nasir Abbas—to undercut the network’s recruitment efforts, with some results⁵².

³¹⁷ See C. Boucek, “Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare,” Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 15

Central to the success of the dialogue process has been the ability of the Saudi state to muster its considerable religious authority to confer legitimacy on the process. The presence on the Advisory Committee of some former militant figures and of regime critics carries credibility with many participants in the program, since it was their da’wah that led them on the path toward radicalization. This factor cannot be understated: Detainees do not sit down with religious figures who lack credibility in the eyes of fundamentalists and their admirers.

³¹⁸ C. Boucek, “Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare,” Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 13

Members of the Religious Subcommittee and the Psychological and Social Subcommittee also remain in contact with program graduates. Clerics will visit with their former dialogue partners, and former detainees will frequently continue to study with the sheikhs who were counseling them in prison. Upon release, graduates are encouraged to maintain this contact and to call on either the sheikhs or the doctors if they are ever in need—something that occurs with some regularity, according to members of the Psychological and Social Subcommittee. Periodic visits by Advisory Committee members on former program participants continue after release to ensure that everything is on track and that there are no problems. While many of the Advisory Committee would readily do so, especially those clerics who believe they are doing God’s work, it is also their responsibility to keep tabs on former security prisoners.

that it must take into account the individual's educational, personal and professional background and the specific challenge associated with the person concerned.

As for the prejudice that they may feel towards the system in place, two factors appear to have played an important positive function: socio-economic integration;³¹⁹ and the ability to peacefully critique and challenge the system in place. One illustration of the latter process is apparent from the Saudi experience. The system put in place seeks to create an element of discussion between the individual concerned and the system so as to create a sense of ownership in the former and a sense of accountability in the latter.³²⁰ While such a regime has its limits and cannot necessarily be replicated in all contexts, it provides a valid example of a system that seeks to nurture a sense of citizenship and participation (rather than a mere passive involvement) on the part of those concerned.

7.3.2.4 Vocational training and employment

As part of rehabilitation efforts to facilitate the process of reintegration of former terrorists, several national programs have put in place vocational training and built in strategies to find (suspected) terrorists remunerated employment.³²¹ This was done

³¹⁹ See, *supra*, XX Family and social network. See also, *infra*, xx. Financial help.

³²⁰ C. Boucek, "Saudi Arabia's "Soft" Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare," Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 18-19

The center provides brief and recurring exposure to life outside the state's custody, made possible through furloughs and day trips with the center's staff. It is the last phase of the program, and before arriving, detainees are informed of exactly how much time they will be spending there, which is typically 8 to 12 weeks. If it is determined that a detainee is not ready to be released by the scheduled date—if, for instance, the authorities believe that he would benefit from more counseling or if it is understood that he has plans to engage in violence—he is entitled to seek compensation from the ministry at the rate of 1,000 SAR per day (approximately \$267). Beginning about June 2005, released program participants who felt they were incarcerated at the center longer than their initial term have been able to take the ministry to court. As of November 2007, according to Prince Muhammad bin Nayef, the ministry had been taken to court 32 times, and it has intentionally mounted weak defenses on every occasion leading to 32 consecutive losses. This has been a deliberate strategy—part of the kingdom's larger soft counterterrorism strategy—designed to demonstrate that a system is in place to redress detainee grievances and that it is possible to win against the alleged most powerful ministry in the country. It delivers a very important message, effectively telling radicals that the system they despise actually works in their favor.

³²¹ See, generally, J. Morton and M. D. Silber, *When Terrorists Come Home - The Need for Rehabilitating and Reintegrating America's Convicted Jihadists* (https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf), 32-33; UNODC, *Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia* (2018), 85-86 (underlying the need for access to training/vocational courses to enhance job prospects, including providing training courses and paying for vocational qualifications, such as plumbing or electrician qualifications).

for instance case in Somalia for former Al Shabab,³²² in Nigeria for former members of Boko Haram,³²³

³²² J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 23 (footnotes omitted):

Such provisions are also offered in Serendi, and with this in mind the second RST outcome was articulated as: ‘Beneficiaries at the centre maximise their likelihood of successful reintegration at the point of departure through developing appropriate knowledge, skills and attitudes, and (re)establishing suitable connections to reintegration locations’. The three subordinate outputs were stated as:

- ‘Beneficiaries attend and participate in classes in education and vocational training, and participate in life-skills initiatives, appropriate to existing livelihood opportunities and tailored to individual needs and ambitions’.
- ‘Beneficiaries participate in reconnection activities that are appropriate to individual needs and ambitions’.
- ‘Beneficiaries receive focused, non-specialised psychosocial and mental health support as required, and receive tailored and responsive case management support spanning the rehabilitation process’.

J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_418-_deradicalisation_and_disengagement_in_somalia_web.pdf),

Recent FGS administrations, with the support of the international community, have attempted to undermine Al-Shabaab through initiatives encouraging disengagement. Particularly, the National Programme for the Treatment and Handling of Disengaged Combatants (subsequently referred to as the National Programme) provides a mechanism for select individuals to benefit from rehabilitation and reintegration support.⁵ This option is available only to those deemed to be ‘low risk’ by the FGS’s National Intelligence and Security Agency (NISA) – that is, individuals who voluntarily disengaged from the organisation, who have denounced Al-Shabaab’s ideology, and who are not seen to pose a future risk to public safety.⁶ More broadly, the National Programme consists of the following five ‘pillars’:

[...]

4. Rehabilitation: The fourth component of the National Programme attempts to set common standards for services provided at rehabilitation centres in Somalia, including in relation to education, vocational training, psychosocial support, facilitating access to families, and so on (see Chapter III). There is a total of four official centres, in Mogadishu, Baidoa, Kismayo and Beledweyne.

³²³ Vanda Felbab-Brown, ‘Nigeria Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 107

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 reeducation, which seems easiest for Nigerian authorities to implement. Discussions are now under way to strengthen other aspects of the programming.¹⁵²

B. Bukarti, *Making Peace With Enemies: Nigeria’s Reintegration Of Boko Haram Fighters* (27 MARCH 2019) (<HTTPS://WARONTEROCKS.COM/201903//MAKING-PEACE-WITH-ENEMIES-NIGERIAS-REINTEGRATION-OF-BOKO-HARAM-FIGHTERS/>)

Operation Safe Corridor also exposes clients to rudimentary vocational training skills, giving participants alternative ways of seeking livelihoods after reintegration. They are asked to choose from carpentry, fish or poultry farming, tailoring or sewing, welding and shoemaking. The program organizers told me such training is vital because it provides economic empowerment, offers clients hope for when they return to their communities, and reduces the chances of recidivism by giving clients a chance to make a living. Many who joined Boko Haram at a young age never had the opportunity to develop employable skills.

in the Indonesian context,³²⁴ and in Saudi Arabia.³²⁵ Such measures are both an incentive for the individual to change course and a way to create a disincentive for a return to old ways.³²⁶ This is also an important element of the need to rebuild a solid and safe social environment around him/her that will provide a shield against a return to violence.³²⁷ Focus should be placed upon training that is conducive to their finding

³²⁴ And Cameron Sumpter, Yuslikha K. Wardhani & Sapto Priyanto (2019): Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2018.1560666, p. 5:

Two major studies have been conducted on the reintegration of former militants in Indonesia. In the late 2000s, a World Bank project sought to evaluate what lead researcher Dave McRae described as the “individually-targeted minimalist reintegration” of former combatants who fought in communal conflicts in Central Sulawesi following the fall of authoritarian rule in the late 1990s.³² Two programs implemented by the Indonesian national police and local government provided short vocational training courses and seed grants to roughly 200–300 individuals.³³ One of the central aims was to remove idleness among recipients, in the hope that keeping people busy would render them less likely to reengage in violence.³⁴ McRae’s study found this rationale may have been misguided as the majority of former combatants had been involved in economic activity prior to the project. Furthermore, due to suboptimal planning and the mismatching of participants’ skills and interests to program goals, few of the small business ventures led to ongoing economic benefits.³⁵ Despite these shortcomings, however, the assistance established a degree of goodwill, and crucially, provided a reason for police to engage regularly with the ex-combatants, which facilitated management of the local security situation.³⁶

See also Dave McRae, “DDR and Localized Violent Conflict: Evaluating Combatant Reintegration Programs in Poso, Indonesia,” *Indonesian Social Development Paper no. 14* (Jakarta: World Bank, 2009).

³²⁵ Middle East Institute, *Deradicalization Programs in Saudi Arabia: A Case Study* (2015) (<https://www.mei.edu/publications/deradicalization-programs-saudi-arabia-case-study>).

³²⁶ Liesbeth van der Heide and Bart Schuurman, Reintegrating Terrorists in the Netherlands: Evaluating the Dutch approach, *Journal for Deradicalization*, Nr 17, Winter 2018/19, 211

With regard to bringing about disengagement, interventions focused on offering alternatives to extremism through a combination of incentives and prohibitions. For instance, by stimulating clients to enroll in (vocational) education, take on internships or find work, RN staff increased their job market prospects and provided alternative sources of self-esteem and direction in life that would hopefully act as bulwarks against renewed engagement in extremism or terrorism.

³²⁷ S. Farrall, Rethinking what works with offenders: Probation, social context and desistance from crime (Padstow: Willan, 2002), p 152 (describing having a job as providing a sense of identity and a role in society); and S. V. Mardsen, *Reintegrating Extremists – Deradicalisation and Desistance* (Palgrave Pivot, 2017), 56 (‘Working, paying taxes and submitting to the economic structures of contemporary society represent a form of acceptance of wider social structures administered by the state. Not only does getting a job reflect integration into the labour market, it also typically involves integration into often diverse social networks.’)

a job.³²⁸ Help to find employment has also proved a worthy element of reintegration of former terrorists.³²⁹

Similarly, several national programs have provided some level of financial assistance to individuals going through rehabilitation program, again to ensure a safety net of

³²⁸ J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 30-31

Notably, none of the 27 respondents reported earning an income using skills acquired through the vocational training provided at Serendi. However, this does not appear to relate to the quality of the tuition on offer per se, with seven of the respondents interviewed in September 2017 providing positive reviews of this training, compared to two claiming that it was 'okay', and only one offering a negative assessment (the remainder were not asked due to time constraints, or did not partake in the vocational training). Neither does this relate to the specific skills being taught, as the modules were selected in accordance with demand in the centre and in line with livelihood mapping conducted by the RST. Rather, the inability to translate new vocational skills into actual employment often reportedly resulted from a lack of capital. For instance, the charcoal-maker highlighted above took a course in welding at Serendi and claimed that he would prefer this work if he could afford the necessary equipment. Similarly, three respondents who took vehicle electrics training claimed that they had been unable to find work in this sector as they would be expected to provide their own tools, which they could not afford. The individual who transports goods on a wheelbarrow also claimed that he would like to buy this equipment outright (which apparently costs around \$50), rather than rent it daily. With this in mind, from 2018 the Serendi team will increasingly help facilitate access to financial services, livelihood opportunities, placements, and educational or vocational training schemes, as required.

See also Vanda Felbab-Brown, 'Somalia Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 126, 148

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.⁸⁷

Vanda Felbab-Brown, 'Nigeria Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 108

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.

³²⁹ See references above. See also Toke Agerschou, 'Preventing Radicalization and Discrimination in Aarhus', *Journal for Deradicalization*, Winter 2014/15, Nr 1, 5, 14

Education and employment 1) Contents: With the purpose of including the citizen in the society his or her attachment to the labour market and educational system will be considered. Based on this status it will be decided whether the citizen needs support in returning to the labour market or the educational system if attachment hereto has been discontinued. 2) Participants: The assigned mentor must continuously provide the support needed to ensure the individual's continued contact with the system and to support the processes initiated in regards to employment and/or education.

sort that would help keep them away from a return to violent ways.³³⁰ Thus, in Saudi Arabia, significant resources are put at the disposal of those going through the system as well as their families. This not only helps the process of reintegration but also establishes a link between the state and those benefiting from its generosity. Similarly, in Indonesia, economic stability achieved through financial support of the state was

³³⁰ J. Horgan and K. Braddock, 'Rehabilitating the Terrorists?: Challenges in Assessing the Effectiveness of Deradicalization Programs', *Terrorism and Political Violence*, 22:267–291, 2010, 271 (footnote omitted):

If deemed eligible for government-sponsored demobilization and reintegration, former fighters are provided with health, economic, and educational benefits as specified by Colombian Decree 128.

See also Human Rights Watch, "Smoke and Mirrors: Colombia's Demobilization of Paramilitary Groups," Human Rights Watch, (<http://www.hrw.org/en/reports/200531/07//smokeand-mirrors?print>); S. V. Mardsen, *Reintegrating Extremists – Deradicalisation and Desistance* (Palgrave Pivot, 2017), 15

In some cases – notably Yemen – government jobs were used as an incentive, and as a mechanism to continue monitoring. Money was also used to motivate change in some states, for example Malaysia and Egypt, where the individual renouncing political violence was provided with material support.

See also Vanda Felbab-Brown, 'Somalia Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 126, 148:

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.

crucial for ensuring that extremists would not reoffend.³³¹ In addition, in this context, ‘refreshment’ courses and workshop are also organized and incentivized by financial

³³¹ Cameron Sumpter, Yuslikha K. Wardhani & Sapto Priyanto (2019): Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2018.1560666, p. 15-17:

While it is difficult to prove, and there remain exceptions, a number of people interviewed for this project, including NGO practitioners, prison officials, police, and former prisoners themselves, believed that economic stability is crucial for ensuring that extremists do not reoffend. Anecdotal evidence suggests that the prominent recidivists Sunakim (Jakarta 2016 attack), Juhanda (Samarinda 2016), and Yayat Cahdiyati (Bandung 2017) each lived with significant economic problems, which either prevented their societal reintegration or inflamed their personal grievances. According to one senior counterterrorism officer in the Indonesian police: “If [former prisoners convicted of terrorism offenses] are already settled down [following release] and their life is running well, they rarely go back to their networks.”⁶⁸ There is certainly no clear link between financial independence and disengagement from extremism in Indonesia, but refocused energy on striving toward that stability, for themselves and their families, may well create the conditions necessary for gradual disengagement and broadening of minds.

This is the general thinking behind the BNPT’s post-prison “de-radicalization” strategy, which is primarily focused on supporting entrepreneurial projects among former extremist prisoners. Following an identification process, which has involved independent researchers brought in as consultants, and a degree of coordination with the parole board and police, officers from the BNPT’s deputy for Prevention, Protection and Deradicalisation⁶⁹ travel to former prisoners’ houses to discuss their future and offer financial assistance for small startup businesses. Seed grants of typically between Rp.5–10 million (roughly \$350–700) are provided to support a particular endeavor. In order to ensure the money goes toward its stipulated use, the agency refrains from handing over cash; instead, officers escort recipients to a shop or manufacturer to purchase the required goods or materials. The strategy appears constructive but in reality the process suffers from a lack of human resources, planning, and ongoing evaluation. As of April 2018, the BNPT had thirteen deradicalization officers responsible for assisting and overseeing former prisoners spread over seventeen provinces, each with their own particular needs and circumstances. One described the situation his team faces as having “200 different problems.”⁷⁰ Officers visit each former prisoner with little or no notice and present the offer of financial assistance. Recipients essentially need to decide on the spot how they will spend the money. Common choices include Islamic clothing and/or books to sell, a sewing machine for clothing alterations, or a wheeled cart for preparing and selling street food such as kebabs or noodles. Once the items are purchased there is reportedly very limited follow-up and there appear to be few genuinely successful financial outcomes. A majority of the former prisoners interviewed conveyed the same message regarding the entrepreneur project: They had no time to decide what to use the money for, ended up rushing the decision, and received no advice on running the businesses. “There was a donation of five million,” explains Fajar, who served several years for his role in the 2005 Bali bombing attack. “But it had to be for items and spent straight away. The items were meant to be for a business so I thought, okay then, let’s just buy a food cart

But then when I asked how I should operate the cart there was no answer. ... There’s no follow-up or continuity. ... So we just buy equipment? If so, it won’t cover the operational cost. In the end we needed money so we just sold it again to pay for our needs.” Rifqi, who did four years for involvement in a militant training camp in Aceh, was given Rp.10 million but struggled to devise a suitable plan. “Today they give the money and tomorrow it must be goods. That’s difficult right? What should we do with it? Finally, my wife used it all to buy clothes to sell online, but there’s no control from BNPT, nothing. I actually wanted to buy tools to service cell phones or laptops because I have the skills, but it was impossible to order them within two days, so well, rather than let the money go to waste we bought clothes.” Many thought greater focus should be put into matching assistance with the personal interests and skills of recipients. Two young men who ran a screen printing business before they were arrested encountered difficulty getting the business up and running after being released, as their equipment had either been lost, stolen, or sold. With help from friends they eventually managed to start printing again but were ineffective at marketing their products. When BNPT officers approached them, they suggested the men turn their attention to breeding ducks. “Well, at first the loss was not so bad,” one said. “We used the capital to buy food but tried to make it last longer. ... The duck’s weight did not increase, which is what is important for ducks, so there was nothing left, no result” (except dinner). The other added: “Screen printing is my hobby. ... Ducks, well it’s livestock.” Government agencies “give help, yes, but then that’s it. There’s no follow-up.”

aid for participants and their family.³³²

This sort of financial and vocational assistance could, however, face opposition in local communities affected by the activities of a terror group as they might oppose terrorists receiving what might be regarded as rewards for the evil they inflicted on their community.³³³ It is therefore important that effective outreach be directed at local communities to explain this process³³⁴ and that the community itself should also receive benefits associated to the reintegration process so that economical support does not

Some had ideas for how the situation could be improved. Reza, who served almost five years for weapons distribution, thought the government needed to pay more attention to individual needs. “For example: ‘What talents do you have? What do you want to develop?’ Then assist them until they are capable. ... Don’t generalize and say: ‘Here, everyone receives a few million’ and then only give us a short time to think about how to use the money. ... Well of course it disappears. Then when it’s gone they say: ‘We gave you help but you couldn’t manage.’ It’s like that right.” Another former prisoner added that purchasing “material is not sufficient. We need training. They give us the fishing rod but we also need the fishing pond. If they give us the rod but we cannot fish, then we are lost. It would be different if we were experts at fishing.” Providing entrepreneurial assistance for former prisoners was actually first initiated by a small Jakarta-based NGO named Yayasan Prasasti Perdamaian (YPP), which was established in 2008 to work on terrorism prevention initiatives. While assistance took place through informal engagements during YPP’s first five years, in 2014 they began recording their data and have since helped sixteen former terrorist prisoners start businesses. Unlike the subsequent BNPT program, YPP helped individuals write business plans and if these met the required standards, small loans were provided that recipients paid back as their business grew. In 2018, YPP stopped providing assistance and began a thorough internal evaluation of the program. Executive Director Taufik Andrie said that engagements will not be assessed on financial success or de-radicalization, “but whether they have stayed away from violence, how they connect with their families, whether they have new social networks and slowly avoided any further engagement with the radical community.” 71

Unfortunately, organizations focused on CVE are not the only NGOs offering support to former prisoners and their families. A handful of Islamic associations ostensibly working on social or humanitarian work reportedly provide assistance so individuals remain connected to extremist networks. Gashibu or Gerakan Sehari Seribu (One Thousand Rupiah Per Day) helps prisoners’ families by paying for child births and education. Gashibu has suspected links to Jamaah Ansharud Daulah (JAD), and while there is no clear evidence of direct ties, the Indonesian government recently froze the organization’s bank accounts. The Azzam Dakwah Centre (ADC) consists of members who have indicated they are pro-ISIS and have links to JAD. A third is the Infaq Dakwah Centre, which is also suspected of providing support for prisoners convicted of terrorism. These organizations used to assist all extremist prisoners but now focus their attention on those who support the Islamic State.⁷²

³³² Cameron Sumpter, Yuslikha K. Wardhani & Sapto Priyanto (2019): Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2018.1560666, p. 7

The national counterterrorism agency, BNPT, has run various programs and seminars in prisons over the past few years aimed at rehabilitating or de-radicalizing inmates convicted of terrorism charges. The approach has predominantly focused on sitting down with inmates for informal conversations, which are incentivized by financial aid for themselves and their families.⁴⁶ The founding national philosophy of Pancasila (belief in one God, nationalism, humanitarianism, social justice, and democracy) has featured prominently in attempts to persuade inmates to abandon their radical beliefs, while religious scholars and “reformed” extremists are brought in for occasional discussions

³³³ J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 29

While current levels of awareness of the National Programme remain limited, there is also the possibility that certain community members are hostile to the fact that former Al-Shabaab members are offered provisions such as basic education and vocational training, which give them a competitive advantage over those who remained uninvolved in violence. Of course, the community may also be more-or-less accepting of individuals in relation to their former rank and/or role within Al-Shabaab. For instance, intelligence operatives and IED-makers may be treated less favourably than tax-collectors, cooks and others in supporting roles.

³³⁴ See, *infra*, xx/.outreach.

merely go to rehabilitated terrorists but also benefits the community.³³⁵

All of these measures should ultimately be aimed to helping to reintegrate the individual concerned and create a greater degree of trust between the individual concerned and the state.

7.3.2.5 Administrative support

Re-adjustment into society might require more than help with finding employment and a basic income. Particularly challenging in some instances for rehabilitated terrorists are administrative steps required for reintegration into society. Several rehabilitation programs have thus built in mechanisms intended to assist that process of administration re-integration as a way to facilitate rehabilitation.³³⁶

³³⁵ See Lisa J. Laplante & Kimberly Theison, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 *Mich. J. Int'l L.* 49 (2006), 69

Programs that benefit the demobilized by giving them access to job training, income and employment generation, and psychosocial accompaniment are equally divisive and may cause resentment in the poor communities in which the demobilized reside.' These former "criminals" are perceived as having easy access to privileges that are beyond the reach of many of the poor, who struggle on a daily basis. Above all else, the IACHR concludes that "[t]he demobilization mechanisms have not been accompanied by comprehensive measures to provide relief to the victims of the violence nor to clarify the many criminal acts that remain unpunished, and therefore the factors generating the conflict in large measure persist."⁰

³³⁶ See, e.g., Cameron Sumpter, Yuslikha K. Wardhani & Sapto Priyanto (2019): *Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society*, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2018.1560666, p. 10-11:

When asked about state assistance with readjusting, one former militant who spent five years in prison for involvement in a training camp in north Sumatra said: "We don't need to discuss central government because it would be too far. We are talking about smaller government, such as officers from the sub-district or village level. None of them approached me when I was freed." Conversely, some had been grateful for the help they had received from local authorities. "The RT (community leader) really supported me," one said. "If there's anything you need just let me know—the important thing is now you're a good person," he was told. Social acceptance is important but prisoners are often more immediately concerned with organizing personal administrative affairs. In most cases, identification cards (required to rent a property, secure employment, and apply for health insurance) and driving licenses have either been lost in the process of arrest and prosecution or retained by police as evidence. After spending a few years in prison, many returnees find it difficult to wade through the bureaucracy associated with getting them back. The extent to which local authorities assist returning prisoners with administration and acclimatization often comes down to the particular village or neighborhood head (RW/RT) and his or her personal willingness to get involved. The 2013 Blueprint's instruction that counterterrorism officials work with community authorities to ensure they have the knowledge and inclination to manage an individual's transition is important but has not been systematically followed. According to IPAC, seventy prisoners convicted of terrorism offenses were released over an eighteen-month period between January 2017 and August 2018.⁶⁶ Ideally, a small team would travel to the returnee's village or neighborhood and hold a meeting with community leaders and local police to devise a modest, informal plan for the individual based on the context and specific dynamics. At the very least everyone would be on the same page. Such gatherings may have taken place on occasion when personal relationships exist between officials from state agencies and local governments, but multistakeholder post-release meetings are reportedly very uncommon.

And, *ibid*, p. 1415-

Assistance from government agencies is also essential for getting prisoners back on their feet financially. Many companies and organizations in Indonesia require prospective employees to provide a police certified character reference letter (*Surat Kelakuan Baik*), but again, the ease of obtaining this document depends on the dynamic facing each individual. One respondent said that he went to his local police and was honest about his former

7.3.2.6 Involvement of local communities

Reintegration is unlikely to succeed unless local communities affected by the return for former terrorists have been prepared for it.³³⁷ It is therefore essential that a degree of trust be built in those communities and that outreach efforts should go towards

involvement with terrorist networks when requesting the reference. The police denied him so he contacted the BNPT who were more helpful, and asked, “Why didn’t you approach us before?” This personal account shows that former terrorist prisoners are sometimes unfamiliar to local law enforcement and their whereabouts unknown to even counterterrorism officials. While the movements and actions of recent parolees may be followed to some extent, those having finished their parole period or released without sanction may quite easily evade scrutiny. A driving license is another document requiring police assistance, and one that many former prisoners pursue. Given the difficulty of securing a job when burdened with a criminal record (particularly involving terrorism), casual shifts as a motorbike taxi (ojek) driver is a popular option for many recently released prisoners. As with taxi cab industries throughout the world, the ojek scene in Indonesia has been disrupted and revolutionized by mobile phone applications. With a clean driving license, mobile phone, and a registered motorcycle anyone can become a driver, and a small community of former terrorist prisoner ojek drivers now ply Jakarta’s streets, supporting each other in their bids to support themselves financially. But while motorbike taxi driving may provide some much needed income, it is probably not a profession that demands the type of commitment and structure required to get one’s life back on track. A former prisoner released in 2016 who works intermittently as an ojek driver believed he would get more respect from neighbors if they saw him going to work in the morning and returning in the evening: “If we’re online ojek drivers, it looks like we’re not working; just waiting at the base for orders.” He felt others would look at him and say, “Wah this person hasn’t changed. He’s just hanging out like before.”

³³⁷ See Eric Rosand, Emily Winterbotham, Michael Jones, and Franziska Praxi-Tabuchi, “A Roadmap to Success: The State of the Global P/CVE Agenda,” The Prevention Project & Royal United Services Institute (September 2018); Eric Rosand, “Communities First: A Blueprint for Organizing and Sustaining a Global Movement Against Violent Extremism,” The Prevention Project (December 2016); United Nations, General Assembly, “Plan of Action to Prevent Violent Extremism: Report of the Secretary-General,” A/70/674 (24 December 2015). http://www.un.org/en/ga/search/view_doc.asp?symbol/A/70/674; The White House (President Barack Obama), “Empowering Local Partners to Prevent Violent Extremism in the United States” (August 2011). https://obamawhitehouse.archives.gov/sites/default/files/empowering_local_partners.pdf; and Cameron Sumpter, Yuslikha K. Wardhani & Sapto Priyanto (2019): Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2018.1560666, p. 2:

Approaches to preventing violent extremism are still relatively new in a number of nations, but consensus is forming that initiatives are most effective when they are led by community stakeholders.² Local actors understand the problems and dynamics specific to their area. They will more likely possess the legitimacy required to engage program participants than practitioners from elsewhere. As fellow community residents, their interactions can be frequent and sustained, ensuring both ongoing support and vigilance. Indonesian state efforts to facilitate former extremist prisoner transitions back into society are well intentioned but human resources appear stretched. Greater involvement from neighborhood associations and civil society organizations would provide local knowledge, consistent engagement and a stronger chance of successful reintegration outcomes.

See also Vanda Felbab-Brown, ‘Nigeria Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 107

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.¹⁵⁵ 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.

explaining the process to them.³³⁸ Community ‘buy-in’ could also come in the form of financial aid and support for those communities and local initiatives.³³⁹ Without a

³³⁸ See, generally, K. Ramakrishna, ‘A Holistic Critique of Singapore’s Counter-Ideological Program, Combating Terrorism Center at West Point, CTC Sentinel, JANUARY 2009, VOLUME 2, ISSUE 1 (<https://ctc.usma.edu/a-holistic-critique-of-singapores-counter-ideological-program/>)

There is also the complex issue of assessing the extent to which the RRG’s counter-ideology work is effective in “immunizing” detainee families and the wider Singaporean Muslim community against the virulent ideological narratives of al-Qa’ida and Ji. The government has tried to foster closer ties between Muslims and non-Muslims so as to ensure that a sufficiently robust social resilience exists to weather the fallout of an actual terrorist strike. It has done so through such instruments as the Community Engagement Program (CEP)⁴⁵ and Inter-Racial Confidence Circles and Harmony Circles in neighborhoods, the workplace and schools⁴⁶. Despite these commendable efforts, however, a conspiracy mindset still afflicts segments of the Muslim community in Singapore, much like in neighboring Malaysia and Indonesia⁴⁷. Despite the genuinely innovative work of the RRG, the underlying, generalized angst of the Singaporean Muslim community—the product of both historic grievances and contemporary resentment at U.S. foreign policy and the Singapore government’s pro-U.S. stance—still remains, forming a restrictive existential envelope within which RRG counter-ideology efforts must operate. Moreover, while some local observers laud the attempts by government-linked Muslim community leaders to develop a uniquely “Singapore Muslim identity” as one possible antidote to foreign extremist ideological appeals⁴⁸, others severely criticize the move. These critics warn that “Singapore Muslims and Islam in Singapore are inextricable from the wider Islamic world”; moreover, if Singapore’s Muslim leaders go overboard in redefining local Islam to expedite greater Muslim integration into mainstream Singapore society, “Singapore would likely isolate herself, and the flock, bewildered, might seek an overseas shepherd,” including foreign “terrorists”⁴⁹. Dealing with the underlying generalized angst of the Singaporean Muslim community requires nothing less than generational change, and must involve attitudinal adjustments on the part of Muslims and non-Muslims alike, Singapore authorities and businesses. Furthermore, given how Singapore is thoroughly wired to the outside world through the internet, a more politically calibrated U.S. foreign policy toward the Muslim world would have to be part of the mix as well⁵⁰.

³³⁹ J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 34

Community acceptance of such programmes: RST research indicated that discrimination was not a major issue for most former Serendi residents (see Social Reintegration, Chapter IV). However, this finding came with the dual caveats that many of these individuals were not open about their past with Al-Shabaab and that the sample was drawn exclusively from a population of former residents who reintegrated in Mogadishu. As such, it is prudent to accept that a lack of community ‘buy-in’ may undermine the reintegration process in other parts of Somalia, as also occurs in other conflict environments. Of course, many such communities are the immediate victims of violence, and thus it should come as no surprise that some members outright reject the idea of living alongside those who previously committed atrocities. There is also the possibility that certain community members resent the fact that violent extremists are provided with basic education, vocational training, and so on, which may give them a competitive advantage over those who remained uninvolved in such violence. While policymakers have some influence over the level of support for the rehabilitation and reintegration process – for instance through community consultations, reconciliation mechanisms, messaging campaigns about the benefits of this programming, and so on – donors should consider that public opposition may be sufficiently strong to make such initiatives unfeasible at least in certain locations.

See also Mabrey, D. J., & Ward, R. H. (2009). Terrorist de-radicalization: comparative approaches for reintegrating terrorists into the community. In S. Ekici, A. Ekici, D. A. McEntire, R. H. Ward, & S. S. Arlikatti (Eds.), *Building terrorism resistant communities: together against terrorism* (pp. 253-263-). Amsterdam: IOS Press; Vanda Felbab-Brown, ‘Somalia Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 126, 156

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.¹²¹ 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

degree of communal acceptance, rehabilitation and reintegration of former terrorists is likely to fail.³⁴⁰

Another factor that complicates reintegration and rehabilitation is stigma. Stigma attaching to an individual's involvement with a terror organization might greatly complicate his or her reintegration, in particular in communities affected by the deeds of that organization.³⁴¹ Anonymity has sometimes served its purpose, in particular in urban settings. In smaller communities, however, this might create more resistance to reintegration and raise issues of security for the individual concerned. Effective outreach to the community is therefore important.³⁴² So is the provision of adequate security, in particular during the initial phase of the reintegration.³⁴³

Providing support to local communities is important not just to facilitate the reintegration of former terrorists but also to build communal resilience against

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.

³⁴⁰ See, e.g., B. Bukarti, *Making Peace With Enemies: Nigeria's Reintegration Of Boko Haram Fighters* (27 march 2019) (<https://warontherocks.com/2019/03/making-peace-with-enemies-nigerias-reintegration-of-boko-haram-fighters/>)

The major challenge is the lopsidedness of Nigeria's deradicalization and reintegration program. Abuja is investing enormous resources to prepare ex-combatants for reinsertion into communities, but little to nothing is being done to prepare the communities that are expected to receive them. This failure is a major reason why reinsertion has not actually yet occurred for any of the graduates. Deradicalization seems virtually pointless if deradicalized individuals cannot be reinserted at the end of it all.

[...]

The Nigerian government and its international partners need to articulate and implement a plan of action for this final stage of deradicalization. Operation Safe Corridor says it operates in secrecy for security reasons, but bringing members of affected communities onboard from the start of the process is key to reinsertion. This could be done by inviting political, religious, and traditional leaders of local affected communities to visit the camp, see things for themselves, and report back to their constituents. This, of course, should be done in a way that does not compromise security and safety of the participants, experts, and the facility. Town hall meetings with communities, which started recently, should be sustained and taken down to the grassroots level.

³⁴¹ Cameron Sumpter, Yuslikha K. Wardhani & Supto Priyanto (2019): Testing Transitions: Extremist Prisoners Re-Entering Indonesian Society, *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2018.1560666, p. 11-12; Mucha, W. (2017). Polarization, stigmatization, radicalization. *Counterterrorism and homeland security in France and Germany*. *Journal for Deradicalization*(10), 230- 254.

³⁴² See, *infra*, xx/outreach.

³⁴³ See, *infra*, xx/security.

terrorist organisations.³⁴⁴

7.3.2.7 Mentors

Mentoring has proved to be an effective tool to help and further the process of reintegration and rehabilitation of former terrorists. Particularly effective have been

³⁴⁴ HM Government, Contest - The United Kingdom's Strategy for Countering Terrorism (June 2018) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf), 31, para 99-100

99 The purpose of Prevent is at its heart to safeguard and support vulnerable people to stop them from becoming terrorists or supporting terrorism. Our Prevent work also extends to supporting the rehabilitation and disengagement of those already involved in terrorism. Prevent works in a similar way to programmes designed to safeguard people from gangs, drug abuse, and physical and sexual abuse. Success means an enhanced response to tackle the causes of radicalisation, in communities and online; continued effective support to those who are vulnerable to radicalisation; and disengagement from terrorist activities by those already engaged in or supporters of terrorism.

Prevent objectives

100 The objectives of Prevent are to:

- Tackle the causes of radicalisation and respond to the ideological challenge of terrorism.
- Safeguard and support those most at risk of radicalisation through early intervention, identifying them and offering support.
- Enable those who have already engaged in terrorism to disengage and rehabilitate.

See also OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 74:

- A local approach to preventing terrorism and countering VERLT is necessary; communities have emerged as the point of focus in the formulation and implementation of counterterrorism policies.
- Community-oriented approaches seek the involvement, support and trust of men and women from local communities in the formulation, implementation and evaluation of counterterrorism measures to increase their effectiveness. They are based on the idea that terrorism and VERLT are threats to community security, not just state security, and that communities are stakeholders and partners in counterterrorism, not just the passive object of law enforcement tactics.

[...]

The support of society as a whole is critical to successfully countering terrorism. The state needs to seek the support of, and draw on partnerships with, non-governmental stakeholders. Community-oriented measures to countering terrorism are an example of publicprivate partnership.

the use of former jihadists and individuals with credible religious education.³⁴⁵ This

³⁴⁵ See, generally, C. Jones, 'Managing extremist offenders: The TACT-ics of policing thought?', *Probation Journal – The Journal of Community and Criminal Justice*, 2015, 1, 6

Mentors. In LPT we have found that the involvement of mentors can assist in the rehabilitative process. The majority of the current TACT service users are deemed to be 'Al-Qaida inspired' and Muslim, and whilst an OM and a service user may both be Muslims, the OM role is inescapably a role of enforcement which could involve recalling the service user back to custody. A Muslim mentor can work alongside the service user in a different way, offering: a sense of religious legitimacy where necessary, in terms of knowledge about their faith and an active, public practice of that; an understanding of certain social/cultural/religious matters, and if necessary can advise probation staff accordingly as well as contributing to discussions around risk – for example by advising if certain literature in the offender's possession is a cause for concern or not; a potential sympathy to a political cause without espousing to any terrorist ideology, such as around issues of some current UK foreign policy; a subsequent role-modelling of that. Again there is potential for such a contrived relationship to be unworkable, but as it is a voluntary opportunity for the offender, there is no enforcement action if the relationship isn't productive, and normally it is valued by the offender. For example, one TACT offender spoke of the sense of security he found by having his mentor attend MAPPA meetings and help temper his uncomfortable experience of being subject to the powers of a largely anonymous, yet authoritative, panel. Again, the small-scale of this work does not readily lend itself to robust evaluation, and as such the use of mentors is very much something that is offered only to the extent that the service user wants/accepts it. In cases where the use of a mentor is not seen to be contributing effectively to the risk management plan, this can easily and swiftly be reviewed and discontinued.

See also Toke Agerschou, 'Preventing Radicalization and Discrimination in Aarhus', *Journal for Deradicalization*, Winter 2014/15, Nr 1, 5, 8

From the spring of 2011, it has been possible to assign a mentor as an intervention in relation to a youth, where there is concern about radicalization. Since September 2014, 21 mentors have been assigned to work on the programme (and more are due to be assigned or are under agreement), in cases where a youth and his or her parents have agreed to a mentor being assigned. In the autumn of 2011, a collaboration with Aarhus University Department of Psychology, under the leadership of Professor Preben Bertelsen, got under way. Through his work on the concept of life psychology, Professor Preben 22nd of September 2014 Bertelsen has contributed to developing the skills of a corps of nine mentors and four mentor consultants. The intention is to equip the mentors with useful tools to support them in their work with the young mentees, who often lack basic life skills, which can be instrumental in keeping them attached to extremist circles.

And, *ibid*, 1314-

Compulsory mentor processes 1) Contents: The individual citizen is always assigned a mentor whose job it is to provide support throughout the various exit measures provided. The purpose of this is to provide coherence and continuity in the exit process - e.g. in regards to the collaboration with various authoritative bodies. The scale and scope of the measure depends on the specific needs of the individual citizen and will always be organized as a temporary and focused measure with the purpose of ensuring the citizen's capability of handling the challenges that the radicalisation has resulted in. Basically the mentor's task is to supervise and provide the support needed to enable the individual's inclusion in society. The target of the mentor's basic task is to facilitate the individual's inclusion in society. 2) Participants: The individual mentor is assigned a consultant who carries out continuous supervision and consulting regarding the development of the mentor/mentee process. In addition the mentor is part of a specialised mentor corps meeting monthly with the mentor consultants. All mentors must complete an educational programme before being assigned a mentee. Mentor processes in exit cases are expected to be more challenging than mentor processes in the preventive part of the anti-radicalisation work. The mentor processes are therefore closely followed by the mentor consultant who provides monthly status reports on the exit process to the task force. Currently all mentors are males since the majority of the cases are young men. If more women become part of the target group the mentor corps will be changed accordingly.

has provided an important element of independence vis-à-vis the state³⁴⁶ and a way to help the process of de-radicalisation through education.³⁴⁷ Informed religious dialogue between those involved in a process of disengagement and those assisting that process is an important element of any such effort.³⁴⁸

S. V. Mardsen, *Reintegrating Extremists – Deradicalisation and Desistance* (Palgrave Pivot, 2017), 2324-

It is important to add that in [Health Identity Intervention], mentors are used where the OM believes it would be valuable to have additional support. These are not mandatory and probationers who do not wish to work with a mentor are under no obligation to do so. The rationale for bringing in external mentors is rooted in the ideological, cultural and political nature of the offence. Mentors are considered to be able to understand better those sociocultural factors relevant to the individual's experience, and have a clearer appreciation of the political grievances expressed by many of the probationers than statutory agencies.

And, *ibid*, 5253- (pointing to the legitimacy of common-based mentors).

³⁴⁶ S. V. Mardsen, *Reintegrating Extremists – Deradicalisation and Desistance* (Palgrave Pivot, 2017), 13

Where external actors are used, they are considered important as a least nominal independence from the state is believed relevant in conferring the legitimacy necessary to facilitate change. Where employees of the state are used, there is perception that trust is more difficult to generate [...], something that reflects the fact that trust development is both an important and challenging part of intervention work [...].

³⁴⁷ For an illustration, see J. Horgan and K. Braddock, 'Rehabilitating the Terrorists?: Challenges in Assessing the Effectiveness of De-radicalization Programs', *Terrorism and Political Violence*, 22:267–291, 2010, 273

Coupled with traditional military counter-terrorism strategies, Indonesia has quietly promoted an ad hoc, police-centered disengagement initiative in response to continued terrorist activity within and around Indonesia. Since his disillusionment with and subsequent disengagement from Jemaah Islamiyah (JI),⁴⁷ former commander Mohammed Nasir Bin Abbas has been part of the public cornerstone of efforts both to prevent radicalization of Indonesian youth as well as to facilitate the disengagement of existing JI members.⁴⁸ Bin Abbas has become a figurehead to rival even Abu Bakr Bashir—to those still loyal to Bashir, Bin Abbas is a hate figure. Bin Abbas claims that to re-educate captured prisoners, he explains to them how they have "misunderstood" the Islamic struggle and "the meaning of Jihad."⁴⁹ The BBC's Peter Taylor⁵⁰ said that Bin Abbas was actively urging (both in public and in private) JI members to "return to the right path of Islamic teaching."

[...]

In addition to assisting police investigations,⁵⁹ Bin Abbas was involved in the "re-education" of arrested JI operatives. In an interview with Tony Jones (ABC), Australian Federal Police Commissioner (AFP) Mick Keelty claimed that Bin Abbas's former position in JI (operational commander of JI's Mantiqi 3 and administrator of the Hudaibiyah training facility) yields respect from those that have been captured.⁶⁰ Keelty argues that such respect can be harnessed to "convert the others."⁶¹ These claims appear founded. While giving testimony against one of the architects of the second Bali bombing, the defendant smiled and shook the hand of Bin Abbas as a sign of respect.⁶² Bell⁶³ confirmed that once JI members are arrested, Bin Abbas holds talks with them. Unusually, he can even spend up to a week with captured members before Indonesian police get significant access to them.⁶⁴ During that time, Bin Abbas challenges detainees' Islamic justifications for armed action against civilians,⁶⁵ and tries to get detainees to cooperate with police investigations.⁶⁶

³⁴⁸ For an illustration, see J. Horgan and K. Braddock, 'Rehabilitating the Terrorists?: Challenges in Assessing the Effectiveness of De-radicalization Programs', *Terrorism and Political Violence*, 22:267–291, 2010, 275

Following the attacks of the USS Cole in 2000 and the French oil tanker Limburg in 2002, Yemeni President Saleh was widely criticized. It became clear that new methods for countering terrorism were necessary to suppress al-Qaeda within Yemen's borders.⁷⁷ To this end, and doubtless encouraged by the view in Yemen that the U.S. government would take matters into its own hands to protect its interests unless Saleh acted fast, a new initiative was born. Five religious scholars were selected to form what would become the Religious Dialogue Committee (RDC). Saleh appointed Hamoud al-Hitar, a widely-respected judge, as its head.

The basis of the RDC rests on the idea that because the political killing of civilians has "faulty intellectual foundations,"⁷⁸ the core tenets of terrorism can be disputed, thus weakening attitudes presumed to underpin support for terrorist activity.⁷⁹ To achieve attitude change, al-Hitar and the rest of the RDC debate with those captured and imprisoned. Al-Hitar claims that many of the captured militants have several parts of the Qur'an memorized as justification for their support of and participation in terrorism.⁸⁰ Because of this, the RDC tends to challenge

7.3.2.8 Security

Security must be paramount to any efforts of rehabilitation and reintegration of former terrorists. Security concerns pertain to returnees,³⁴⁹ but also to staff in charge of their rehabilitation and local communities in which they will be reintegrated.³⁵⁰ Victims of terrorist violence should also be protected from re-victimisation. Absence of security might prevent or discourage full reintegration and undermine rehabilitation efforts.³⁵¹ Providing a secure environment for all those concerned is therefore both a pre-condition to successful reintegration and a necessary element of a strategy of reintegration of former terrorists into society.

militants not on the content but on their understanding of the verses and Hadiths. In a published statement explaining the philosophy and operations of the RDC,⁸¹ al-Hitar explains that the subjects that he and the other religious scholars invite the participants to discuss include the place of jihad in Islam and its justifications, the relations of the Muslims and others, the concept of the State, government, and ruler rights within Islam.⁸² The basis for the debates, al-Hitar argues, is mutual respect.⁸³ Al-Hitar engages captured militants in “dialogue at eye level.”⁸⁴ The meetings are small and intimate—between five and seven militants per session.⁸⁵ Once meetings conclude, participants document and sign off on what they have discussed and learned. After weeks of debate, if the prisoners renounce violence and (if applicable) the terrorist groups of which they were part, they are released and offered vocational training and help finding employment

³⁴⁹ Vanda Felbab-Brown, ‘Somalia Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 126, 148-149

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.

³⁵⁰ J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 34

Security considerations: Rehabilitation centres and their residents and staff are vulnerable to attack by violent extremist groups – indeed, the more successful the programme, the more likely it is that such groups will be incentivised to target what could amount to an existential threat. Attacks may take various forms, including direct strikes on the centres, the targeting of family members and staff, and assaults on beneficiaries on weekend leave. With this in mind, national and international policymakers must consider whether it is possible to identify locations that are sufficiently secure for rehabilitation centres. Donors must also ensure that adequate finance is provided within the programme budget to cover security considerations.

³⁵¹ Vanda Felbab-Brown, ‘Nigeria Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 87-88

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.

7.4 Internment and limitation of movement orders

In some cases, captured terrorist or those who have left such a group have been subject to measures of interment. So have members of their family.³⁵² This sort of measures could be problematic from the point of view of human rights law as they are indiscriminate, interfere with the freedom of those concerned and could expose them to mistreatment and abuse of their due process rights. Therefore, where such measures are considered, they should be carefully evaluated against those standards.

More appropriate perhaps are measures – taken ideally by a judicial authority with competence to monitor – that restrict the freedom of movement of those concerned without involving any measure of detention. This could involve a prohibition to visit certain places, to attend certain occasions or restrictions as regards the free movement of the person concerned. Such measures could be particularly appropriate for individuals with limited association to a terrorist group and no demonstrated involvement in the commission of serious offences.

³⁵² See, e.g., Mara Redlich Revkin, ‘Iraq Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 68-69

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 challenges¹⁶³ – 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.”¹⁶⁴ 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.”¹⁶⁵

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.¹⁶⁶ 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.”¹⁶⁷ Although this camp was closed – after Human Rights Watch reported that at least 10 women and children had died traveling to or at the camp¹⁶⁸ – 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,¹⁶⁹ which they are not free to leave unless they receive a “green light” from all of the different security agencies and their respective databases.¹⁷⁰

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.¹⁷¹ 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.

7.5 Rehabilitation and reintegration

Rehabilitation and reintegration are to be understood here as referring to methods and means intended to facilitate a terrorist's return to society and acceptance within the relevant communities.³⁵³ These overlapping goals take a longer term view of the process of disengagement and reintegration of former terrorists.³⁵⁴ They are primarily focused on those being 'rehabilitated', but are also seen as providing a way to mitigate the risk of further radicalization of *others*.³⁵⁵ Rehabilitation has been identified as a particularly important element of the counter-terrorism strategy advanced by the UN Security

³⁵³ For slightly different definition of these terms, see also International Center for the Study of Radicalisation (ICSR), *Reintegrating ISIS Supporters in Syria: Efforts, Priorities and Challenges* (2018) (<https://icsr.info/wp-content/uploads/2018/08/ICSR-Report-Reintegrating-ISIS-Supporters-in-Syria-Efforts-Priorities-and-Challenges.pdf>), 9

- Rehabilitation: a purposeful and planned intervention that aims to change characteristics of ISIS supporters or members (attitudes; cognitive skills and processes; personality and/or mental health; and social, educational or vocational skills) that are believed to be the motives that drove the individual to join or support the group, with the intention to reduce the chance that the individual will re-join the group or continue to support it.
- Reintegration: a process that leads to a safe transition back into the community, by which former ISIS members live a law-abiding life and acquire attitudes and behaviours that generally lead them to become productive, functioning members of society.

Tinka Veldhuis, "Designing Rehabilitation And Reintegration Programmes For Violent Extremist Offenders: A Realist Approach," International Center For Counter-Terrorism, March 2, 2012, <https://icct.nl/publication/designing-rehabilitation-and-reintegration-programmes-for-violent-extremist-offenders-a-realist-approach/>.

[R]ehabilitation is seen as a purposeful, planned intervention, which aims to change characteristics of the offender (attitudes, cognitive skills and processes, personality or mental health, and social, educational or vocational skills) that are believed to be the cause of the individual's criminal behavior, with the intention to reduce the chance that the individual will re-offend. Moreover, reintegration is understood as a safe transition to the community, by which the individual proceeds to live a law-abiding life following his or her release and acquires attitudes and behaviors that generally lead to productive functioning in society.

³⁵⁴ See also E. Entenmann, L. van der Heide, D. Weggemans, J. Dorsey, "Rehabilitation for Foreign Fighters? Relevance, Challenges and Opportunities for the Criminal Justice Sector", International Centre for Counter-Terrorism, January 2016, (hereafter, E. Entenmann, L. van der Heide, D. Weggemans, J. Dorsey, "Rehabilitation for Foreign Fighters? Relevance, Challenges and Opportunities for the Criminal Justice Sector"); HM Government, *Contest - The United Kingdom's Strategy for Countering Terrorism* (June 2018) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf), 31, para 40, paras 128-130.

³⁵⁵ Georgia Holmer and Adrian Shtuni, *Returning Foreign Fighters and the Reintegration Imperative* (United States Institute Of Peace, 2017) (<https://www.usip.org/sites/default/files/2017-03/sr402-returning-foreign-fighters-and-the-reintegration-imperative.pdf>).

Council and by other international organisations.³⁵⁶ It is an important complement to measures of retribution and punishment.

This category includes a broad range of potential measures, mechanisms and processes. In Syria, for instance, a rehabilitation program was established by the Syrian Counter Extremism Centre and target ISIS-affiliated militants and defectors. In that context, rehabilitation measures focus primarily on religious views and disengagement from

³⁵⁶ See, e.g., UNSC Resolution 2178 (2014), S/RES/2178 (2014), 24 September 2014, in particular, paras 29ff:

Prosecution, Rehabilitation and Reintegration Strategies:

29. Calls upon Member States to assess and investigate suspected individuals whom they have reasonable grounds to believe are terrorists, including suspected foreign terrorist fighters and their accompanying family members, including spouses and children, entering those Member States' territories, to develop and implement comprehensive risk assessments for those individuals, and to take appropriate action, including by considering appropriate prosecution, rehabilitation, and reintegration measures and emphasizes that Member States should ensure that they take all such action in compliance with domestic and international law;

30. Calls upon Member States, emphasizing that they are obliged, in accordance with resolution 1373, to ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, to develop and implement comprehensive and tailored prosecution, rehabilitation, and reintegration strategies and protocols, in accordance with their obligations under international law, including with respect to foreign terrorist fighters and spouses and children accompanying re turning and relocating foreign terrorist fighters, as well as their suitability for rehabilitation, and to do so in consultation, as appropriate, with local communities, mental health and education practitioners and other relevant civil society organizations and actors, and requests UNODC and other relevant UN agencies, consistent with their existing mandates and resources, and other relevant actors to continue providing technical assistance to Member States, upon request, in this regard;

31. Emphasizes that women and children associated with foreign terrorist fighters returning or relocating to and from conflict may have served in many different roles, including as supporters, facilitators, or perpetrators of terrorist acts, and require special focus when developing tailored prosecution, rehabilitation and reintegration strategies, and stresses the importance of assisting women and children associated with foreign terrorist fighters who may be victims of terrorism, and to do so taking into account gender and age sensitivities;

32. Underscores the importance of a whole of government approach and recognizes the role civil society organizations can play, including in the health, social welfare and education sectors in contributing to the rehabilitation and reintegration of returning and relocating foreign terrorist fighters and their families, as civil society organizations may have relevant knowledge of, access to and engagement with local communities to be able to confront the challenges of recruitment and radicalization to violence, and encourages Member States to engage with them proactively when developing rehabilitation and reintegration strategies;

See also United Nations Security Council, Counter-Terrorism Committee, Security Council Guiding Principles on Foreign Terrorist Fighters: The 2015 Madrid Guiding Principles + 2018 Addendum, S/2015939/ and S/201836-35 ,(2019) 1177/, para 45 (footnotes omitted):

45. In the Madrid Guiding Principles, the Counter-Terrorism Committee noted that Member States should consider alternatives to incarceration, as well as the reintegration and possible rehabilitation of returnees, prisoners and detainees. In its resolution 2396 (2017), the Security Council called upon Member States to assess and investigate individuals (including suspected foreign terrorist fighters and their accompanying family members, including spouses and children) whom they have reasonable grounds to believe are terrorists and who enter their territories; to develop and implement comprehensive risk assessments for such individuals; and to take appropriate action, including by considering appropriate prosecution, rehabilitation and reintegration measures, taking into account that some individuals may be victims of terrorism. The Council emphasized in that regard that Member States were obliged, in accordance with resolution 1373 (2001), to ensure that any person who participated in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts was brought to justice. The Council also emphasized that States should ensure that all such actions be taken in compliance with domestic and international law.

Guiding Principle 46

ISIS doctrine, as well as psychological support.³⁵⁷

In undertaking efforts to develop and implement prosecution, rehabilitation and reintegration strategies and protocols, Member States should:

- (a) Implement their obligations to ensure that terrorists are brought to justice, as required under resolutions 1373 (2001), 2178 (2014) and 2396 (2017), and ensure that their criminal justice systems are capable of dealing with all serious crimes that may have been committed by foreign terrorist fighters;
- (b) Consider ways to ensure that prosecution, rehabilitation and reintegration strategies correspond to national counter-terrorism strategies, including effective methods to counter violent extremism conducive to terrorism;
- (c) Consider ways to ensure that prosecution, rehabilitation and reintegration strategies are timely, appropriate, comprehensive and tailored, taking into account gender and age sensitivities and related factors, comprehensive risk assessments, the severity of the crime(s) committed, available evidence, intent and individual culpability, the support network, the public interest and other relevant considerations or factors, as appropriate, and that they are in compliance with domestic and international law, including international human rights and humanitarian law;
- (d) Ensure that such strategies can be combined with other measures, such as monitoring and/or reporting, supervision, probation, fixed addresses, restraining orders, surrender of passport and/or identification and travel bans, all of which should be used in a manner compliant with applicable international human rights law and national legislation and should be subject to effective review;
- (e) Consider pursuing a whole-of-Government approach and, while recognizing the role that can be played by civil society organizations, including in the health, social welfare and education sectors and in local communities, as appropriate, consider ways to ensure, in developing such an approach, effective coordination and clear leadership, including by creating multidisciplinary teams, which may include law-enforcement agencies, the criminal justice sector, prison and probation services, social services and, as appropriate, civil society organizations;
- (f) Consider providing actors who assist them in implementing prosecution, rehabilitation and reintegration strategies with the resources, support, guidance and effective oversight required and the opportunity to consult with the competent authority, as appropriate;
- (g) Engage proactively with civil society when developing rehabilitation and reintegration strategies for returning and relocating foreign terrorist fighters and their families, as civil society organizations may have relevant knowledge of, access to and engagement with local communities;
- (h) Consider encouraging the voluntary participation and leadership of women in the design, implementation, monitoring, and evaluation of strategies for addressing returning and relocating foreign terrorist fighters and their families;
- (i) Ensure that programmes aimed at addressing and countering terrorist narratives, including in prisons, respect international human rights law, including the right to freedom of opinion and expression, the right to freedom of religion or belief and the right to be free from arbitrary or unlawful interference with privacy;
- (j) Monitor, evaluate and review the effectiveness of prosecution, rehabilitation and reintegration strategies.

See also UNSC Resolution 2396 (2017), S/RES/2396(2017), 21 December 2017. Regarding other organisations, see also: “Declaration on strengthening OSCE efforts to prevent and counter terrorism” adopted by the OSCE Ministerial Council in Hamburg on 9 December 2016, MC.DOC/116/; “Ministerial Declaration on preventing and countering violent extremism and radicalization that lead to terrorism”, adopted by the OSCE Ministerial Council in Belgrade on 4 December 2015, MC.DOC/415/; “Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders”, Global Counterterrorism Forum (GCTF); “Foreign Terrorist Fighters: Eurojust’s Views on the Phenomenon and the Criminal Justice Response, Fourth Eurojust Report”, Eurojust, November 2016, p.15.

³⁵⁷ International Center for the Study of Radicalisation (ICSR), *Reintegrating ISIS Supporters in Syria: Efforts, Priorities and Challenges* (2018) (<https://icsr.info/wp-content/uploads/2018/08/ICSR-Report-Reintegrating-ISIS-Supporters-in-Syria-Efforts-Priorities-and-Challenges.pdf>), 25ff (footnotes omitted):

While there does not seem to be a local reconciliation process in the town of Mare’ in Aleppo’s countryside, a more advanced rehabilitation process to deal with former ISIS members has been established through the Syrian Counter Extremism Centre (SCEC). This is the only centre of its kind in Syria. The centre is located in Mare and controlled by the Turkish-led forces.⁹⁷ The local civil society actors and religious scholars involved in this initiative founded the centre in October 2017 to address, among other things, the emerging problem resulting from ISIS’s territorial losses in north-eastern Syria. These losses caused hundreds of ISIS-affiliated militants and defectors to flee to rebel-controlled areas in northern Syria.⁹⁸ While other actors are focusing on fighting the group militarily, the centre focuses on countering violent extremism and establishing de-radicalization programs to erase ISIS’s entrenched ideology.

[...]

Established in a former school, the centre includes thirty-five staff, five of which deal directly with ISIS members while the rest are guards and administrators. All the people involved are working on a voluntary basis, as the centre does not receive foreign funds. The running costs of the project are covered by small donations raised locally.¹⁰⁰ The centre hosts twenty-five ISIS members who were captured or defected, the majority of whom are Syrians while the rest are from the Caucasus, Uzbekistan, Ukraine, Tunisia, Iraq and other countries. The centre has so far only been admitting ISIS members who have been referred by local courts, and whose sentences include residing at the centre for rehabilitation.¹⁰¹ The centre was able to reach such an arrangement – with some of the local courts and the affiliated rebel groups – due to the prominence of some of the people involved in this initiative, as well as the importance of the work it is doing. Consequently, the respective courts started referring captured ISIS members to the centre until the latter reached its maximum capacity.¹⁰²

The centre's residents are divided into three categories. The first is the low-risk group, which includes Syrian members who were not fighters or have not been accused of violations against civilians. The second category are those considered medium-risk and includes Syrian combatants involved in violence or criminal activities. The third and high-risk category includes all non-Syrian members. While the profile of the second and third categories are similar, in terms of committing crimes against civilians, the centre differentiates between them for two reasons. First, it is due to the assumption that most of the Syrians joined ISIS for pragmatic reasons such as fame, power, money etc. In contrast, foreign ISIS members are considered more ideologically motivated. Second, the language barrier makes it more difficult to communicate with those in the third category, thus making it more difficult to rehabilitate them.¹⁰³

For each of these categories, there are workshops and seminars in religious doctrine to familiarize them with a more moderate form of Islam than the version imposed by ISIS. Other sessions aim at countering ISIS propaganda and narratives by explaining the damages caused by ISIS attacks and who the real targets of such assaults were. Videos, photos, reports, and newspapers are usually used as evidence to support the argument. The residents also attend courses in civic education, law, communication, human security, human rights and other relevant topics that can help reintegrate them into their communities.¹⁰⁴ While group psychosocial support sessions are mandatory for everyone, many have to attend individual sessions to help wean them off ISIS ideology. The residents attend three such sessions every day, while spending the rest of the time watching movies, playing chess and backgammon etc.¹⁰⁵

The residents stay at the centre between one and six months. During this period, the progress of the residents is measured and shared with local authorities who base their release decisions on the centre's recommendations. Those who make quick progress can be released from the centre after the first month, while others may require an extended stay. During that time, the families of the residents are allowed to visit them for one hour once a week.¹⁰⁶ The stay at the centre is deducted from their prison sentence; as such, the centre operates both as a detention and a rehabilitation facility. Four former ISIS members, who belong to low and medium risk groups, have been released based on the centre's recommendation. The centre has established mechanisms to follow up on released individuals (such as home visits, establishing communication channels with their communities etc.) to monitor their reintegration into society.¹⁰⁷ Though the centre has demonstrated some success, it also faces numerous challenges, notably a lack of funding. The limited financial resources thus only allows the centre to accept a small number of ISIS members. This has also led to the centre's inability to hire translators, making it difficult to communicate with some of the foreign residents who cannot communicate in Arabic.¹⁰⁸ The centre's sole dependence on small donations raised by locals may also risk the continuity of its operation if, and when, locals can no longer cover the centre's expenses, which may be very soon.¹⁰⁹

Additionally, the people in charge of the centre have no previous experience in the field of rehabilitation or countering violent extremism. Despite various attempts, they have not been able to make contact with any other experts or centres who work in the field. This is due to the lack of knowledge about who to contact, the limited attempts to reach out, and the lack of willingness among those that were contacted. Therefore, most of the centre's staff lack the knowledge and experience that allow them to work with former ISIS supporters without risking being counterproductive, particularly given that they have designed their programs alone. This issue was partially raised by the centre's director who expressed the need for more experienced specialists, especially when dealing with hardened ISIS loyalists.¹¹⁰ Besides, the centre – which deals with underage ISIS members – does not have specialised youth counsellors or staff familiar with child/youth rehabilitation. This raises concerns about treating children similarly to adult ISIS members and detaining them in the same place as those who have committed serious crimes. Furthermore, the centre does not address the wider impact of ISIS on the thousands of local residents living there who joined Islamic State in different capacities, or who were influenced by it.

In Saudi Arabia, counselling is offered to rehabilitate former combatants and help – financial, vocational, psychological, and educational – is provided for that same purpose.³⁵⁸ In Denmark, a multi-agency intervention together with local authorities offer a rehabilitation program focused on family and local communities and offers religious and mentoring assistance as well as help with housing and employment.³⁵⁹ In Malaysia, a great deal of focus on rehabilitation goes to the issue of employment and making

³⁵⁸ C. Boucek, “Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare,” Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 11

The centerpiece of Saudi Arabia’s rehabilitation strategy is the counseling program, a comprehensive effort to rehabilitate and reeducate violent extremists and extremist sympathizers through intensive religious debates and psychological counseling. The objective of the program is to de-radicalize and demobilize individuals and to encourage extremists to renounce “terrorist ideologies,” especially the doctrine of takfir. Detained security offenders—regardless of their individual offenses—are invited to participate in the rehabilitation process. Once the process is completed, those determined to have renounced their former beliefs are eligible to be released from custody. Ministry of Interior officials stress, however, that individuals who have “blood on their hands” and who complete the rehabilitation program still will not be released early. The counseling program is based not on punishment or retribution but on a presumption of benevolence; that is, the state does not seek to exact revenge through this program. It begins from the assumption that the suspects were lied to and misled by extremists into straying from true Islam. Saudi security officials assert that extremists prey on people who want to know more about their faith, then corrupt them through exposure to violent extremist ideologies. The manipulation of naive individuals—including those who merely seek to become more pious—is a recurring theme in Saudi counterterrorism programs. The government repeatedly tells detainees and their families that it wants to assist security prisoners in returning to the correct path. Counseling is thus presented as help for victims of radicalization, not as punishment for transgressors.

And, *ibid*, 17:

Prisoners who have successfully completed the rehabilitation process to the satisfaction of the program sheikhs, doctors, and psychologists are transferred to a specialized external rehabilitation facility called the Care Rehabilitation Center to facilitate the transition back to society. This residential rehabilitation facility, which was established several years ago, offers a very different environment than a traditional prison. Detainees live communally in dormitory-type housing, prepare group meals, and have open access to grassy courtyards and open sky—the latter most definitely a switch from prison life. Moreover, guards at the center do not wear uniforms and they frequently mix with program participants, including playing such sports as soccer and volleyball. Numerous recreation and other leisure activities also are available to detainees. Such activities are considered important in the counter-radicalization process, because they not only build teamwork but also encourage acceptance and develop notions of inclusion. One of the most revolutionary rehabilitation activities is art therapy. Getting radicalized young men who previously would have rejected any type of visual art as forbidden by Islam to participate in art therapy is a major accomplishment. And for the government to engage in art therapy, absent rebuke from religious conservatives and staunch social traditionalists, is indicative of the progressive nature of the rehabilitation program as a whole.

³⁵⁹ See, generally, J. Morton and M. D. Silber, *When Terrorists Come Home - The Need for Rehabilitating and Reintegrating America’s Convicted Jihadists* (https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf), 39; Gilles De Kerchove, Jacob Bundsgaard, Doug Stone, And Matthew Levitt, “Rehabilitation And Reintegration Of Returning Foreign Terrorist Fighters,” Washington Institute For Near East Policy, February 23, 2015, <https://www.washingtoninstitute.org/policy-analysis/view/rehabilitation-and-reintegration-of-returning-foreign-terrorist-fighters>; Preben Bertelsen, “Danish Preventive Measures And De-Radicalization Strategies: The Aarhus Model,” Adenauer-Stiftung, January 2015, http://psy.au.dk/fileadmin/Psykologi/Forskning/Preben_Bertelsen/Avisartikler_radikalisering/Panorama.pdf; ; Sören Billing, “Denmark’s Jihadist Rehab: School, Sport And Islam,” *The Local*, December 3, 2014, <https://www.thelocal.dk/20141203/denmarks-jihadist-rehab-homework-football-and-islam>; John Beck, “Denmark’s ‘Jihadist Rehab’ Center Offers Counseling Rather Than Jail Time,” *Vice News*, February 16, 2015, <https://news.vice.com/article/denmarks-jihadist-rehab-center-offers-counseling-rather-than-jail-time>.

participants self-dependent.³⁶⁰ In Somalia, rehabilitation of former al Shabaab members is multi-faceted, involving medical, social and psychological care, de-radicalisation and religious education as well as interaction with family members.³⁶¹ This proved particularly well suited for low(ish) members of the organization.³⁶² European “exit programs” use psychosocial modalities, and rely on personalized interventions as well as long-term and sustained investment and specialized expertise.³⁶³

Liesbeth van der Heide and Bart Schuurman have identified some of the ‘best practices’ pertaining to this sort of initiatives:

These include the need for extensive post-release care alongside surveillance and deterrence capabilities, the importance of including family members in reintegration efforts, ensuring sufficient public support for reintegration programs, using independent clerics to conduct religious deradicalization interventions, the utility of dialogue-based interventions to challenge extremist convictions, and the potential to use financial incentives to instigate and ensure continued [...]. Authors have also stressed the importance of establishing good working relationships between program staff and clients, the need to offer tailor-made approaches and the necessity of effective cooperation between all parties

³⁶⁰ Ahmad Zahid Hamidi, ‘Malaysia’s Policy On Counter Terrorism And Deradicalisation Strategy’, *Journal of Public Security and Safety* Vol. 6 No. 2/2016:

Malaysia has formulated an integrated rehabilitation module for those detained under the Prevention of Terrorism Act 2015 (POTA). This module covers various aspects such as social skills, self-management, patriotism, financial management and psychology. This module serves as a guideline to the rehabilitation officers in their work. The rehabilitation and deradicalisation activities are conducted periodically in the prisons and rehabilitation centres. To rehabilitate and deradicalise terrorists and extremists successfully, the Malaysian authorities cannot work single-handedly. The programmes need to engage all related parties including community leaders, family members, former terrorists, religious teachers as well as different sectors of the society. Malaysia’s deradicalisation initiatives also include constant dialogues with various stakeholders and international partners. Apart from engagement, the dialogues provide feedback on policy and programmes, and opportunities of experience sharing with other counterparts.

³⁶¹ Vanda Felbab-Brown, ‘Somalia Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 126, 148.

³⁶² Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 11.

³⁶³ Georgia Holmer and Adrian Shtuni, *Returning Foreign Fighters and the Reintegration Imperative* (United States Institute Of Peace, 2017) (<https://www.usip.org/sites/default/files/2017-03/sr402-returning-foreign-fighters-and-the-reintegration-imperative.pdf>).

involved in reintegration [...].³⁶⁴

The Global Counter-Terrorism Forum has for its part focused on the following factors as core to successful reintegration efforts:

Good Practice #19 – Develop comprehensive reintegration programs for returning FTFs. Comprehensive reintegration programs – including in prisons - are a critical component to respond to the potential threat posed by returnees. FTFs are driven by different motivational factors that led them to go abroad to fight – including religious, humanitarian, ideological, economic or political concerns – and radicalization to violent extremism may happen during the time abroad rather than serving as the primary motivational factor for traveling. Accordingly, reintegration programs should account for the different motivational factors and include an assessment of individual returnees to determine the most appropriate approach. Key principles for consideration to guide engagement and the development of such programs include: (1) the need to articulate the goal of activities to reduce the risk of returnees committing terrorist acts; (2) the importance of developing targeted and tailored engagement strategies based on the specific motivational factors; and (3) the need to involve multi-disciplinary actors in law enforcement, communities, and faith-based organizations. Other key considerations include how to engage families and community members who are connected to returnees, encouraging critical thinking and challenging the logic and messaging of FTFs, and understanding and acknowledging both real and perceived grievances to effectively engage in meaningful discussion. Communities should be closely involved to provide support to individuals, to frame reintegration programs, and to neutralize possible future radicalization efforts.³⁶⁵

³⁶⁴ Liesbeth van der Heide and Bart Schuurman, Reintegrating Terrorists in the Netherlands: Evaluating the Dutch approach, *Journal for Deradicalization*, Nr 17, Winter 2018/19, 203. See also Tinka Veldhuis, *Designing Rehabilitation and Reintegration Programmes for Violent Extremist Offenders: A Realist Approach*, ICCT Research Paper March 2012 (<https://icct.nl/wp-content/uploads/2015/05/ICCT-Veldhuis-Designing-Rehabilitation-Reintegration-Programmes-March-2012.pdf>), 9-10, identifying mechanisms of rehabilitation as including: a) education; b) vocational training; c) cognitive behavioural therapy; d) religious counselling; e) miscellaneous (including individual classification and needs assessments, group discussions, on the job training, parole and probation, social and recreational activities, testing and evaluation, and (financial) aftercare).

³⁶⁵ Global Counter-Terrorism Forum (GCTF), “Foreign Terrorist Fighters” (FTF) Initiative The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon. See also Global Counter-Terrorism Forum (GCTF), Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders, 10ff, good practices nos 15ff.

Voluntariness is a particularly important feature of any rehabilitation and reintegration effort.³⁶⁶ So is a degree of support from families and local communities.³⁶⁷ More generally, this sort of programs require a level of resources commensurate and adequate to their ultimate goals of rehabilitation and reintegration.³⁶⁸

Rehabilitation efforts should account for the cultural, religious and social context relevant to the process and account for the economic situation of those concerned (those

³⁶⁶ J. Morton and M. D. Silber, *When Terrorists Come Home - The Need for Rehabilitating and Reintegrating America's Convicted Jihadists* (https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf), 20ff.

³⁶⁷ J. Morton and M. D. Silber, *When Terrorists Come Home - The Need for Rehabilitating and Reintegrating America's Convicted Jihadists* (https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf), 27-28.

³⁶⁸ <https://www.lowyinstitute.org/the-interpretor/terror-suspects-riot-jakarta-underscores-prison-problems>

The national counterterrorism agency (BNPT) has for the past several years run sessions with extremist inmates aimed at deradicalisation. But with some 275 convicted terrorists (not counting the 156 suspects at Mako Brimob) distributed among roughly 70 prisons, logistical problems mean engagements are ultimately few and far between.

[...]

What is clear is that interventions are more likely to be successfully received if they are personally tailored to an individual's background and personality, and involve frequent engagements. The less than ideal situation in Indonesia means that BNPT officers can only visit most prisons a few times per year, which makes any lasting impact of their deradicalisation efforts unlikely, however well intentioned.

Regarding the need for a variety of types of expertise, see also Global Counter-Terrorism Forum (GCTF), Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders, 78-:

Good Practice Number 7: Rehabilitation programs could incorporate a broad range of cross-disciplinary experts, with close coordination among the relevant departments and personnel involved. With the wide range of motivations and factors that may have pushed individuals towards violent extremism, prison rehabilitation is a complex undertaking, one that ideally includes a range of different types of experts incorporated into the programs. As discussed at greater length below, psychologists, social workers, religious scholars, aftercare experts, and even family members and communities may all have a role to play in a successful rehabilitation program. Other personnel, such as correctional officers and law enforcement agents also may be interacting with the inmates during this sensitive time period. It is important that all of these efforts be carefully planned, structured, and coordinated to maximize the effectiveness of the program, and ensure that all of those involved with the inmates are imparting consistent messages to the inmates.

See also, *ibid*, good practice nos 8-14 (regarding the various categories of potentially relevant actors).

subject to rehabilitation, their families and local communities).³⁶⁹ The designers of those programs should also be mindful of the need to preserve and protect the freedom

³⁶⁹ Georgia Holmer and Adrian Shtuni, *Returning Foreign Fighters and the Reintegration Imperative* (United States Institute Of Peace, 2017) (<https://www.usip.org/sites/default/files/2017-03/sr402-returning-foreign-fighters-and-the-reintegration-imperative.pdf>), 11-12

This report suggests several important guiding principles in designing and developing effective noncustodial programs to reintegrate former foreign fighters and those convicted of terrorist crimes back into society.

First, theological reeducation by itself is unlikely to prevent radicalization or to move a person away from affiliation with a violent extremist group or identity. Research converges around the importance of addressing affective, social, and cognitive factors in any effort to rehabilitate and reintegrate individuals into society. In addition, rehabilitation programs also need to be based on a solid understanding of the unique social and cultural dynamics that led to radicalization and mobilization, and the factors that brought the fighters home again. In this way, designing effective reintegration programs requires multiple levels of analysis and a merging of technical expertise with local wisdom and capacity.

Also, no single model of rehabilitation and reintegration can be applied across cultural contexts. Ideas of social and familial obligations, honor, shame, forgiveness, and reconciliation are all culturally defined. The ways in which communities interact and are structured vary tremendously, as do the roles and influence of families, community leaders, and institutions. Successful programs have greater impact and greater legitimacy when they are developed by communities and informed by a local understanding of social norms, community relationships, and cultural traditions.

The active participation of family members and communities is key to effective reintegration for returnees. In many ways, family and community experience the reintegration process together with the returnee and require aftercare support and assistance as well. This is particularly critical and requires a different level of effort when families have helped enable radicalization. Rebuilding family and community ties helps bolster post-custodial reintegration.

An investment in long-term psychosocial treatment, monitoring, and individualized mentoring programs is crucial. Disengagement from an affiliation with a violent extremist group takes time and is not linear. Participants vulnerable to recruitment often have unaddressed psychosocial issues, and those who have experienced war often bring back the emotional damage of exposure to and participation in violence. Programs must be professional, flexible, iterative, sustained, and capable of accommodating the special needs of women and children and addressing the residual impact of trauma

For programs to be sustainable, their objectives need to be transparent and their interlocutors credible. These characteristics permit the establishment of clear metrics for success. Interlocutors must be carefully vetted to minimize the possibility of their promoting illiberal and undemocratic values or agendas that may prove harmful in the long term. In some instances, formers—individuals previously affiliated with violent extremist or extremist groups—have been part of deradicalization programs and, despite advocating nonviolence, have continued to support extremist ideologies, undermining efforts at true rehabilitation.

Safe, accountable, and effective lines of communication need to be developed between law enforcement entities and the credible interlocutors supporting these efforts—a challenging aspect of any deradicalization or prevention program. Law enforcement plays a crucial role, indeed the lead role, in keeping communities safe from the threat of violence, and their involvement is necessary when a threat emerges. Those managing reintegration programs, however, must ensure some separation from security actors so that participants are given the opportunity to fully rehabilitate voluntarily, civil society organizations are not instrumentalized in the collection of intelligence, and civil rights of participants are fully respected.

Nesting rehabilitation and reintegration programs into larger efforts of economic, social, and political reform and stability—especially in fragile and emerging democracies—will enable their chances of success. It is unrealistic to expect that programs will produce lasting rehabilitation and meaningful reintegration outcomes if the local structural conditions and grievances that fuel radicalization are not addressed. Doing that means, in particular, ensuring a parallel focus on security and justice sector reform and good governance.

Regarding the importance of socio-economic reintegration, see also Institute for Security Studies, <https://issafrica.org/iss-today/the-challenge-of-reintegrating-former-terrorists-in-africa>.

of thought of those concerned.³⁷⁰ More generally, rehabilitation/reintegration efforts should be structured and implemented in a manner consistent with relevant standards of human rights, be evidence-based and should account for the personal circumstances of the individuals concerned.³⁷¹ And they should also account for the individual features of those concerned, including their gender, age, origin, education and so on. Holmer and Shtuni have noted in that respect that

‘[t]he most promising feature of first-generation deradicalization programs implemented in Middle East and Southeast Asia is their three-pronged intervention effort that addresses affective, pragmatic, and ideological bonds concurrently, thus emphasizing the role of social and community relations in the reintegration process’.³⁷²

Outreach to relevant communities should be carried out to ensure that those going through such a process are received back into society or, at least, that their return does not create undue risks for them or locals.³⁷³

³⁷⁰ See Global Counter-Terrorism Forum (GCTF), “Foreign Terrorist Fighters” (FTF) Initiative The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon, 2:

As noted by the United Nations Counterterrorism Committee Executive Directorate in its Global Implementation Survey on the implementation of resolution 1624, rehabilitation programs “need to be considered carefully in view of their direct impact on fundamental rights, including the right to freedom of thought, conscience, religion and opinion, as well as the right to fair treatment in accordance with the rule of law.”

³⁷¹ UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters (2018), para 78:

Rehabilitation and reintegration strategies and de-radicalization programmes consistent with international human rights law should be developed and implemented along with the criminal justice measures. Alternative approaches to incarceration should be considered, based on risk assessment, availability of evidence and other factors. Interventions should engage government authorities, community members and civil society stakeholders as an effective long-term response. Rehabilitation and reintegration programmes should be complemented by comprehensive strategies and community-based initiatives that prevent violent extremism, in particular the recruitment and radicalization of at-risk youth. Considering that prisons have been found in some cases to be grounds for recruitment, a combination of judicially mandated de-radicalization, rehabilitation programs, and potential house arrest should be considered. Tailored rehabilitation and reintegration strategies should be developed for different categories of returnees, including women and children. States should engage proactively with community members and civil society organizations when designing and implementing rehabilitation and reintegration strategies, as requested by resolution 2396 (2017).

³⁷² Georgia Holmer and Adrian Shtuni, *Returning Foreign Fighters and the Reintegration Imperative* (United States Institute Of Peace, 2017) (<https://www.usip.org/sites/default/files/2017-03/sr402-returning-foreign-fighters-and-the-reintegration-imperative.pdf>).

³⁷³ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 11.

7.6 De-radicalisation and disengagement

De-radicalisation is generally understood as referring to a psychological and cognitive process by which the individual experiences a fundamental change in understanding and belief cognisant to their worldview.³⁷⁴ In contrast, disengagement is generally

³⁷⁴ International Center for the Study of Radicalisation (ICSR), *Reintegrating ISIS Supporters in Syria: Efforts, Priorities and Challenges* (2018) (<https://icsr.info/wp-content/uploads/2018/08/ICSR-Report-Reintegrating-ISIS-Supporters-in-Syria-Efforts-Priorities-and-Challenges.pdf>), 9. See also J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 9

In contrast to disengagement, deradicalization can be seen as a social and psychological process that results in attitudinal change, effectively reducing an individual's commitment to the belief that personal involvement in violence is necessary and justified. Whereas disengagement is primarily a process of behavioral change, deradicalization seeks cognitive adaptations.²²

However, this by no means represents a consensus understanding, with other commentators instead applying the concept of deradicalisation to refer to changes at both the cognitive and behavioural levels.²³ The authors of this report reject this latter interpretation on the basis that greater analytical clarity can be gained through intentionally decoupling attitudinal and behavioural change into separate concepts. More specifically, this is because behavioural change often occurs without attitudinal change (as represented by Individual Z in Figure 2), and vice versa (Individual X). For instance, the former may transpire if individuals are captured, if they 'burn out', or if they elect to dedicate more time to their families.²⁴ Conversely, deradicalisation occurs without disengagement, for example, in cases where individuals are prevented from exiting by the threat of retaliation by the violent extremist group in question. This phenomenon was regularly reported by Serendi residents interviewed by the RST, who highlighted Al-Shabaab's willingness to apply violence in such cases (see Chapter II).

Middle East Institute, *Deradicalization Programs in Saudi Arabia: A Case Study* (2015) (<https://www.mei.edu/publications/deradicalization-programs-saudi-arabia-case-study>)

The program aims to "deprogram" jihadist radicals, changing their beliefs and behaviors until they no longer pose a threat to the state.

See also C. Boucek, "Saudi Arabia's "Soft" Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare," Middle East Program, Carnegie Endowment for International Peace (September 2008): 23; and Liesbeth van der Heide and Bart Schuurman, *Reintegrating Terrorists in the Netherlands: Evaluating the Dutch approach*, *Journal for Deradicalization*, Nr 17, Winter 2018/19, 19/ (noting the absence of definitional clarity regarding this concept, but suggesting that deradicalization refers to 'cognitively oriented, encompassing the gradual dissolution of the extremist worldview that legitimizes and encourages terrorist violence'); J. Horgan and K. Braddock, 'Rehabilitating the Terrorists?: Challenges in Assessing the Effectiveness of De-radicalization Programs', *Terrorism and Political Violence*, 22:267–291, 2010, 280

De-radicalization: the social and psychological process whereby an individual's commitment to, and involvement in, violent radicalization is reduced to the extent that they are no longer at risk of involvement and engagement in violent activity. De-radicalization may also refer to any initiative that tries to achieve a reduction of risk of re-offending through addressing the specific and relevant disengagement issues (p. 153).

Tinka Veldhuis, "Designing Rehabilitation And Reintegration Programmes For Violent Extremist Offenders: A Realist Approach," International Center For Counter-Terrorism, March 2, 2012, <https://icct.nl/publication/designing-rehabilitation-and-reintegration-programmes-for-violent-extremist-offenders-a-realist-approach/>.

De-radicalization is fundamentally a psychological and cognitive process by which the individual experiences a fundamental change in understanding and belief. However, de-radicalization does not necessarily go hand in hand with disengagement.

understood as referring to withdrawal from association with violent third parties.³⁷⁵ These definitions are not intended to draw clear, authoritative, lines between what can be done and what cannot. They merely highlight the general outlines of categories of alternatives (or supplements) to measures of detention that have been adopted in relation to terrorists with a view to ensuring their eventual safe return to society. And these categories are not hermetically sealed and overlap a great deal in some instances.

Because of the perceived interference with freedom of thought (and religion) involved in (certain) processes of ‘de-radicalisation’, a clear preference is currently evident for measures of disengagement rather than de-radicalisation although the former might

³⁷⁵ See, e.g., J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf), 9

Perhaps with this in mind, another common approach is to more specifically interpret disengagement in terms of ceasing involvement in the creation of violence. For instance, Mary Beth Altier, Christian Thoroughgood and John Horgan state simply that ‘we define disengagement as the process of ceasing terrorist activity’.¹⁹ Disengagement is also often characterised as a process that tends to occur over a substantial period, rather than being a specific event.²⁰ However, this was generally not the case with many Serendi residents who reported that their disengagement occurred suddenly when they were presented with an opportunity to escape from Al-Shabaab (see Chapter II). By contrast, most commentators apply the term ‘deradicalisation’ to mean changes in attitudes only (in other words, a leftward movement in Figure 2).²¹

Liesbeth van der Heide and Bart Schuurman, *Reintegrating Terrorists in the Netherlands: Evaluating the Dutch approach*, *Journal for Deradicalization*, Nr 17, Winter 2018/19, 19/

As the obverse of ‘radicalization’ and ‘engagement in terrorism’, subjects still mired in conceptual confusion and poor empirical underpinnings, it is no surprise that widely-accepted definitions are absent (Schmid, 2013; Schuurman & Taylor, 2018) Nonetheless, there is some consensus that disengagement from terrorism entails behavioral change to the effect that an individual no longer participates in or supports this form of political violence. Deradicalization is cognitively oriented, encompassing the gradual dissolution of the extremist worldview that legitimizes and encourages terrorist violence (Ashour, 2007; Bjørge, 2009; Horgan, 2009). People can disengage from terrorism behaviorally without necessarily deradicalizing in a cognitive sense (Horgan & Braddock, 2010; Sukabdi, 2015). Moreover, and particularly interesting for reintegration programs, disengagement can also be initiated involuntarily, for instance by removing someone from a terrorist group through arrest and imprisonment (Ferguson, 2011).

[...]

Two conclusions may be drawn from this brief conceptual discussion. First, reintegration programs should not focus solely on deradicalizing their participants but also see ‘mere’ disengagement as a potentially positive outcome. While abandoning the extremist beliefs that can legitimize and motivate terrorism might seem a more robust way of preventing recidivism, changing deeply-held beliefs is a very difficult undertaking that might not prove feasible in a majority of cases, especially given the practical constraints in terms of time and resources within which reintegration programs operate

J. Horgan and K. Braddock, ‘Rehabilitating the Terrorists?: Challenges in Assessing the Effectiveness of De-radicalization Programs’, *Terrorism and Political Violence*, 22:267–291, 2010, 280

Disengagement: the process whereby an individual experiences a change in role or function that is usually associated with a reduction of violent participation. It may not necessarily involve leaving the movement, but is most frequently associated with significant temporary or permanent role change. Additionally, while disengagement may stem from role change, that role change may be influenced by psychological factors such as disillusionment, burnout or the failure to reach the expectations that influenced initial involvement. This can lead to a member seeking out a different role within the movement (p. 152).

[...]

have a more limited effect than the latter.³⁷⁶

De-radicalization implies a different change than those associated with disengagement alone: it implies change at the cognitive level, not simply the physical cessation of some observable behavior. Discussions about de-radicalization imply long-lasting change in orientation such that there is presumably a reduced risk of re-engaging in terrorist activity. However, while clearly identifiable as a component in particular programs (perhaps most obviously in the Saudi case), it would appear that a preoccupation with de-radicalization may be both premature and naïve. Certainly it does not adequately characterize the programs under examination. At the very least, it might be more appropriate to collectively refer to these programs as “risk reduction” initiatives—regardless of the operational differences, resources, and expected outcomes (let alone terminology), attempting to reduce re-engagement in terrorism is the one unambiguous common thread between these initiatives. In the absence of convincing data, whether reliable de-radicalization is a requirement remains highly questionable.

J. Horgan, “**Deradicalization or Disengagement? A Process in Need of Clarity and a Counterterrorism Initiative in Need of Evaluation**”, *Perspectives on Terrorism*, Vol 2(4) (2008) (<http://www.terrorismanalysts.com/pt/index.php/pot%20/article/view/32/html>); S. V. Mardsen, *Reintegrating Extremists – Deradicalisation and Desistance* (Palgrave Pivot, 2017), 8

Commonly distinguished from disengagement, deradicalization is generally understood as attitudinal and ideological change leading to a reduction in the commitment to militancy. Disengagement, however, encompasses behavioural change related to the move away from political violence [...].

Tinka Veldhuis, *Designing Rehabilitation and Reintegration Programmes for Violent Extremist Offenders: A Realist Approach*, ICCT Research Paper March 2012 (<https://icct.nl/wp-content/uploads/201505/ICCT-Veldhuis-Designing-Rehabilitation-Reintegration-Programmes-March-2012.pdf>), 2:

Further, a clear distinction must be made between disengagement and de-radicalisation, processes that can manifest themselves at both the individual and collective level.¹⁰ Disengagement denotes a behavioural change by which individuals or movements reduce or stop using violent methods. Disengagement can be partial and does not necessarily imply a complete move away from violence.¹¹ Movements could decide to slightly alter their tactics and individuals can change their role in the movement to a more peripheral position, without denouncing violence completely or leaving the movement entirely. Disengagement may or may not involve de-radicalisation, which requires not only a change in behaviour but also a change in belief. De-radicalisation, in turn, is fundamentally a psychological and cognitive process by which the individual experiences a fundamental change in understanding and belief. However, de-radicalisation does not necessarily go hand in hand with disengagement.¹² Individuals can go through a psychological process of renouncing violence whilst, for a number of reasons, remaining active in the violent movement. For example, social pressure, fear of revenge or prosecution and lack of alternatives can inhibit the individual from moving away from violence, even if he or she mentally disputes the movement’s violent strategies.¹³ When dealing with inmates who have an extremist background, rehabilitation programmes can include efforts geared towards both de-radicalisation and disengagement, but in general pursue broader ambitions to prepare and assist individuals in returning peacefully to society after imprisonment.

³⁷⁶ See, generally, Global Counter-Terrorism Forum (GCTF), “Foreign Terrorist Fighters” (FTF) Initiative The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon, 3:

Perhaps most important is defining from the outset whether the goal of the program is to change the views or merely the behavior of the inmates (deradicalization vs. disengagement). A rehabilitation that aims for the latter is likely to be more successful in achieving its goals, but this approach may be less effective in the long-term in reducing the appeal of violent extremist ideologies and reducing the potential for further violence and terrorism.

See also J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_418-_deradicalisation_and_disengagement_in_somalia_web.pdf), 12

the ‘Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prison’, published by the UN Office on Drugs and Crime (UNODC), argues that:

Perhaps most important is defining from the outset whether the goal of the intervention is to change the views, values and attitudes (deradicalization) or the behaviour of the violent extremist prisoner (disengagement from violence). Interventions that aim for the latter are likely to be more successful in achieving their goals. They do not attempt to change a prisoner’s radical or extremist beliefs and views but instead seek to get a prisoner [to] renounce the use of violence to achieve their objectives.²⁶

Both of these processes involve spiritual, social and educational engagement with the individuals concerned. This can take a variety of forms designed to tackle the drivers of radicalisation around universal needs for identity, self-esteem, meaning and purpose; as well as to address personal grievances that the extremist narrative has exacerbated. Support typically includes mentoring, psychological support, theological and ideological advice, vocational training.³⁷⁷ To some extent, the approach will need to be individualized so as to account for the particular circumstances of the individual concerned.³⁷⁸

Of course, the case for privileging efforts to influence behaviours is problematic, with a key counter-argument being that sustained disengagement may be more likely if driven by attitudinal change. Furthermore, with such programming still effectively in a phase of trial and error, empirical evidence demonstrating the effects of basic education provisions, vocational training, civic and peace education, psychosocial support, and other specific initiatives remains inadequate. As such, readers should disregard the UNODC claim about which forms of programming ‘are likely to be more successful’,²⁷ pending reliable evidence. The above arguments also rest on the flawed premise that it is necessary to choose between disengagement and deradicalisation measures. The authors of this report argue that programmes should incorporate initiatives aiming to achieve both by default, and that this should be the case even for centres such as Serendi, where most residents did not become involved in violent extremism on ideological grounds (see Chapter II). As detailed below, the Serendi team delivers disengagement programming through basic education, vocational training, psychosocial support, family reconnection activities, and so on, and focuses on deradicalisation through civic, political and religious education and ‘orientation sessions’ provided by the centre imams (see Chapter III).

Regarding European ‘exit’ programs and early deradicalization efforts, see Georgia Holmer and Adrian Shtuni, *Returning Foreign Fighters and the Reintegration Imperative* (United States Institute Of Peace, 2017) (<https://www.usip.org/sites/default/files/2017-03/sr402-returning-foreign-fighters-and-the-reintegration-imperative.pdf>), 6ff.

³⁷⁷ See, e.g., UNODC, *Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia* (2018), 85-86:

Many nations have enacted new legislation in response to resolution 2178 aimed at criminalizing terrorist activities relating to FTF. However, for those individuals who fall outside the legislative framework, programmes need to be in place to deal with issues relating to rehabilitation, reintegration and deradicalization in order to mitigate potential risks associated with their experience.

Elements of such programmes, include (but are not limited to):

- Psychological support and counselling: including professional psychological support and counselling services such as regular sessions of cognitive behavioural therapy (or similar)
- Housing support: including access to social housing, assistance in relocating or help setting up on one’s own.
- Access to training/vocational courses to enhance job prospects: this may include providing training courses and paying for vocational qualifications, such as plumbing or electrician qualifications.
- Theological support: religious-based extremism is often exacerbated through obtaining information on religious texts from a single source without access to individuals in a position to challenge incorrect perceptions. People well versed in a particular religion, and in particular those who resonate with the target audience, can provide information and guidance in theological matters.
- Mentoring: this can include older peers acting as support for young people who may be on the path to becoming radicalized. Mentors can act as friends to young people, give a personal example for them to aspire to, or provide them with a familiar and safe dialogue partner.
- Family support and access to family members if separated: families are essential to the process of reintegrating and helping individuals once again feel part of society. This support could include parenting advice and guidance from social care professionals, access to imprisoned individuals or support in reaching distant family members.

³⁷⁸ UNODC, *Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia* (2018), 85-86.

The overall purpose of this sort of measures is to drive the individual away from its relationship to a terror organization and, at the same time, anchor him/her to a new set of values and relationships.³⁷⁹ In a disengagement process, the focus is on changing *behaviour* and attitude (in particular in relation to the use of violence) instead of *thoughts*, which would be the objective of deradicalisation programmes, as the latter is very difficult and hard to measure. For that purpose, support with vocational training, employment,³⁸⁰ housing,³⁸¹ and the creation of a new network of relationships³⁸² has proven effective. The process should help promote a set of new worldviews and connections to shared civic values. What society needs to protect itself against is not ideas different or contrary to those of the majority but the legitimization and use of violence and discrimination against those not sharing those views. De-radicalisation/disengagement should not therefore seek to force anyone to adopt views consistent with those of the majority, but to ensure that they renounce violence and discrimination as legitimate means of advancing their ideas.

Addressing the stigma associated with former membership in a terror organization is also important to their ability to create a new identity and move on from their relationship to that organization.³⁸³ Nurturing the individual's sense of citizenship and society's view

³⁷⁹ For a discussion of the causes and circumstances of disengagement, see generally J. Horgan, *Deradicalization or Disengagement? A Process in Need of Clarity and a Counterterrorism Initiative in Need of Evaluation*, *Perspectives on Terrorism*, Vol. 2, No. 4 (February 2008), pp. 3-8; Kate Barrelle (2015) *Pro-integration: disengagement from and life after extremism*, *Behavioral Sciences of Terrorism and Political Aggression*, 7:2, 129-142, DOI: 10.1080/19434472.2014.988165.

³⁸⁰ J. Morton and M. D. Silber, *When Terrorists Come Home - The Need for Rehabilitating and Reintegrating America's Convicted Jihadists* (https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf), 25.

³⁸¹ Toke Agerschou, 'Preventing Radicalization and Discrimination in Aarhus', *Journal for Deradicalization*, Winter 2014/15, Nr 1, 5, 14.

³⁸² Toke Agerschou, 'Preventing Radicalization and Discrimination in Aarhus', *Journal for Deradicalization*, Winter 2014/15, Nr 1, 5, 15

1) Contents: As a part of the exit process it is vital to focus on the individual's network and whether there could be some among these people that could be part of and assist in supporting the individual in his or her exit process. For example parents of children who take part in violent environments are offered participation in a network of parents in similar situations. In some cases it may be necessary to look beyond the individual's close network (e.g. family members) and create alternative networks. 2) Participants: The Info House employees have the initial contact with the individual and therefore perform a screening of the individual to assess whether close relatives or friends can be included in the process or whether there is a need to consider alternative communities. In those cases where it will be meaningful to include parents, spouses or others, the East Jutland Police District will carry out counselling and guidance. In addition parents will receive an offer to participate in the existing parental network. In cases where it is necessary to consider alternative networks the mentor plays a central part in motivating the individual to participate.

³⁸³ Institute for Security Studies, <https://issafrica.org/iss-today/the-challenge-of-reintegrating-former-terrorists-in-africa>

Furthermore, with the stigma attached to returning fighters and their relatives, communities' reluctance to welcome former militants need to be addressed. Former Democratic Republic of the Congo child soldiers still suffer the consequences of stigma even from their families, more than a decade after their involvement in hostilities. In Diffa, Niger, communities continue to view former militants as killers, and are reluctant to accept former militants.

See also J. Morton and M. D. Silber, *When Terrorists Come Home - The Need for Rehabilitating and Reintegrating America's Convicted Jihadists* (https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf), 26-27.

of that citizenship is an important element of any disengagement effort. These two goals should form an integral part of any process of disengagement/de-radicalisation.

The use of individuals not connected to the state to help the process of disengagement and de-radicalisation has been recommended so as to highlight the independence of the process from the authorities. Reliance has also been placed (successfully) in some cases on reformed terrorists.³⁸⁴

This provides a degree of independence and impartiality to the program and helps creating trust among those who are put through these programs.

³⁸⁴ See *supra*, dd/resources. See also J. Morton and M. D. Silber, *When Terrorists Come Home - The Need for Rehabilitating and Reintegrating America's Convicted Jihadists* (https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf), 33-34:

Former extremists have a unique capacity to act as empathic mentors. They understand the processes associated with the progression into and out of extremist movements. Formers are likely to identify and accurately assess indicators of risk, even where program participants may be engaging merely to satisfy the requirements of their supervised release conditions. Formers also offer a motivational archetype of sorts for those that have deradicalized on their own while imprisoned.

This idea is also backed by the Rome Memorandum, which notes: Reformed extremists, particularly those who have been through the rehabilitation process themselves, may be influential with inmates participating in these programs. The testimonials of former terrorists can be dramatic evidence of the benefits of change. These former violent extremists can be carefully vetted and selected.²¹⁷

[...]

VI. The community-led program should utilize a network of vetted former extremists that those in the program can engage with to share common experiences.

For those with out family support networks to rely on this network can provide the same sense of meaning, purpose and identity extremist movements offer. For many violent extremists, exiting their respective movements returns them to a potentially problematic lacking sense of belonging and purpose, similar to the state that commonly facilitates radicalization in the first place. A detailed study of 89 former white supremacists, for example, has documented that the process of leaving deeply meaningful movements produces uninvited and undesired cognitive, emotional and physiological responses triggered by environmental factors.²²⁵ The sense of feeling there is no place to go after imprisonment, combined with other factors highlighted so far, can induce re-engagement with extremist movements after release.²²⁶

[...]

Multidisciplinary research has documented that rather than getting adherents to renounce sacred values in totality, it is better to refine and adjust them.²³¹ With this in mind, we recommend that program participants are encouraged to embed in a collective comprised of formers, (the interventionists), several of whom are likely to have experienced re-entry and reintegration after a period of incarceration. Such a community represents an alternative network built on principles antithetical to extremism. Additionally, embedding repentant and reformed former extremists in such an alternative ecosystem can expand the derivative objectives of the community-led program.

As academic researchers John Horgan and Mary Beth Altier describe, “There remains great potential for repentant and voluntarily disengaged terrorists to help counter violent extremism by reducing the allure of involvement to would-be recruits and deconstructing the myths that feed recruitment narratives.”²³² In Indonesia, for example, a similar network of formers – some in prison and others reintegrating – engages university students in seminars around the country and shares their stories as a means of prevention. Facilitating the growth of a network that can rival the relatively small jihadist networks exerting influence in the American ambit in size and scope would help get to the root of the problem.

Disengagement/de-radicalisation have generally, though not always, been voluntary.³⁸⁵ Voluntariness is seen not just as an important consideration from the point of view of human rights but also as a guarantee of the effectiveness of the process. While voluntariness is therefore important, this does not mean that commitment to disengagement cannot be incentivized with types of assistance and support (such as housing and education) that would help the overall purpose of directing the individual concerned away from a terror organization and towards civic engagement.

7.7 Reparation programs and restorative justice mechanisms

‘Restorative justice’ is a broad notion:

Restorative justice is a flexible, participatory and problem-solving response to criminal behaviour, which can provide a complementary or an alternative path to justice. It can improve access to justice, particularly for victims of crime and vulnerable and marginalized populations, including in transitional justice contexts. Restorative justice has a great potential to contribute to the achievement of Sustainable Development Goal (SDG) 16 on providing access to justice for all and building effective, accountable and inclusive institutions at all levels.³⁸⁶

As stated somewhat circularly in the *Basic principles on the use of restorative justice programmes in criminal matters*, restorative justice includes ‘any programme that uses

³⁸⁵ Georgia Holmer and Adrian Shtuni, *Returning Foreign Fighters and the Reintegration Imperative* (United States Institute Of Peace, 2017) (<https://www.usip.org/sites/default/files/2017-03/sr402-returning-foreign-fighters-and-the-reintegration-imperative.pdf>), 7.

³⁸⁶ UNODC, *Handbook On Restorative Justice Programmes* (Criminal Handbook Justice Series, 2nd ed, 2020), 1 and, *ibid*,

restorative processes and seeks to achieve restorative outcomes’.³⁸⁷ ‘Restorative justice programmes are based on the belief that the parties involved in or affected by crime ought to participate actively in repairing the harm and alleviating the suffering that they caused and, whenever possible, taking steps to prevent the reoccurrence of the harm.

This approach is also seen as a means to promote tolerance and inclusiveness, uncover truth, encourage the peaceful expression and resolution of conflict, build respect for diversity and promote responsible community practices.’³⁸⁸ In that sense, restorative justice is an important complement to other mechanisms of justice and transitional justice.³⁸⁹ It can take a variety of forms of redress and may be combined with other types of responses to situations where widespread rights violations or crimes have taken place.

Among the most important elements of restorative justice are reparation schemes. First, reparation is important for the victims of crimes or rights violations as it can contribute to their sense of justice and retribution and might also the process of recognition as victims. Second, reparation is also important at the community level where reparation – particularly if provided in whole or in part by those responsible – could help the process of reintegration and give the community a sense of the value of non-judicial and non-custodial processes. Finally, from the point of view of former terrorists, reparation would be an act of repentance that could help the process of disengagement from a terrorist organization and help smooth his/her return to society. In that sense, it is an important

³⁸⁷ Basic principles on the use of restorative justice programmes in criminal matters, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000), para 1. See also, *ibid*, paras 2-3:

2. “Restorative outcome” means an agreement reached as the result of a restorative process. Examples of restorative outcomes include restitution, community service and any other programme or response designed to accomplish reparation of the victim and community, and reintegration of the victim and/or the offender.
3. “Restorative process” means any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conferencing and sentencing circles.

See also UNODC, *Handbook On Restorative Justice Programmes* (Criminal Handbook Justice Series, 2nd ed, 2020), 4 (footnote omitted):

Restorative justice is an approach that offers offenders, victims and the community an alternative pathway to justice. It promotes the safe participation of victims in resolving the situation and offers people who accept responsibility for the harm caused by their actions an opportunity to make themselves accountable to those they have harmed. It is based on the recognition that criminal behaviour not only violates the law, but also harms victims and the community.

See also General Assembly resolution 55/59, annex; E/CN.15/2002/5 and Corr.1; E/CN.15/2002/5/Add.1.

³⁸⁸ UNODC, *Handbook On Restorative Justice Programmes* (Criminal Handbook Justice Series, 2nd ed, 2020), 3 (and, *ibid*, 8-10).

³⁸⁹ *Ibid*, 23.

element of the rehabilitation process.³⁹⁰The rehabilitative function of reparation could in turn be an important element of reintegration of former terrorist. Slye and Freeman have described the value of reparation and healing schemes in those terms:

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.

[...]

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.³⁹¹

³⁹⁰ See also https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf, pp 31ff:

From a wider perspective, restitution and compensation fulfil other important criminal justice goals. Experts recognize provisions for victims as an important objective of criminal justice. Of particular significance in this regard is the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which provides that, where appropriate, offenders should make restitution to victims, their families or dependants.²⁶ Such restitution, the Declaration explains, “should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of victimization, the provision of services and the restoration of rights”.²⁷ The Tokyo Rules do not define compensation orders; however, compensation orders can be taken to refer to victim restitution as well, in particular in a sentencing order in which a payment is required to be made to a state-run victim compensation fund. In this manner, the victim is guaranteed redress without having to wait for the offender to complete payment of the order. The Handbook on Justice for Victims elaborates on the general value of restitution and compensation, pointing out that this is a socially constructive sentence that also offers “the greatest possible scope for rehabilitation”.²⁸

³⁹¹ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 5 and 29. See also, *ibid*, 14:

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.

Reparation schemes could be conceived either as voluntary schemes entered into by former members of terror organisations or as part of or in place of a sanction.³⁹² In that latter context, ‘[r]estitution of the loss to the victim is deemed an appropriate aim of criminal justice, and it is in the interests of society as a whole.’³⁹³

A convicted persons could be required as part of a sanction to pay a fine or perform services that benefit that community, or to contribute monetary or in-kind reparations.³⁹⁴

Reparation could also come as an alternative outside of the criminal law context where it would have to operate on a voluntary basis and could provide for former terrorists to make amend for their actions or those of the group to which they belonged. Compensation or services can be provided directly to individual victims, or communally and/or regionally. ‘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.’³⁹⁵ Of particular significance in this regard is the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which provides that, where appropriate, offenders should make restitution to victims, their families or dependents.³⁹⁶ Such restitution, the *Declaration* explains, “should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of victimization, the provision of services and the restoration of rights”.³⁹⁷

Reparation could take many forms. It does not have to be financial in nature. In every case, however, they should be meaningful and reflect the nature of what is being repaired as well as the (cultural, religious and social) context in question:

³⁹² See United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985.

³⁹³ https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf.

³⁹⁴ Council of Europe, Recommendation No. R (92) 16 Of The Committee Of Ministers To Member States On The European Rules On Community Sanctions And Measures (Adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers’ Deputies) (<https://pjp-eu.coe.int/documents/3983922/6970334/CMRec+%2892%29+16+on+the+European+rules+on+community+sanctions+and+measures.pdf/01647732-1cf7-4ea8-88ba-2c041bc3f5d6>). See also <http://ifit-transitions.org/resources/publications/major-publications-briefings/the-limits-of-punishment-transitional-justice-and-violent-extremism/limits-of-punishmend-collated.pdf/view>, p 25.

³⁹⁵ <http://ifit-transitions.org/resources/publications/major-publications-briefings/the-limits-of-punishment-transitional-justice-and-violent-extremism/limits-of-punishmend-collated.pdf/view>, p 25.

³⁹⁶ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, art 8.

³⁹⁷ Ibid.

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.³⁹⁸

Financial help could be beneficial to the victim or the community in question. The construction of monuments, hospitals or schools could also have powerful symbolic value. It is important to the rehabilitation and reintegration process that former terrorists involved in these schemes should participate in a meaningful manner to the restorative process of reparation. Unless reparation forms part of a sentence or alternative sanction ordered by a competent authority, participation in a reparation procedure should in

³⁹⁸ Mara Redlich Revkin, ‘Iraq Case Study’, in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>), 40.

principle be voluntary.³⁹⁹

From the point of view of the victims and communities concerned, eligibility criteria should be clear and reparation should be sufficient in nature to be meaningful to those benefiting from it.⁴⁰⁰ It should account for the means and capabilities of the individual concerned and not be over-burdensome.⁴⁰¹ Monitoring and close supervision should be ensured by the authorities or agencies concerned.

If a reparation scheme is put in place, adequate resources will be necessary. This will involve not just money or other forms of resources capable of serving as reparation. It will also require resources necessary to run the administrative infrastructure relevant

³⁹⁹ UNODC, *Handbook On Restorative Justice Programmes* (Criminal Handbook Justice Series, 2nd ed, 2020), 56ff:

Preparation of participants in advance of a restorative justice process is crucial to the success and fairness of the process. Before they agree to participate in a restorative process, parties must be fully informed of their rights, the nature of the restorative justice process, the possible consequences of their decision to participate and the details of any grievance procedures. The preparation may also include a suitability assessment, including an assessment of the willingness (or motivation) of participants to genuinely engage in the process. Explaining the process to prospective participants and what will be expected of them, as well as responding to questions they may have, eventually form the basis of their informed consent to participate. Issues relating to potential power imbalances between the parties, risks to the victim, the offender or other participants, and the timing of the intervention can be explored and, if possible, addressed at that level. The scope and mode of the intervention can be discussed and become the object of a prior agreement between the parties (e.g., expectations of prospective participants, whether they are open to meeting directly or indirectly, whether they consent to other parties being present, location of the meeting, how the confidentiality of certain information will be protected, exclusion of certain individuals from the process). In all restorative justice processes, it is important to protect the interests, rights and safety of the victims and to ensure that revictimization does not occur. This often requires a considerable amount of preparatory work with the victim prior to any encounter with the offender. This may take weeks, months, or, in the case of very serious offences that have resulted in the incarceration of the offender, years. This pre-meeting preparation is designed to ensure that the victim is emotionally and psychologically prepared to engage in a dialogue with the offender.

See also Basic principles on the use of restorative justice programmes in criminal matters, ECOSOC Res. 2000/14/, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000), para 7:

7. Restorative processes should be used only with the free and voluntary consent of the parties. The parties should be able to withdraw such consent at any time during the process. [...]

⁴⁰⁰ Mara Redlich Revkin, 'Iraq Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>), 40

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.

⁴⁰¹ Basic principles on the use of restorative justice programmes in criminal matters, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000), para 7:

Agreements should be arrived at voluntarily by the parties and contain only reasonable and proportionate obligations.

to such a scheme.⁴⁰² Any reparation scheme should be handled fairly and transparently while also trying to avoid create corruption or patronage.⁴⁰³

⁴⁰² See https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf, pp 31ff

A victim compensation scheme, particularly if it is paid by the state in the first instance, requires a major investment in administrative infrastructure. The form that this takes will vary according to the social welfare or criminal justice systems in place when such a scheme is introduced. It may be possible, for example, to make compensation payments through an existing system. Other countries have found it more effective to set up a separate victim compensation fund with its own administration. Such a fund can then consolidate payments from fines, compensation paid by offenders, and other sources, using them to guarantee compensation to victims. One drawback is that offenders are very often so poor that the amount they are able to contribute is negligible. The difficulty in finding the additional resources to provide adequate compensation and to pay for the administration of the fund may make it an unrealistic proposition in developing societies.

⁴⁰³ Mara Redlich Revkin, 'Iraq Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 44, 67-68

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.¹⁷² 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."¹⁷³ However, the process is slow, taking two years on average.¹⁷⁴ 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 2017.¹⁷⁵ 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 2017.¹⁷⁶

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 Mosul¹⁷⁷ and other Iraqi cities.¹⁷⁸ Although the group created its own real estate department that issued "statements of ownership,"¹⁷⁹ 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.¹⁸⁰ In other cases, military forces have gifted abandoned properties to civilians with *wa-sta* (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."¹⁸¹ 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."¹⁸² 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.¹⁸³ Although IS issued its own ID cards, birth certificates,¹⁸⁴ and marriage contracts,¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷

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, ¹⁸⁸ is now working to investigate and document crimes committed by

7.8 Truth and reconciliation mechanisms

The field of transitional justice offers examples of so-called truth and reconciliation commissions. Those are forensically minded commission that seek to offer an alternative to traditional mechanisms of justice and focus on two core functions and objectives:

- a) establishing the truth, in the sense of a credible and fact-base record of certain events (including causes, general circumstances, history, individual participation, etc) and
- b) reconciliation, in the sense of providing a venue in which different groups (including victims and perpetrators) can gather to contribute to this national or regional narrative with a view to create a basis on which to rebuild social relations.⁴⁰⁴

Truth and reconciliation commissions are particularly useful alternatives to criminal prosecution as they are typically faster, cheaper and use a broader factual lens, one that is not necessarily nor primarily focused on the accused. It is participatory in nature and has important cathartic qualities. To be effective, however, they might require a degree of leverage with those who might otherwise be reluctant to participate. They are therefore useful as alternatives (or supplement) to prosecutions: those voluntarily

IS including through DNA analysis of bodies recovered from mass graves.¹⁸⁹ 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.¹⁹⁰

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.¹⁹¹ Tribal leaders distributed the funds preferentially to their supporters and family members, prompting accusations of corruption.¹⁹² 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.¹⁹³

⁴⁰⁴<http://ifit-transitions.org/resources/publications/major-publications-briefings/the-limits-of-punishment-transitional-justice-and-violent-extremism/limits-of-punishment-collated.pdf/view>, pp 38ff

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.

participate in them could, for instance, be granted amnesties⁴⁰⁵ (generally for minor offences) in exchange for full and truthful participation and/or a reduction in sentence (as is the case with the *JEP* in Colombia).⁴⁰⁶

Such measures could be combined with ‘peace committees’ set up in local communities with the assistance of the United Nations or other respected international organisations. National archives could be set up to collect such material and national historians be tasked to write an objective account of relevant events on that basis. Public discussions, mediations, psychological support and other forms of support to relevant communities

⁴⁰⁵ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 13

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

⁴⁰⁶ For an illustration, see Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 14

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.

And, *ibid*, 28:

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.

could be built into such a structure.⁴⁰⁷

Victims' participation in any such process would be essential. Support mechanisms and relevant protective measures should be provided to ensure the safe and effective participation of victims to such a process.

Furthermore, to have an impact on the society concerned, such a commission should have the ability to make its message and record known to the broadest possible range of people. Effective outreach and meaningful participation by relevant groups (victims; community leaders; perpetrators; civil society; etc) are therefore important elements of any such venture.⁴⁰⁸

7.9 Administrative measures

There is no generally-accepted definition of what constitutes an 'administrative measure' in the context of counter-terrorism activities. They have been described in a variety of ways including under this sort of general description:

Within the context of this document, administrative measures refer to coercive measures that may lawfully restrict, in accordance with the rule of law and applicable domestic law, the exercise of certain human rights, irrespective of laying criminal charges, against a person or entity who is determined to pose a risk to national security. There are several broad categories of administrative measures. Depending on applicable law, these include, but are not limited to, measures that may affect the exercise of the right to liberty of movement, measures on the involuntary

⁴⁰⁷ See, e.g., Vanda Felbab-Brown, 'Somalia Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 126, 154

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.¹¹⁸ 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.¹¹⁹ 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.

⁴⁰⁸ See, *infra*, dd/outreach.

deprivation of nationality, measures that may affect the exercise of the right to liberty and security of person, measures that may affect the exercise of the right to expression, peaceful assembly or association, and measures freezing funds, financial assets or economic resources.⁴⁰⁹

At one end of the spectrum of administrative measures are measures of administrative detention. The Working Group on Arbitrary Detention has defined administrative detention as the arrest and detention of individuals by State authorities outside the criminal law context (e.g., for reasons of security, including terrorism) and as a form of preventive detention.⁴¹⁰ ‘Administrative detention therefore occurs where it is not imposed in connection with, or with a view to proceedings within the criminal justice system for, a particular crime.’⁴¹¹ This could be the case, for instance, of individuals known to be associated with a terrorist organization, or individuals representing a terrorist threat. This sort of measures raise a number of difficulties from the point of view of human rights, including as regard their compatibility with the right of those concerned to liberty.⁴¹² It has been noted that where an individual is deprived of liberty through administrative detention, including for the purposes of counter-terrorism screening or de-radicalization, States must comply with strict guarantees enshrined in article 9 of the International Covenant on Civil and Political Rights:⁴¹³

- Such detention must be based on grounds and procedures clearly established in domestic law.
- The detainee must have access to an effective means to challenge the lawfulness of his or her detention, including access to a lawyer.

⁴⁰⁹ Global Counter-Terrorism Forum (GCTF), *Global Recommendations on the Use of Rule of Law-Based Administrative Measures in a Counterterrorism Context*, 1.

⁴¹⁰ UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 121.

⁴¹¹ *Ibid.*

⁴¹² For an illustration, see e.g., *Secretary of State for the Home Department v JJ* [2007] UKHL 45.

⁴¹³ UNODC, *Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism* (UN, Vienna, 2019), 121, referring to: 7CCPR/C/GC/35, para. 15. See also F. de Londras, ‘Counter-terrorist detention and international human rights law’, in XX (footnote omitted):

Further, even where there is an administrative measure of indefinite duration the UN Working Group on Arbitrary Detention has suggested that the provision of safeguards and the deduction of its duration from subsequent time to be served as a result of a criminal conviction are factors that can lead to the detention being non-arbitrary. Thus, the mere fact of counter-terrorist detention being administrative does not in itself make it incompatible with international human rights law.

Referring to: Working Group on Arbitrary Detention, *Civil and Political Rights, including Questions of Torture and Detention*, UN Doc E/CN.4/1999/63 (18 December 1998).

- A judicial or other independent and impartial body must decide without delay on challenges to the lawfulness of detention and periodically review the continuing lawfulness and necessity of detention.
- A person who has been unlawfully detained should have an enforceable right to compensation.⁴¹⁴

As an alternative to administrative detention, there are a number of administrative measures that can be adopted to avoid the need for detention while providing some degree of control and oversight over individuals presenting a risk of radicalization or association with terrorist acts. These include, for instance, a) control orders, b) house arrest orders, c) tracking measures, d) orders on movement limitations, e) electronic tagging, f) prohibited contact orders, g) monitoring, and h) confiscations. These measures have in common that they could result in the violation or erosion of the fundamental rights of those concerned. The fact that they are (generally) non-penal in character may mean that they are not subject to the same level of due process (and judicial oversight) as is normally applicable in criminal cases. It is essential, however, that in all instances they could only be ordered when this is done in compliance with basic requirements of due process.⁴¹⁵ In particular, they should be non-discriminatory in character, prescribed by law, necessary to a legitimate purpose being pursued by the authority, proportionate to that goal and subject to adequate safeguards that are capable

⁴¹⁴ See also Human Rights Committee, General Comment No 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, para 15 (footnotes omitted):

To the extent that States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken.

⁴¹⁵ UN CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance To States On Human Rights-Compliant Responses To The Threat Posed By Foreign Fighters (2018). See also UNODC, Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia (2018), 31; “Administrative Measures against Foreign Fighters: In Search of Limits and Safeguards”, International Centre for CounterTerrorism (December 2016) (<https://icct.nl/wp-content/uploads/2016/12/ICCT-Boutin-Administrative-MeasuresDecember2016-1.pdf>); Global Counter-Terrorism Forum (GCTF), Glion Recommendations on the Use of Rule of Law-Based Administrative Measures in a Counterterrorism Context, 1-4 and 10, in particular, General principle 1-4.

of preserving the fundamental rights of those concerned.⁴¹⁶ Judicial review and oversight of such measures is not required in principle (unless it amounts to detention⁴¹⁷), but is highly desirable from the point of view of human rights law.

8. PUBLIC INFORMATION, OUTREACH AND COUNTER-NARRATIVES

8.1 General observations

Successful non-detention counter-strategies will necessarily involve a great deal of communication.⁴¹⁸ Individually, to those being ‘rehabilitated’. But also collectively, to affected communities (of victims) and towards those who could be tempted to join terror organisations. This element of ‘outreach’ is essential to creating an environment in which the terrorists’ narrative is both countered and exposed. This must be done in a manner compliant with human rights, in particular freedom of speech, and must carry a clear and comprehensible message.

In the present context of finding alternatives to detention for terrorists and suspected terrorists, an effective communication strategy will have several particular functions. First, it should seek to address resistance that might exist in certain communities to any

⁴¹⁶ Global Counter-Terrorism Forum (GCTF), *Global Recommendations on the Use of Rule of Law-Based Administrative Measures in a Counterterrorism Context*, 1:

To minimize any potential negative side effects of specific counterterrorism measures, administrative measures must be implemented in full compliance with international human rights law, which articulates the narrow circumstances in which limits on the exercise of human rights are permissible. It is important to distinguish between different measures and their respective impacts on human rights. States should be cognizant that in the case-by-case implementation of administrative measures, they may directly or indirectly impact other rights. States should ascertain that they do not limit non-derogable human rights. This analysis is an essential part of the assessment as to whether the measure is permitted under international human rights law.

[...]

States should bear in mind that human rights and national security should not be mutually exclusive but mutually reinforcing.

⁴¹⁷ See “Guide on Article 5 of the Convention, Right to Liberty and Security”, ECtHR, April 2014, , pp. 4-5; and General Comment No. 35, CCPR, para. 5.

⁴¹⁸ UNODC, *Handbook On Restorative Justice Programmes* (Criminal Handbook Justice Series, 2nd ed, 2020), 95-96:

Securing support from criminal justice organizations Implementing a new restorative justice programme or major changes to existing programmes requires a communication strategy. The aim is to effectively promote restorative justice approaches to both criminal justice professionals and the community. This communication strategy can be initiated from several sources, including the government and NGOs.

measures falling short of strict punishment, in particular those affected by terrorism.⁴¹⁹ Such a strategy should explain the reasons for and benefits of an alternative course of action. It should also voice the legitimate concerns of those communities and seek to address them.

Second, an effective outreach strategy should control expectations: transitional justice efforts will not at once address all the ills that might have contributed to promoting violence. Nor should it be expected to resolve them all at once. It is therefore important that any such measure should be accompanied by a broader effort to promote a constructive collective debate in the society concerned about the causes and circumstances that might have contributed to terrorism.⁴²⁰

Third, outreach will also need to be directed towards those normally competent for the prosecute-detain part of state's response so that they have an understanding of the process and so as to lower the barriers of resistance to transitional justice solutions that

⁴¹⁹ UNODC, *Handbook On Restorative Justice Programmes* (Criminal Handbook Justice Series, 2nd ed, 2020), 95-96:

The incorporation of participatory processes in the justice system can easily be perceived as a challenge to the status quo. One should avoid making the mistake of underestimating the resilience of the status quo, the system's own force of inertia, or the active and passive resistance that the proposed changes are likely to face. The proposed changes, if successfully implemented, will necessarily affect spheres of professional influence and spans of power and control, or encroach on various people's "turf". Measures that are essentially meant to empower victims and the community are likely to be initially perceived by some justice professionals as threatening. At first, and unless such perceptions are managed effectively, the adoption of participatory justice approaches is bound to be interpreted by many as a zero-sum game, one in which they must lose some of their power for others to be empowered. Criminal justice personnel must be trained in the principles and practice of restorative justice. Notions of forgiveness and healing, for example, may be relatively foreign to members of the judiciary trained in legal procedures and substantive law. Police officers may be reluctant to refer cases to a restorative justice programme due to a lack of information about restorative principles and practice generally and, in particular, the specific restorative programme being implemented. If police are not educated about restorative justice, they cannot inform victims about the benefits of participating in a restorative justice process. Probation supervision personnel and other front-line workers should be encouraged to utilize restorative approaches in carrying out their work. This may require them to acquire new skills.

⁴²⁰ Vanda Felbab-Brown, 'Nigeria Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 115

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.

might exist in those communities.⁴²¹

Any such campaign of outreach will require a great deal of resources. Particularly important is the question of the identity of those who will be asked to *make the case* for non-detention/prosecution measures. Their ability to engage with the relevant communities will be essential. It will also require time to have any meaningful effect. It should be constantly reassessed to ensure that it fulfills its goals and reach the relevant communities.

8.2 Raising awareness and support among politicians, judges and decision-makers

UNODC's Handbook on strategies to reduce overcrowding in prisons draws attention to the importance of outreach towards decision-makers:

Experience in many countries has shown that alternative sentences are not used because there is not adequate understanding and commitment at the highest levels, including ministries, parliaments and executive bodies. In addition, the judiciary may lack confidence in their effective implementation or may be reluctant to apply them due to real or perceived public pressure. Therefore key requirements to ensure that alternatives are applied in practice are, firstly, to take measures to influence criminal justice policies by raising the awareness of politicians and decision makers. The essential step in this process is to define prison overcrowding on a political level as a problem that should and can be solved.

⁴²¹ UNODC, *Handbook On Restorative Justice Programmes* (Criminal Handbook Justice Series, 2nd ed, 2020), 95-96:

Criminal justice practitioners and community volunteers involved in a programme require effective training on the techniques and skills that they will need in order to feel confident participating in the new processes. An additional strategy that can be utilized to overcome the reservations of criminal justice professionals, as to the value of restorative practices, is to convince them to participate in a restorative process. On this personal level, reportedly sceptical senior police executives, prosecutors and judges may soon become zealous advocates. On the other hand, one issue that occurs is that organizations may “symbolically” adopt restorative justice processes by labelling current practices as “restorative”, thus avoiding the required changes in policy and orientation that are required by true restorative justice practices. It is also important to identify and recruit allies who will actively support the proposed changes. It is equally important to identify individuals in key positions in the justice system who are amenable to adopting participatory and restorative approaches and championing them. Key stakeholders must themselves get involved in planning and implementing the changes to existing processes at an early stage of programme development. Prosecutors, for example, are in a key position to refer cases to new programmes and should receive particular attention. It should be recognized that justice personnel will be taking some risks in order to support a new restorative justice initiative and they may not all be amenable to assuming those risks.

Secondly there is a need to secure judges' confidence in alternatives to imprisonment. It is essential that the judiciary, as the body responsible for sentencing, is involved in the development of strategies and programmes that aim to reduce the use of imprisonment in favour of alternatives. They should receive additional training on alternatives to imprisonment, and their awareness about the use of alternatives worldwide and the potential benefits should be improved via, for example, participation in conferences and seminars.

Thirdly, experience shows that developing a regime of alternatives to imprisonment within a consultative process that includes all relevant government agencies, criminal justice institutions, and representatives of civil society generates commitment and support by all key actors and, consequently, sustainability. Representatives of civil society, including victims' support organizations, should be involved in the consultative process, to increase public acceptance, understanding and involvement.

Fourthly, public awareness activities need to be carried out to harness public support. The public has an immense influence on the determination of criminal justice policies by politicians, as well as on sentencing tendencies of the courts. The public should be informed about the harmful consequences of imprisonment and the purpose and justification of alternative sentences. Much of people's and the politicians' response to crime and their reliance on punishments are explained by their belief that criminal sanctions are an effective way of dealing with many problems. Learning about basic criminological facts from reliable sources, and not from the media, can help change their views. To this end, accurate data should be widely available to the public and the media, so as to earn their understanding and cooperation.

Such measures need to be sustained over a long period, until the penal culture in a country has been changed sufficiently and the benefits of alternative responses to crime have been felt and understood, in order to reduce the risks of reverting to punitive criminal justice policies to which imprisonment is central.⁴²²

⁴²² UNODC, Handbook on strategies to reduce overcrowding in prisons (CRIMINAL JUSTICE HANDBOOK SERIES, 2013) (https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf), pp. 136-137 (footnote omitted). See also Tapio Lappi-Seppala, Enhancing the Community Alternatives – Getting the Measures Accepted and Implemented, (http://www.unafei.or.jp/english/pdf/RS_No61/No61_11VE_Seppala3.pdf).

This will require clarity of message and a strategy of delivery to reach all relevant communities so that there is clear and sound understanding of the government's plan.⁴²³ Coordination and cooperation among various relevant agencies will also be an important element of cohesion in deploying such a strategy.

8.3 Feedbacking – Experts and the public

To gain legitimacy and acceptance, any transitional justice alternative will need to be tested, critiqued and, where necessary, reviewed and re-set. This *feed-backing* should be done with experts to ensure that it corresponds to relevant 'best practices' and with the public at large to ensure that the public is both informed and accepting of the initiative:

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

⁴²³ See Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 20-21

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.

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.⁴²⁴

Outreach of this sort should take place not only during the setting up phase of the program, but also during its rolling out so that relevant partners and communities continue to be engaged with the process.

8.4 Victims

Those affected by terrorist activities constitute a particularly important constituency in relation to outreach. They, perhaps more than any other community, need to understand why alternatives to prosecution and detention are provided for individuals who have inflicted much harm to them, their families or communities. Particularly important in this context is respect for the victims' rights to truth and reparation. Any alternative to detention for perpetrators of crimes against them or their community will therefore have to contain necessary and sufficient elements of truth and reparation. The case for a non-penal form of justice and reparation will have to be made convincingly in relation to them so that they are not made to feel that their rights and interests are being compromised, sacrificed or ignored without proper consideration.

Reparation might take a variety of forms – from financial to psychological support, and symbolic forms of reparation.⁴²⁵ Reparation will have to be commensurate to the gravity of the acts which they seek to repair although non-material forms of reparation might in

⁴²⁴ Ronald Slye and Mark Freeman, *The Limits of Punishment Transitional Justice and Violent Extremism framework paper* (Institute for Integrated Transition, United Nations University, 2018) (<https://i.unu.edu/media/cpr.unu.edu/attachment/3130/1-LoP-Framework-Paper-final.pdf>), 28.

⁴²⁵ See, *supra*, dd/reparation. For an illustration, see Vanda Felbab-Brown, 'Nigeria Case Study', in Institute for Integrated Transitions, United Nations University, and UNU-CPR, *The Limits of Punishment – Transitional Justice and Violent Extremism* (May 2018) (<https://i.unu.edu/media/cpr.unu.edu/post/2761/LoPWeb070119.pdf>) 83, 115

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.

some cases serve that purpose.⁴²⁶ To the extent that benefits are allocated to those being rehabilitated, it will be important that victims and the communities concerned should receive no less support than those being reintegrated.

The element of truth-seeking and acknowledgment by the perpetrators of their responsibility towards the victims are central elements of any such process. Perpetrators' participation in such a process should be incentivized, in particular by conditioning non-penal types of responses to their involvement in such a process or through conditional amnesties.

8.5 Local communities and civil society

If they are to accept alternatives to detention for convicted or suspected terrorists, local communities in which those will be reintegrated will need a clear understanding of the stakes and the reason for the state's apparent kindness to those involved in terrorist activities. They will also need guarantees that the security of all will be provided. The avoidance of stigmatization and a climate of adequate security demands that local communities should be duly informed of the planned course of action.⁴²⁷ Outreach towards them will, therefore, be important:

For instance, rehabilitation programmes often seem to rest on the assumption that changing relevant characteristics of the inmate is sufficient to facilitate re-socialisation and the re-entry processes. However, it is not. Rehabilitation is not a unilateral process. Preparing the individual for his return into mainstream society is only one side of the equation. It is equally important to prepare the receiving community for the inmate's return. At least two examples are relevant here to support this argument.

Firstly, the environment to which the inmate returns might be characterised by risk factors that are known to be conducive to radicalisation or extremist behaviour. After all, there were reasons present that caused the individual to deviate and be incarcerated in the first place. Criminological literature has identified a range of risk factors that are associated with criminal conduct and re-offending. Some of these factors, like criminal

⁴²⁶ See, again, *supra*, dd/reparation.

⁴²⁷ See also, *supra*, xx/stigma et al in relation to local communities.

record and family criminality, are static and cannot be changed. Others, like anti-social attitudes and values, poor self-control, poor problem-solving skills, and lack of employment skills, are dynamic (often called criminogenic needs) and can be targeted in prison-based programmes.

Other relevant factors, which are not carried within the individual but are nested within the context, might be more difficult to change and require additional measures. For example, it has been shown that anti-social associates, family dysfunction, and lack of employment are correlated with reoffending.⁵⁶ In addition, extremism literature identifies a series of factors that are believed to be conducive to violent radicalisation and terrorist behaviour.⁵⁷ Experiences of (collective) humiliation, social rejection and relative deprivation can contribute to post-release radicalisation and push ex-inmates back towards violent extremist movements. Individuals who, upon release, have no protective social environment to return to, run the risk of being pulled straight back into the extremist environment they came from.

Secondly, whether rehabilitation and reintegration will be successful depends critically on the willingness of the host community to adopt the ex-offender and accept him as a full member again. Ex-inmates and probation officers are greatly concerned with negative stereotypes that exist among the public about ex-inmates and - criminals. Research consistently reveals that inmates are confronted with negative stigmas, which hinder the reintegration process and cause difficulties in finding housing or employment. Arguably, such stigmatisation effects are at least as strong, if not stronger, for ex-inmates who have a violent extremist background. In sum, the road from imprisonment to a 'normal' life outside prison cannot be expected to be a smooth one. Ex-inmates are confronted with several issues that can severely obstruct the re-entry process and increase the likelihood of recidivism. Transforming extremist offenders into peaceful, law-abiding citizens is one thing, but to keep them away from violence in the extended future is another. To maximise the chances of success, additional measures must be taken to address criminogenic needs in the offenders' immediate environment, and to establish a safe and trusting social network to return to. It is of

profound importance to actively engender the receiving environment as a protective factor against recidivism and to encourage the community to support the re-entry and reintegration process.⁴²⁸

The above will require engagement by state authorities with ‘with religious authorities, community leaders and other civil society actors, who have relevant expertise in crafting and delivering effective counter-narratives, in countering narratives used by terrorists, including foreign terrorist fighters, and their supporters.’⁴²⁹ It will also require sensitivity to the particular concerns of local communities and, where relevant, consideration of local – cultural, religious and social – peculiarities of those communities. Financial and economical support for them might also go hand in hand with this aspect of an outreach strategy.

8.6 Facilitating disengagement – Counter-narrative

Facilitating disengagement by former terrorists will also sometimes be assisted by a strong counter-narrative that challenges and dismantles that of their (former) organization.⁴³⁰ Such strategies are difficult to render effective and even harder to measure when it comes to evaluating their effectiveness. It is important, however, that radical theories leading to violence not go unchallenged. This was duly underlined by the UN Security Council in Resolution 2178.⁴³¹ The strategy for an informed counter-narrative was also clearly laid out by the OSCE/ODIHR in those terms:

⁴²⁸ Tinka Veldhuis, *Designing Rehabilitation and Reintegration Programmes for Violent Extremist Offenders: A Realist Approach*, ICCT Research Paper March 2012 (<https://icct.nl/wp-content/uploads/2015/05/ICCT-Veldhuis-Designing-Rehabilitation-Reintegration-Programmes-March-2012.pdf>), 12 (footnotes omitted).

⁴²⁹ UNSC Resolution 2178 (2014), S/RES/2178 (2014), 24 September 2014, para 35.

⁴³⁰ UNODC, *Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia* (2018), 89-90

A crucial element of any PVE/CVE strategy is the development an alternative to the narratives of extremist groups or organizations. The alternative narrative should seek to discredit and highlight weaknesses and inconsistencies in extremist propaganda and messaging, while keeping sight of the main target audience of such messaging: the youth of South and South-East Asia.

⁴³¹ UNSC Resolution 2178 (2014), S/RES/2178 (2014), 24 September 2014, paras 33-34:

33. Stresses the need to effectively counter the ways that ISIL, Al-Qaida, and associated individuals, groups, undertakings and entities use their narratives to incite and recruit others to commit terrorist acts, and further recalls in this regard resolution 2354 (2017) and the “Comprehensive International Framework to Counter Terrorist Narratives” (S/2017375/) with recommended guidelines and good practices;
34. Encourages Member States to collaborate in the pursuit of developing and implementing effective counter-narrative strategies in accordance with resolution 2354 (2017), including those relating to foreign terrorist fighters, in a manner compliant with their obligations under international law, including international human rights law, international refugee law and international humanitarian law, as applicable;

Countering the appeal of terrorism requires more specific interventions. The narratives and ideas that underpin terrorism need to be understood to address any legitimate grievances they may exploit and to avoid initiating actions that validate the case made by terrorists. Terrorists may use a broad range of arguments, and it is critical that they be each challenged by relevant and credible voices. This includes both proving these narratives ideologically and factually wrong, and spreading positive counter-messages to the very audiences that are targeted for violent radicalization and recruitment. The insights and experience of former violent extremists or individuals who have disengaged from a path to VERLT can help to more effectively formulate and disseminate counter-messages and narratives.

Some countries are putting significant efforts into strategic communication to counter terrorist propaganda through traditional and new media. A number of initiatives, led by governments and/or civil society organizations, seek, in particular, to bring to the fore voices promoting tolerance and non-violence, to highlight the plight of victims of terrorism and encourage solidarity with them, or to encourage former violent extremists to speak out against violent extremism and terrorism. To win this “battle for hearts and minds”, ideological engagement should be backed by genuine efforts to address grievances. States should carefully avoid initiating actions or policies that might lend legitimacy to terrorist claims and reinforce the grievances they exploit.

Effectively countering the appeal of terrorism is about offering credible alternatives and ideological challenges to the claims made by terrorists. These efforts will be easily undermined if the state is perceived, through its action or inaction, to validate the claims made by terrorists.⁴³²

⁴³² OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 45.

Such a strategy was adopted, for instance, in the Somali context to entice disengagement from Al-Shabaab, by targeting group members either directly or via their families and community leaders.⁴³³ Malaysia has similarly set up Counter Messaging Centre (CMC) to monitor terrorist narratives through social media and other channels to deny extremists the means and opportunities to pursue extremist or terrorist activities and

⁴³³ J. Khalil et al, *Deradicalisation and Disengagement in Somalia: Evidence from a Rehabilitation Programme for Former Members of Al-Shabaab* (https://rusi.org/sites/default/files/20190104_whr_4-18_deradicalisation_and_disengagement_in_somalia_web.pdf),

Outreach: A variety of national and international agencies are involved in both online and offline communications campaigns that aim to entice disengagement from groups such as Al-Shabaab, by targeting group members either directly or via their families and community leaders. These encompass radio-based amnesty proclamations by high-profile political figures, internet campaigns, and leaflet drops, among other methods.

And, *ibid*, 18:

A final enabling factor worthy of specific attention is that of media and communications, as specifically investigated in November 2017. The majority of the 38 Serendi residents interviewed about this subject agreed that their main information and communication channels while with Al-Shabaab were radio and mobile phones. It is through these channels that many were driven to exit the organisation, for instance, having been encouraged by their families or having heard the amnesty proclamations. By contrast, there was generally little access to the internet and television (including for most members fortunate enough to be granted holiday periods), and no respondents reported being influenced to disengage by leaflet campaigns. In any case, access to all such sources varied substantially between units and locations. For instance, Al-Shabaab regulations regarding communications tended to be stricter in insecure regions, with many respondents in such locations reporting that they were only permitted to access their phones on Thursdays and Fridays. Pre-battle restrictions were also widely enforced on phone use, and as would be expected the members were not allowed to discuss operational details.

promote their message in that way.⁴³⁴ Such programs should seek to combat and defeat the ideas of terrorist groupings but also to win the war of ideas against them. “Good practices” in this context have been said to include the following elements:

· *Actively engaging with the private sector, civil society and local communities.* This exemplifies an open society in which the government interacts with its population and welcomes its participation in the design and implementation of social policies. The counter-narrative should be disseminated on a local level, through the use of networks of participating CSOs. This approach legitimizes the message; facilitates its spread throughout the population; demonstrates inclusive policymaking; supports the principles of freedom of expression and assembly; and creates a sense of belonging and loyalty within the community.

· *Strengthening the sense of national identity and of belonging to the community.* Counter-narratives can emphasize the importance of national

⁴³⁴ Ahmad Zahid Hamidi, ‘Malaysia’s Policy On Counter Terrorism And Deradicalisation Strategy’, Journal of Public Security and Safety Vol. 6 No. 2/2016. See also, *ibid*, 15-16:

The advancement of information communication technology has created a borderless world and benefited the international community in connecting to each other in real time. The same technology has also been abused by criminals and terrorists for propagating their ideologies, recruiting the vulnerable young people for wrongful purposes and execute terror attacks. They use the new communication platform especially through social media networks such as Facebook, Twitter, YouTube, email and even through smartphones by WhatsApp and Telegram as an avenue to indoctrinate and spread the twisted message of hatred. Radicalisation continues to be an utmost concern to security agencies all over the world and remains as one of the potent threats especially through the extensive use of the internet as a tool in spreading violent extremism and radical propaganda.

Malaysia believes that an important strategy to counter violent Islamic extremism is to remove distortions and lies about religion, retelling the narrative of Islam to convey the clear message that, the extremists are blasphemers in their distorted religious ideology and actions that lead to the loss of innocent lives. Their deviant acts are contrary to the teaching of the Holy Quran and the Prophet Muhammad when they claim to act in the name of religion or on the religious authority. Malaysia has a long history of emphasizing moderation through the practice of wasatiyyah, a Quranic injunction.

In this aspect, Malaysia had initiated the Regional Digital Counter Messaging Communication Centre. The key role of the Centre is to synchronize efforts to counter radical social media messages and present the true image of Islam, within ASEAN and beyond (Zahid Hamidi, 2016d). This centre utilizes studies that illustrate that the state that Daesh has set up is not in accordance to the principles of Islam. Time is of the essence in curbing the ideological spread of Daesh that is demonstrating new ambition, reach and capabilities. They have come to employ and use technology to disseminate their ideologies in their recruitment drives, and went to the extent of leveraging on the technological infrastructure provided by the governments they seek to overthrow.

Any promotion, solicitation or propagation of extremism or terrorism using any media constitutes an offence Under Chapter VI A of the Malaysian Penal Code. It is the general duty of the licensees under the Malaysian Communications and Multimedia Act 1998 to assist the authority as far as reasonably necessary in preventing the commission or attempted commission of an offence under the laws of Malaysia. The Malaysian Communications and Multimedia Commission (MCMC) acts as the monitoring agency in regard of this. When such propagation takes place in social media platforms such as Facebook and Twitter, the licensees, upon receiving written request from the authority, may in accordance with the above mentioned provision, executes the request by undertaking appropriate and feasible actions including but not limited to restricting access and removal of contents in identified websites and social media accounts.

Regarding the United Kingdom’s strategy, see: HM Government, *Counter-Extremism Strategy*, October 2015 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/470088/51859_Cm9148_Accessible.pdf).

or community identity, in contrast to religious identity, thereby increasing resilience against groups who use religion to promote violent extremism. One author has explained, for example, that the term “Indonesian Muslim” can heighten national cohesion more effectively than “Muslims in Indonesia”.²³⁴ The former term highlights national identity, while the latter term implies that the nation is merely a place where one is physically located.

·*The use of credible voices.* Victims and former radicals or terrorists who have walked away from violence can increase credibility and create empathy among young people. Victims’ experiences would play a vital role as they would have the chance to show the dangers and real-life results of terrorism and how this has directly affected them, while gaining empathy and helping young people understand how much hurt terrorism can cause. This would, in turn, strengthen the moral principles that can prevent individuals turning to violence to achieve their aims. With regard to former terrorists, their experiences within this field would help to discredit the terrorist message, while at the same time adding credibility to the counter-narrative among the younger generation (which would not necessarily be the case if the source of the message was governmental). For example, the AIDA Foundation in Indonesia is developing a programme in which victims of terrorist attacks visit schools in order to share their experiences with the children and to explain the outcomes of an attack.

·*Youth as generators of counter-narratives.* Today’s youth are not only the recipients or intended audience for a PVE/CVE plan; youth should also be seen as generators of its content. Youth messages possess credibility that governmental experts generally cannot leverage themselves if they are unaware of trends and topics that appeal to young people. One example of youth participation in the field of PVE/CVE is The Asian Youth Council,²³⁶ based in Malaysia. National PVE/CVE strategies should implement frameworks allowing youth groups and CSOs to flourish.

·*Enhancement of critical thinking.* Ultimately, the prevention of radicalization is a task of strengthening society against the impact of terrorist messaging. Youth education enhancing critical thinking will increase the ability to think independently and identify the flaws in exploitative propaganda.⁴³⁵

⁴³⁵ UNODC, *Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia* (2018), 89-90.

8.7 Preventive outreach – Informing and educating

There is also an aspect of outreach that is more general in nature and more forward looking: it seeks to prevent the growth and spread of fundamentalist messages and their taking root in national communities. To be successful, counterterrorism efforts must include prevention efforts to address conditions and factors conducive to the spread of terrorism, disrupt terrorist radicalization and stem recruitment.⁴³⁶ And states have recognized the need to address not just the violent symptoms of terrorism, but also “the various social, economic, political and other factors, including violent separatism and extremism, that engender conditions in which terrorist organizations are able to recruit and win support”.⁴³⁷ The OSCE thus noted that

“[c]ounter[ing] [violent extremism and terrorism] requires both effective criminal-justice action against those who incite others to terrorism and seek to recruit others for terrorism, and comprehensive, multi-disciplinary

⁴³⁶ OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 40.

⁴³⁷ OSCE, “The Bucharest Plan of Action for Combating Terrorism”, op. cit., note 1; OSCE, “Charter on Preventing and Combating Terrorism”, op. cit., note 9; OSCE, “OSCE Consolidated Framework for the Fight against Terrorism”, op. cit., note 2; OSCE Ministerial Council, Decision No. 10/08, “Further Promoting the OSCE’s Action in Countering Terrorism”, Helsinki, 5 December 2008; OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 40. Many states have developed specific policies and put significant efforts into this. See, e.g., Council of the European Union, “The European Union Strategy for Combating Radicalization and Recruitment to Terrorism”, 2005, ; Ministry of the Interior of the Czech Republic, “Strategy for Combating Extremism”, 2009, ; Government of Denmark, “A Common and Safe Future: A Danish Action Plan to Prevent Extremism”, 2009, ; The Australian Government, “Countering Violent Extremism Strategy”, 2011, ; Norwegian Ministry of Justice and the Police, “Collective Security - a Shared Responsibility: Action Plan to Prevent Radicalization and Violent Extremism”, March 2011, ; United Kingdom Home Office, “Prevent Strategy”, 7 June 2011, ; Swedish Ministry of Justice, “Action Plan to Safeguard Democracy against Violence-Promoting Extremism”, Government Communication 2011/21:44, Stockholm, 8 December 2011, ; The President of the United States of America, “Strategy to Empower Local Partners to Prevent Violent Extremism in the United States”, August 2011, ; Ministry of the Interior of Finland, “Towards a Cohesive Society: Action Plan to Prevent Violent Extremism”, 8 June 2012, ; Belgian Ministry of the Interior and for the Equality of Opportunities, “Programme de prévention de la radicalisation violente” [Programme to prevent violent radicalization], 16 April 2013.

efforts to address conditions that are conducive to terrorism”.⁴³⁸

The United Nations Secretary-General’s Plan of Action on Preventing Violent Extremism similarly emphasizes the need for Member States to “develop joint and participatory strategies, including with civil society and local communities, to prevent the emergence of violent extremism”.⁴³⁹ The UN Security Council echoed this message in Resolution 2178.⁴⁴⁰ Education, economical assistance and development, empowerment of local communities as well as well-crafted information campaigns are all relevant elements

⁴³⁸ OSCE/ODIHR, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014) (<https://www.osce.org/secretariat/111438?download=true>), 40, and, *ibid*, 44:

VERLT is a complex, multidimensional phenomenon requiring a sophisticated, multidisciplinary response. There is no panacea, and countries are faced with the risk that an individual might be radicalized to, and recruited for, terrorism, which can never be entirely eliminated. In view of the broad range of factors that can possibly combine to drive VERLT, policies and measures to counter this threat need to be properly informed and tailored to be effective in mitigating this risk. Intelligence, research and consultation drawing on different sources of knowledge and expertise can contribute to the development of an evidence-based, context-specific and dynamic understanding of the threat of VERLT.

Tackling the many conditions conducive to terrorism, especially structural and push factors, depends on efforts in fields relevant, but not specific to countering terrorism, such as:

- Addressing negative socio-economic factors, such as corruption and lack of good governance, as well as high unemployment, especially among youth;
- Strengthening democratic institutions and the rule of law, including democratic policing, promoting dialogue between the state and society, and ensuring respect for human rights and fundamental freedoms;
- Combating intolerance and discrimination, as well as promoting mutual respect, coexistence and harmonious relations between ethnic, religious, linguistic and other groups; and
- Preventing violent conflicts, as well as promoting peaceful settlement of disputes and resolution of existing conflicts.

See also resolution 2002/13 of the UN Economic and Social Council on “Action to promote effective crime prevention” (ECOSOC Resolution 2002/13), annex on Guidelines for the Prevention of Crime; Handbook on the crime prevention guidelines: Making them work (Vienna: United Nations Office on Drugs and Crime, 2010); and “OSCE Consolidated Framework for the Fight against Terrorism”.

⁴³⁹ A/70/674. This call was later addressed on a number of occasions by the international community:

- The United Nations Security Council, through the resolution highlights “the importance of the role of the media, civil and religious society, the business community and educational institutions in fostering an environment that is not conducive to incitement of terrorism”.
- Resolution 2129 addresses the need to enhance partnerships with “international, regional and sub-regional organizations, civil society, academia and other entities in conducting research and information-gathering, and identifying good practices” and “underscores the importance of engaging with development entities”.
- Resolution 2178 encourages Member States to “engage relevant local communities and nongovernmental actors in developing strategies” to counter violent extremism; this is the first time that countering violent extremism is mentioned in a resolution adopted under chapter VII of the United Nations Charter.

See also UNODC, *Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia* (2018), 55-56.

⁴⁴⁰ UNSC Resolution 2178 (2014), S/RES/2178 (2014), 24 September 2014,

16. Encourages Member States to engage relevant local communities and non-governmental actors in developing strategies to counter the violent extremist narrative that can incite terrorist acts, address the conditions conducive to the spread of violent extremism, which can be conducive to terrorism, including by empowering youth, families, women, religious, cultural and education leaders, and all other concerned groups of civil society and adopt tailored approaches to countering recruitment to this kind of violent extremism and promoting social inclusion and cohesion;

of such a process. Saudi Arabia offers an interesting approach, though a financially costly one:

Hundreds of government-run programs in the kingdom are aimed at prevention, according to Abdulrahman al-Hadlaq, an adviser to Prince Muhammad. This includes activities to educate the public about radical Islam and the dangers of extremism, as well as programs designed to short-circuit radicalization by providing alternatives. Many of these programs, implemented through the “guidance department” at the Ministry of Interior, are designed to confront extremism through the promotion and propagation of a more judicious interpretation of religious doctrine—absent takfir, the accusation of another Muslim of being an apostate—and are focused on strict jurisprudence of recognized scholars and authorities. The primary audience is not extremists themselves, but the larger population that may sympathize with extremists and those who do not condemn the beliefs that lead to extremism.

[...]

In other programs aimed at prevention, the Ministry of Culture and Information has initiated a series of projects—some for youths and some for adults—utilizing television, newspapers, and other forms of communication. Experts are loaned out to schools and mosques to speak about the dangers of extremism. Similarly, the Ministry of Islamic Affairs sponsors lectures and classes at mosques throughout the country, utilizing speakers and materials recommended by experts on extremism. Also, weeklong evening discussion and lecture series have been organized around different themes, featuring different sheikhs every evening.⁴⁴¹

In addition, the government has developed school programs intended to

⁴⁴¹ C. Boucek, “Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare,” Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 8.

inform and educate regarding this issue,⁴⁴² developed outreach material,⁴⁴³ and engaged in a broad public campaign of outreach.⁴⁴⁴ Similar *preventive*

⁴⁴² C. Boucek, "Saudi Arabia's "Soft" Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare," Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 8-10

⁴⁴³ C. Boucek, "Saudi Arabia's "Soft" Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare," Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 14

Through its materials, the subcommittee seeks to reinforce several messages. These include the concept that extremists will use its recruits to advance their own cause and that those who fall in with militants have misunderstood the basic tenets of Islam. One example of the type of materials produced by the Media Subcommittee was a television program that featured a character who was recruited for a terrorist attack. When the character, a young Saudi man, learned that this was to be a suicide attack, he refused to carry it out, but the extremists deceived him and detonated the explosives remotely. The character in the program survived but was left severely disfigured. The message of the program was clear: Involvement with terrorists will result in tragic consequences, for you and for your entire family. This story line bears similarities to the real-life story of one of the rehabilitation program's more famous participants, Ahmed al-Shayea, a young Saudi who was involved in the Baghdad fuel truck bombing of the Jordanian Embassy that killed twelve people. A number of similar stories were reported in early 2008 involving the manipulation of two mentally disabled Iraqi women in Baghdad suicide bombings.² The Media Subcommittee also produces books, pamphlets, and other materials used in the program. In coordination with the Ministry of Islamic Affairs and the Ministry of Education, the subcommittee helps coordinate lectures and speakers for mosques and schools. Through these efforts, the Advisory Committee has been able to deliver its message to a wide range of audiences in mosques and schools and at summer camps and clubs.

⁴⁴⁴ C. Boucek, "Saudi Arabia's "Soft" Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare," Middle East Program, Carnegie Endowment for International Peace (2008) (https://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf), 10-11

An essential aspect of the Saudi prevention program has been a large-scale public information and awareness campaign. The goals of these efforts are to foster cooperation between the state and the public; highlight the damage done by terrorism and extremism; and end public support and tolerance for extremist beliefs.

In the aftermath of the 2003 Riyadh bombings and the ensuing campaign by the al-Qaeda in the Arabian Peninsula organization, the Saudi government put up signs and billboards throughout Riyadh focusing on the evils of terrorism. Billboards along major roads and signs hung from overpasses all drew attention to carnage of the attacks. Some juxtaposed images of the faithful praying at Kaaba in Mecca with photos taken at the scene of some of the attacks. Typical slogans included "Our religion rejects terrorism" and "We all say no to terrorism." Others depicted the wreckage of car bombs and asked: "Are these the actions of the sons of our nation?"

Other signs were intended to foster greater cooperation between the police and public security officers and the general public. One image featured two clasped hands, one belonging to a person in a traditional thobe and the other in uniform. This image and others were designed to urge the public to cooperate with security personnel and demonstrate that the government and the people were acting together to preserve public safety. The extremists and their sympathizers thus were cast as outsiders acting not in the best interests of the people but to advance their own agendas. Some photos highlighted the actions of armed security personnel participating in raids, engaging in shootouts with terrorists, and carrying officers wounded in action. Other photos depicted security and emergency workers at the hajj (pilgrimage) helping children, elderly, and infirm pilgrims. All pictures sought to convey the idea that the state protects Muslim civilians and works to advance their well-being.

The campaign has also sought to highlight sacrifices made by security officers. One poster featured photos of all the policemen and security officers killed while fighting terrorism. The caption read: "These men died protecting you from terrorists." It was widely distributed throughout the kingdom, as were similar posters, all of them prominently hung in public spaces.

outreach efforts have also been conducted in other countries.⁴⁴⁵

9. CONCLUSIONS AND RECOMMENDATIONS

The counter-terrorism value of alternatives to detention should not be exaggerated. They cannot deal with all the associated challenges, nor should they be understood as the solution in every case or every context. Detention is and will remain a necessary part of the counter-terrorism arsenal. Instead, these alternatives are to be understood as valuable tools to supplement the traditional response of prosecution and detention. It is particular well suited for those at the margin of the terrorist threat or those who represent only a minor threat to society, in particular children. It is also well suited to address situations where mass incarceration puts a strain on the state's resources or where detention is typically used as default position. Instead, alternatives to detention build on the premise – a correct legal premise – that detention should be the exception and freedom the principle. Detention should therefore only be envisaged where no reasonable alternatives exist that could take care of the threat posed by the individual or individuals concerned.

There is no magic formula to finding effective alternatives to detention in relation to terrorists or suspected terrorist. Nor is there any guarantee that what might have worked in one context will necessarily work in another. There is also the associated difficulty of measuring success and deciding what amount of “failure” and risk is acceptable to the state in question. Resources too are a major element of the equation. It will have to be sufficient in both quantity and quality. Some of these alternatives are generally cheaper financially than their prosecution/detention counterpart but they might not come cheap. And they might require quite a bit of expertise (e.g., psychologists; mentors; religious advisors; education experts; administrative staff) that will impact the resources of the state. In evaluating alternatives to detention for terrorists in a given context, states and

⁴⁴⁵ See, e.g., France, Ministère de la Justice, « Prévenir Pour Protéger » Plan national de prévention de la radicalization (2018), 11ff; HM Government, Contest - The United Kingdom's Strategy for Countering Terrorism (June 2018) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf), 78, para 304:

In 2015, we published the Counter-Extremism Strategy. The strategy is based around four pillars:

- i. Countering extremist ideology by making sure every part of Government is taking action to confront extremist narratives that run contrary to our shared values.
- ii. Actively supporting mainstream voices especially in our faith communities and civil society.
- iii. Disrupting the most harmful extremists using all of the tools available to us and prosecuting those who break the law.
- iv. Building more cohesive communities by tackling segregation and feelings of alienation, which can provide fertile ground for extremist messages.

relevant authorities can therefore find inspiration in the experience of others but it will also be expected to evaluate proposed models against the – social, economic, religious, political, security – specificities of that particular state.

While there is no ready-made formula for success in that regard, there are certain ‘good practices’ that can be proposed as a general framework within which to evaluate possible alternatives to detention for convicted terrorists or suspected terrorists. First, the goals and purposes of such a program should be clearly laid out. This will allow the state to draw up the plan and design the relevant structure and procedures relevant to such a scheme. It might also require the state in question to adopt a new legal framework for it. Finally, clarity of goals will enable the authorities to continuously evaluate the program and its effectiveness and decide how to improve it, and whether to continue with it or abandon it.

Secondly, and tightly connected to the first point, resources commensurate to and necessary for the effective implementation of the program should in turn be made available and inter-agencies cooperation ensured. As noted above, resources are to be understood here not just in financial terms, but also a) in terms of necessary expertise, and b) coordination and cooperation between the various agencies and communities (private and public) relevant to the success of such a scheme.

Third, in all cases, alternatives to detention must be set up and implemented in a manner consistent with the state’s international legal obligations. In particular, human rights obligations must at all times be complied with by the state – whether in a situation of detention or outside of one. In that context, the rights and concerns of victims of human rights violations and crimes should be center-stage. In particular, their right to truth and reparation should constitute an integral part of any effort to design an alternative to detention for individuals who have terrorized their communities or committed harm against them directly.

Fourth, any alternative to detention should be tailored for the specific cultural, religious and social context in which it is to apply. There is no, generally applicable, formula that could apply to any and all environments. The tailoring of any such alternative to the relevant context will require that due consideration be given to that context, all relevant circumstances, in particular as regards the security situation in the country concerned and what resources it has at its disposal, and what and how many individuals it is

expected to deal with. The views and concerns of victims of acts of terrorism should also be fully considered and taken on board in designing any plan for an alternative to detention.

Fifth, at the individual level, state should adopt an individualized approach to the possibility of alternative to detention. Criteria of eligibility should be clearly laid out and be implemented in a fair and even-handed manner. Different categories should be distinguished according to the potential threat they pose (e.g., hard-core terrorists vs loosely connected individuals) and their specific needs (e.g., children and women). Their specific needs, in particular educational, financial, and vocational should be factored in the equation. Transparency and impartiality of the process should be guaranteed at all stages of the process. Discrimination and arbitrariness avoided.

Sixth, states could reduce the pressure of the prosecution-detention equation for terrorists by ensuring that the notion of ‘terrorism’ under its own laws is kept within reasonable boundaries and that only cases that warrant the full force of the law are subject to a prosecution and detention strategy. This would imply, inter alia, that states should start from the presumption that detention should not occur unless no safe and reasonable alternatives exist to address the threat posed by a given individual. Strict compliance with human rights at all relevant times is also likely to contribute to a decrease in cases by ensuring that only forensically credible cases are prosecuted and that evidence obtained through torture or coercive means does not serve as a basis for prosecution (and detention).

Seventh, among the choices open to state as alternatives to detention are so-called ‘judicial’ alternatives and non-judicial alternatives. The former rely upon the existing judicial system to find alternatives to detention for those charged with or convicted with a terrorist offence. Non-judicial alternatives operate outside that system. The former have certain advantages: they benefit from the legitimacy and authority of the judicial system; they are subject to due process and judicial control; they provide a high level of legal certainty and protection for those concerned. As illustration, they would involve non-prosecution decisions (conditional or not) or favourable plea agreement at the pre-trial stage, stay of proceedings order at the trial stage, suspended sentence or community service order at the sentencing stage and early release mechanism post-conviction. In contrast, non-judicial measures – such as use of traditional justice mechanism, truth and reconciliation commissions, disengagement, rehabilitation, reparation or

de-radicalisation programs – have the advantage of being more flexible, cheaper and more adaptable to the specific needs of those concerned. In other words, they can be specifically tailored to the context and circumstances of the case and not be tied to a pre-existing process and procedure. Their drawback is that their effectiveness is in some respect uncertain and could be unsatisfactory from the point of view of due process. In every case, states should consider what approach or approaches is best suited to their circumstances. Different mechanisms can be effectively combined so that the pressure of one operates on the other so as to make the whole arrangement more effective. For instance, a strong and effective system of prosecution would greatly incentivize participation by suspected or convicted terrorists in non-penal mechanisms where they can expect a degree of leniency in return for their contribution to truth, reconciliation or reparation for victims. In every case, states should ensure that the system operates fairly, transparently and impartially – and in a manner consistent with basic standards of due process. The system should also be mindful for the personal circumstances of those concerned, in particular children who should be regarded prima facie as victims whose best interests should guide decisions pertaining to their treatment.

Regarding non-judicial alternatives to detention, a number of overarching factors should be kept in mind when designing a suitable mechanism, including these: a) the role and importance of an individual's family network and social environment cannot be over-emphasised and should be promoted and supported through the implementation of the designed mechanism; b) the same is true of the individual's ability to find its place back into society; this might imply providing him with education, vocational training, administrative support, and religious education to counter the negative influence of radical doctrines; c) local communities in which individuals will be re-integrated should be involved in this process to ensure that their concerns are duly taken on board, that they understand the process and do not create resistance to it and that any security consequences that might result from reintegration are duly addressed and taken care of; d) mentors and other types of psychological and religious support should also form part of such a mechanism again with the dual purpose of ensuring a safe return into society and protecting the individual against the possibility of return to terrorist organisations; e) the security of all those concerned – terrorists; victims; staff; members of local communities – should be at the center of any such mechanism and is the responsibility of the state concerned.

Among the various non-judicial mechanisms available as alternatives (or supplement) to a policy of detention for terrorists and suspects terrorists, the following can be flagged here. Traditional mechanisms of justice provide a flexible, context-specific, solution that is mindful of local mores and sensitivities. They have been faulted at times for guaranteeing less than adequate due process protection for those concerned. Reparation schemes are important rehabilitative mechanisms that care for one element of victims' rights. It can take a variety of form and be individualized or collective. Most importantly, a reparation scheme is not necessarily a stand-alone mechanism but can be combined with other – judicial and non-judicial – means of justice. Internment is a type of lesser limitation upon an individual's freedom of movement falling short of detention. It provides some control over the individuals concerned while avoiding incarceration and allowing them to enjoy a larger degree of freedom. It is again a measure that can usefully be combined with others – e.g., participation in community projects or truth and reconciliation commissions. Rehabilitation focuses on the return of a terrorist to society, ensuring that he is able to find a safe, secure and meaningful place in society. Like disengagement, which focuses on disconnecting an individual from a terrorist organization, it ultimately seek to provide the individual concerned with the tools – educational, religious, social, and professional – necessary to ensure that he can engage with society in a peaceful and law-abiding manner. Finally, de-radicalisation program seek to change the worldview and mindset of those concerned with a view to have them abandon their support for violent radical ideas. Such programs have sometimes been criticized for being ineffective, incapable of evaluation or raising concerns regarding the human rights of those concerned.

Finally, a strong and effective outreach strategy should accompany all stages of deployment of a policy of alternatives to detention for terrorists and terrorist suspects. Such a strategy should explain the reasons for these alternatives and make sure that its main aspects are being discussed freely and openly. Victims and local affected communities should be an integral part of that strategy so that they and their concerns are heard and addressed. Engagement by local communities and local actors should be sought and nurtured. As part of this *outreach*, communal or group grievances should be addressed and resources go to help those communities in which terrorists are to be reintegrated so that those communities feel some of the benefits attached to the non-detention strategy of the state. Security concerns, in particular those of victims and affected communities (but also those of reformed terrorists and staff employed to help

their reintegration) should be guaranteed at all stages.

In every case, states should be focusing on what works and what can reasonably be achieved rather than on pre-existing models. A willingness to adapt, change and, where necessary, go back on the steps taken are necessary attributes in a context where hard evidence of success is hard to come by. Human rights standards recognized under international law do not just provide a minimum threshold to be guaranteed under any mechanism that provides an alternative to detention for terrorist. They also provide a guiding light of what every state should seek to achieve for each and all of its citizens so as to combat and eventually eliminate the scourge of terrorism.

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