DISENGAGEMENT, DISASSOCIATION, REINTEGRATION AND RECONCILIATION

ELIGIBILITY CONDITIONS AND PRACTICES

IOM
UN MIGRATION

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CONTENTS

LIST OF ACRONYMS AND ABBREVIATIONS

DDR	disarmament, demobilization and reintegration
DDRR	disengagement, disassociation, reintegration and reconciliation
ICG	International Crisis Group
ISIL	Islamic State in Iraq and the Levant
LGBTQI+	lesbian, gay, bisexual, transgender, queer (or questioning) and intersex
SPJ	structured professional judgement
TJI	Transitional Justice Institute
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
USAID	United States Agency for International Development
VEO	violent extremist organization
VERA	Violent Extremism Risk Assessment

EXECUTIVE SUMMARY

The separation of an individual from a violent extremist organization (VEO) puts pressure on governments and communities to find an acceptable balance among competing interests. On one side, former associates who receive timely rehabilitation and reintegration support will be more likely to transition successfully into social, political and economic spheres of civilian life. Offering associates a viable future outside their groups can encourage defections and reduce the group's capabilities to do harm. On the other side, States have responsibilities to victims and legal obligations to hold accountable perpetrators of serious crimes, coupled with a compelling interest in protecting society from recidivist violence.

A critical, early step in achieving this balance is screening and categorizing associates to determine their subsequent treatment. The legality, effectiveness and security of all subsequent phases of treatment and handling depend on the adoption of a sound screening process. Screening criteria tend to focus on three considerations: (a) criminal culpability; (b) level of involvement in a VEO; and (c) assessed risk of future violence.[1] A sound screening process enables the State to take appropriate action according to application of these criteria, which may result in immediate release, referral to rehabilitation and reintegration programming or criminal investigation for possible prosecution.

Regarding criminal culpability, States are obligated by international law to prosecute individuals suspected of certain crimes, including at a minimum, crimes against humanity, war crimes and genocide. Specified terrorism offences, as well as the group's status under counter-terrorism sanction regimes, implicates additional obligations and constraints, including a duty to prosecute or extradite. It follows that former associates who are reasonably suspected of these crimes are ineligible for immediate release or rehabilitation and reintegration programming.

A common outcome of screening in countries experiencing violent extremism has been the identification of a category for former associates whose crimes do not trigger international obligations to prosecute, but whose other crimes, involvement with the VEO and risk level render them ineligible for immediate release. For this category, alternatives to prosecution or prison may be appropriate, provided that due process and human rights are safeguarded. IOM developed the disengagement, disassociation, reintegration and reconciliation (DDRR) framework to support national governments in navigating the challenges and legal complexities that arise in violent extremist contexts. As with the long-standing commitment to disarmament, demobilization and reintegration of IOM, the Organization's engagement with DDRR stems from a commitment to the prevention and resolution of the drivers of crisis-induced displacement, as well as its mandate to provide reintegration assistance for migrants and displaced populations.

[1] As discussed in chapter 1, processes to assess risk of future extremist violence do not rest on an established evidentiary base; the existence of methods have not been fully validated, and their predictive value remains unproven.

INTRODUCTION

Increasingly over the last decade, IOM has been called on to support States in conflict situations to address the challenges that ensue when individuals "disengage" or exit from VEO. In response, IOM developed a new approach for DDRR. This approach addresses the particular circumstances and risks attached to violent extremist environments, while drawing on the institutional expertise of IOM from over 25 years of work in community stabilization and disarmament, demobilization and reintegration (DDR), and the Organization's emerging practice in preventing violent extremism.

DDRR recognizes that contexts with violent extremism often lack one or more of the preconditions that underpin DDR, such as the following: (a) existence of a signed peace agreement or a cessation of hostilities that establishes a legal basis; (b) agreed eligibility criteria; (c) political will of the parties to the conflict; and (d) security guarantees; among others.

DDRR also recognizes that there is enormous variation among former associates, who range from high-level commanders to victims, in terms of their legal status and needs.[2] As these differences are determinative of their future treatment, it is critical that the State screen former associates to establish individual profiles, ensuring due process and compliance with domestic and international law. Only after a former associate is screened can the State make a sound and lawful decision if the individual will be referred to the criminal justice system for prosecution or eligible for other pathways.

Support for individuals who disengage from VEOs also implicates different laws and guidance. For example, a series of United Nations Security Council resolutions call for criminal investigation and, where appropriate, prosecution of persons reasonably suspected of terrorist offences. In resolution 1373 (United Nations, 2001), the Security Council decided that all Member States shall ensure that those who participate in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts are brought to justice. Resolutions 2178 (United Nations, 2014a) and 2396 (United Nations, 2017a) further call on Member States to assess and investigate suspected individuals whom they have reasonable grounds to believe are terrorists, including foreign terrorist fighters, as well as implement prosecution, rehabilitation and reintegration strategies. In the specific context of Boko Haram and Islamic State in Iraq and the Levant (ISIL), resolution 2349 (United Nations, 2017b) calls upon concerned governments to develop and implement vetting criteria and processes consistent with law, allowing for the prompt assessment of all persons who have been associated with Boko Haram and ISIL. Taken together, these resolutions underscore the importance of accountability and justice as part of the counter-terrorism agenda. It is evident that any blanket amnesty for those who disengage from a VEO would be inconsistent with international standards, and eligibility for rehabilitation and reintegration support is contingent on the outcome of individual screening.

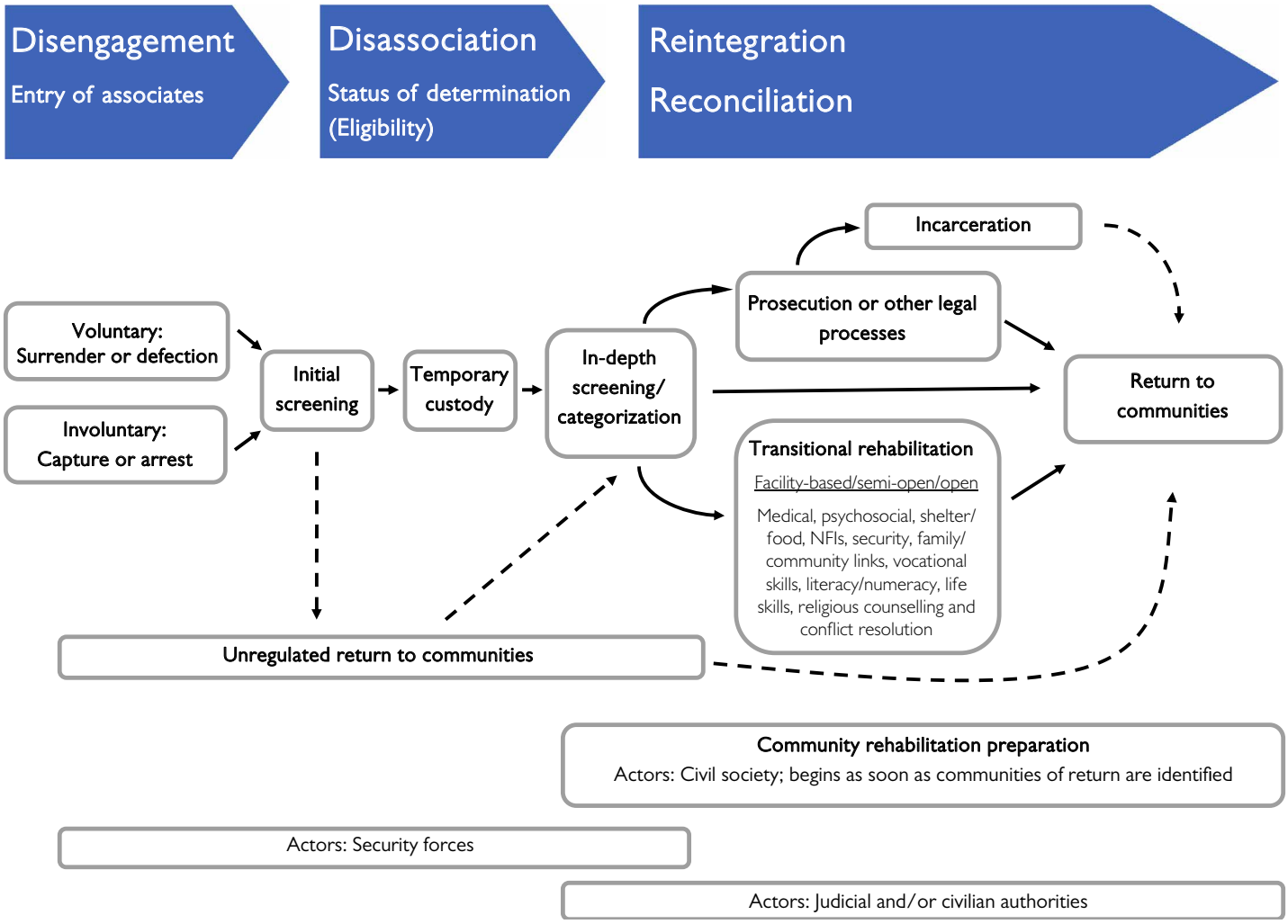
[2] As referenced in this document, the term "associate" means any person over whom the national or regional authorities have some responsibility or authority, through custody or otherwise, and whom they believe had some contact with a violent extremist organization. The term does not prejudge the nature of any relationship. Associates may include the following: (a) combatants or fighters at all levels; (b) those performing a broad range of non-combat roles, for example espionage, and support functions, for example cleaning, cooking or record-keeping; (c) hostages, other victims and civilians accompanying fighters; and (d) persons erroneously believed to be related to a VEO.

While recognizing that the establishment and application of screening criteria fall within the sole responsibility of national authorities, this document contributes to the wider efforts of IOM in providing technical support to governments in violent extremist situations to understand their legal obligations and design solid screening and transitional rehabilitation processes. Except for a brief discussion in the section on specific groups in chapter 2, which emphasizes IOM's commitment to the immediate handover of children associated with armed groups to child protection agencies, this document does not address children.

OVERVIEW OF DISENGAGEMENT, DISASSOCIATION, REINTEGRATION AND RECONCILIATION

The DDRR approach of IOM is discussed in depth in *New Contexts of Ongoing Conflict and Violent Extremism: Disengagement, Disassociation, Reintegration and Reconciliation* (forthcoming) and illustrated in figure 1, which shows the progression of former associates through four phases of treatment and handling. Although there are contextual differences and variances in how States address and handle these caseloads, this framing reflects a broadly applicable process drawn from the experiences of IOM in the Lake Chad Basin region.

Figure 1. Disengagement, disassociation, reintegration and reconciliation



Source: Figure elaborated by authors.

The first phase of DDRR begins when associates of VEOs disengage, either voluntarily (surrender or defection) or involuntarily (capture or arrest), with most taken into custody by security forces. After registration, phase 2 or "disassociation" is launched with a screening process, undertaken by national authorities within a reasonable time frame, to apply legally defined criteria in determining categories of cases for further treatment and handling. As discussed in chapter 3 on the application of eligibility criteria, due process concerns and human rights law are paramount, given the deprivation of liberty and the momentous consequences of the determinations made.

Phase 3 or transitional rehabilitation serves released former associates and those who are neither suspected of an international crime that requires the State to prosecute nor eligible for immediate release. While community-based reintegration may be possible for them, some national authorities have conditioned the release of individuals in this category on participation in transitional rehabilitation. As used within the DDRR framework, *rehabilitation* refers broadly to efforts, such as medical and psychosocial support, counselling and referral services, socioeconomic assistance, education and training, as well as community and family outreach, aiming to improve reintegration outcomes. *Transitional rehabilitation* refers to an interim rehabilitation process in a non-prison setting targeting a range of issues faced by former associates prior to their return to community life. It aims to build community trust and confidence in the disengagement process, facilitate successful reintegration and reduce the risk of recidivism. Considerations on rehabilitation programming in these contexts are laid out in IOM's *Disengagement, Disassociation, Reintegration and Reconciliation: Transitional Rehabilitation* (forthcoming).

Phase 4 focuses on reintegration, which continues to address the socioeconomic needs of the individual while promoting the welfare of the community as a whole. The intervention can be integrated with support to reconciliation tailored to the local context and culture, which may involve restorative justice forums, community-based psychosocial recovery activities or other transitional justice undertakings to re-establish a basic foundation for the longer-term process of individual and community recovery.

IMPLICATIONS FOR PROGRAMMING

For IOM, the provision of rehabilitation and reintegration support for former associates of VEOs is only possible where the State adopts eligibility criteria and screening processes that accord with applicable laws and standards. The provision of rehabilitation services, especially in closed facilities, must be prescribed by law with appropriate safeguards for participants' due process and human rights. When dealing with sanctioned groups, engagement of IOM is further contingent on legal clarity that its assistance would not qualify as "material support" to the group or members in contravention of the laws of the United Nations and Member States. In the absence of these conditions, any rehabilitation or reintegration support would incur unacceptable legal, security, institutional and principle risks.

At the same time, the experience of IOM in countries facing violent extremism makes clear that many host governments require support in meeting these conditions and launching a legal and sound DDRR programme. Accordingly, IOM provides technical support to national and local governments in addressing "upstream" requirements, including the following:

- Establish criteria and procedures to screen and categorize disengaging associates of VEOs.
- Identify a legal basis for transitional rehabilitation for those former associates who are neither released immediately nor sentenced to prison. This process involves a thorough review of applicable international and domestic law. It may also require changes in domestic laws to lay a foundation for alternative measures. For example, exemptions may be carved out from existing counter-terrorism legislation.
- Develop a policy framework for the post-screening treatment and handling of former associates, including a strategy for transitional rehabilitation and related tools.

As part of a government-led process, IOM is well-positioned to promote whole-of-government and whole-of-society creative processes. IOM can play a convening role and allocate resources to the provision of specialized technical expertise. IOM staff are not authorized to engage directly in screening processes or establish institutional ownership of personal data collected during screening.

IOM recognizes that support to any State or regional security forces, including the military or police, or any government body with responsibility over these forces is governed by the United Nations Human Rights Due Diligence Policy (United Nations, 2013). Under the policy, IOM cannot provide support where there are substantial grounds to believe there is a real risk that the receiving entity is committing grave violations of international humanitarian, human rights or refugee law, and where the relevant authorities fail to take mitigating measures.

CHAPTER 1.

ESTABLISHING ELIGIBILITY CRITERIA

It is the responsibility of each State to establish criteria, anchored in a legal framework and consistent with international law, to determine which former associates are released, criminally investigated for possible prosecution, or offered transitional programming. These criteria are likely to be formulated as a part of a broader process of learning and dialogue that builds knowledge on relevant concepts and incorporates diverse perspectives. For example, to establish transitional justice processes and policies for alternative forms of punishment, the African Union (2019) has advised States to engage in transparent consultations with affected communities, victims and other stakeholders in ways that promote the participation of women, youth and displaced persons. The nature and extent of consultations will depend on security factors and the availability of forums where information and opinions can be shared freely (Transitional Justice Institute (TJI), 2013). Such participatory approaches help in the following: (a) aligning transitional justice strategies with local contexts, culture and history; (b) identifying solutions that balance security and justice aims; and (c) supporting long-term reconciliation.

A whole-of-government approach is essential to bring together relevant entities at multiple levels and account for their varying interests and expertise. Recent experience highlights the need for reconciling the interests of administrative or executive authorities, who may wish to operationalize rehabilitation and reintegration strategies quickly, with the legitimate concerns of legal and judicial entities. Such whole-of-government efforts are most effective when there are clear mandates, a designation of authority to an entity or entities with primary responsibility for establishing criteria, and frameworks for inter-institutional cooperation.

The three general criteria discussed in this chapter are those mostly commonly used in screening the following: (a) suspicion of certain crimes; (b) level of risk to the community; and (c) level of involvement with the violent extremist organization (VEO). Application of these criteria has resulted in at least three categories of former associates and pathways:

- **Victims and others with no criminal involvement:** Those who are not suspected of specified crimes, present a low level of association with the group and do not pose a risk to the community are eligible for immediate release. They may also be offered transitional rehabilitation services to aid in their recovery, as well as longer-term reintegration support. Hostages and other victims, as well as individuals with no substantive ties to the group, are often within this category.
- **Individuals suspected of serious crimes.** Disengaged associates who are reasonably suspected of specified crimes, intensively involved with the group or pose a high risk to the community are sometimes referred to as “high profile” or “high risk.” Their criminal culpability subjects them to investigation and prosecution in accordance with domestic laws and international obligations.

- **Middle-category cases.** This grouping, sometimes labelled as "low risk" or "low profile", includes former associates whose crimes do not rise to the level of serious crimes requiring prosecution, but whose release has been conditioned by some national authorities on participation in transitional rehabilitation.

1.1. CRITERIA ON CRIMINAL ACCOUNTABILITY

Questions relating to an individual's eligibility with respect to criminal accountability are governed by applicable international and domestic laws and standards. International sources include humanitarian and criminal law instruments, such as the Geneva Conventions, the Rome Statute of the International Criminal Court, the international counter-terrorism framework and non-binding guidance.

1.1.1. International sources

Geneva Conventions and Rome Statute

In cases of international or internal armed conflict, the Geneva Conventions provide a treaty basis for the duty to prosecute or extradite grave breaches of international humanitarian law. Where applicable, the Rome Statute provides for a clear obligation to fully investigate and prosecute crimes against humanity, war crimes and genocide. Persons reasonably suspected of such crimes must be referred to a judicial process, and they are therefore ineligible for immediate access to rehabilitation or reintegration. In cases where international humanitarian law does not apply and the State is not party to the Rome Statute, these sources remain relevant guidance on the applicable international standards.

There is a strong argument to add serious violations of human rights to the above list of crimes that bar eligibility.[3] For example, in 2004, the United Nations Security Council stated that while amnesties can be encouraged in post-conflict contexts, "these can never be permitted to excuse genocide, war crimes, crimes against humanity, or gross violations of human rights" (United Nations, 2004).[4]

However, there is no universal definition of "serious" (or alternatively, grave, gross or flagrant) human rights violations. Some authorities have defined the term by enumerating a list of crimes that qualify as serious violations. These include, among others, arbitrary arrests and detention, rape and other sexual violence, violations of the right to property, obstructing access to humanitarian aid and recruitment of children into armed groups (Geneva Academy, 2014).[5] Some of these violations such as rape are inherently serious, meaning that even a single, isolated incident is serious (see ibid.; Perez-Leon, 2017). For other violations such as violations of the right to property, the character of the violation will matter.

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[3] In determining what violations can be considered serious, definitions look to the character of the right, questioning whether the right at stake is fundamental such as the right to life, as well as the character of the violation, meaning its magnitude, impact and type of victim.

[4] More recently, the Security Council applied this exclusion in a DDR context, noting that former combatants "not suspected of genocide, war crimes, crimes against humanity or abuses of human rights" were to benefit from DDR services in the Democratic Republic of the Congo (United Nations, Security Council resolution 2409 on the situation concerning the Democratic Republic of the Congo (S/RES/2409 of 27 March 2018), para. 37). Similarly, human rights courts have rejected amnesties that purported to extend to such violations as incompatible with a State's obligations to investigate and prosecute.

[5] Other crimes deemed serious include the following: forced disappearance; large-scale population displacement; torture and other cruel, inhuman or degrading treatment; violations of the right to life, including murder and massacres, extrajudicial and summary executions; attacks on health and education facilities; forced evictions; gender-based violence; restrictions on movement; sexual and other forms of violence against children; and slave and forced labour.

Including a category of serious violations in a disengagement, disassociation, reintegration and reconciliation (DDRR) policy will capture some criminal conduct that the State would likely want to investigate and prosecute but that does not qualify as a crime against humanity, a war crime or genocide. To that end, a State may exclude individuals suspected of serious violations of human rights, generally, or spell out specific violations or both.[6] The State can also highlight criminal categories and patterns that have met with widespread condemnation. Another option is to consider the nature of the victim, for example by listing violent acts against children or crimes related to gender as grounds for ineligibility from DDRR.[7]

Counter-terrorism framework

The global counter-terrorism framework includes resolutions adopted by the United Nations Security Council and 19 international treaties. In a series of binding resolutions adopted by the Security Council acting under chapter VII (1373 (2001), 2178 (2014) and 2396 (2017)) and in resolution 2349, which was not adopted under chapter VII, Member States are required to assess and investigate acts of terrorism, ensure terrorists are brought to justice, and develop comprehensive prosecution, rehabilitation and reintegration strategies.

The 19 UN-sponsored counter-terrorism treaties impose an *aut dedere aut judicare* duty on parties, requiring them to extradite or prosecute perpetrators of international terrorism (see Annex 1 for a full list of treaties). In connection with former associates of VEOs, depending on each country's party status to the treaty in question, the criminalized conduct[8] in certain treaties may be particularly relevant, including the following: (a) International Convention against the Taking of Hostages (1979); (b) International Convention for the Suppression of Terrorist Bombings (1997); and (c) International Convention for the Suppression of the Financing of Terrorism (1999).[9]

Non-binding guidance

The United Nations General Assembly adopted the United Nations Global Counter-Terrorism Strategy (United Nations, 2006) in 2006 by consensus. The Strategy is a unique global instrument to enhance national, regional and international efforts to counter terrorism. The General Assembly reviews the Strategy every two years, making it a living document attuned to Member States' counter-terrorism priorities.

In 2016, the United Nations Secretary-General put forward the Plan of Action to Prevent Violent Extremism, which calls for a comprehensive approach with essential security-based measures and systematic preventive steps to address the underlying drivers of recruitment. In its resolutions 70/291 (United Nations, 2016) and 72/284 (United Nations, 2018) for the fifth and sixth biennial review of the United Nations Global Counter-Terrorism Strategy, the General Assembly encouraged Member States to consider relevant recommendations from the Plan of Action and develop their own national and regional plans.

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[6] Note, for example, in addressing this same issue, lawmakers in the Niger denied DDR-type benefits to Boko Haram associates accused of crimes against humanity, war crimes, genocide and *tout autre* crime grave (any other grave crime). On one side, such inclusive language bolsters accountability by making it possible for prosecutors to bring perpetrators of serious crimes to justice. On the other, as the Niger has discovered, the conceptual breadth and vagueness of "grave crimes" make objective and consistent enforcement a challenge.

[7] On children, see, for example, UNICEF, 2007; calling for prosecution of violence against children associated with armed forces or armed groups, including sexual violence against girls (United Nations, 2015a).

[8] Generally, these treaties require an international element, and do not apply where the offence is single State, the alleged offenders and victims are nationals of that State and the alleged offender is found in the territory of that State.

[9] A different version of the extradite or prosecute principle appears in global treaties on organized crime. Generally, the duty there does not come into play until another State party requests extradition. If the State where the accused is present declines an extradition request for specified reasons, that denial triggers a duty to prosecute.

1.1.2. Domestic law and policy

The criteria related to criminal accountability are also shaped by applicable domestic norms covering the following examples: (a) legislation and jurisdiction over terrorism crimes; (b) extent of prosecutorial discretion; (c) national procedures for amnesties, pardons and pre- or post-trial alternatives; and (d) rights of victims. Moreover, substantial policy interests are involved, such as the rule of law and prevention of crime and violence.

Domestic counter-terrorism legislation may create independent duties to investigate and prosecute terrorist crimes without exception. Such legislation often codifies crimes of terrorism broadly, covering recruitment, training or financing of terrorist offences, and calls for severe sanctions, sometimes including the death penalty. Frequently, military courts are granted exclusive jurisdiction over such offences.

Prosecutorial discretion refers to the authority to decline or defer prosecution, in the public interest, even where there is a legal basis and evidence to prove criminal guilt. Discretion may be necessary for pragmatic reasons in crises where the number of people subject to judicial process outstrips national capacities. In such situations, States may adopt strategies to prioritize prosecution based on the nature of the crimes or the level of involvement of the accused. If DDRR eligibility and the prosecutorial strategies are not aligned, there is a risk that some former associates will be barred from rehabilitation and reintegration services, but ultimately not investigated or prosecuted by the justice system. The opportunity to rehabilitate these individuals would be lost, without advancing any of the goals of prosecution.

1.2. ADDITIONAL CRITERIA

1.2.1. Risk of future violence

Good practice requires assessment and management of the risk of future violence posed by a former associate of a VEO. These processes are undertaken during screening and at regular intervals thereafter. Imagine a case where a former associate remains ideologically committed to the VEO and to the use of violence to achieve political change.[10] If that person enters a rehabilitation programme, he or she threatens the security of other participants and staff. The person may report sensitive information back to the group, which could lead to reprisals against former associates. Upon release, the person may harm the host community. In addition to the immediate harm suffered, such negative outcome could reduce future defections and stoke communal distrust of the reintegration process.

Note that in Somalia, risk assessment is central to eligibility for benefits to captured or defecting Al-Shabaab members. Those considered "high risk" are technically ineligible for leniency or services and routed to the judicial system. Those considered "low risk" are generally eligible, although the president has stated that perpetrators of some crimes such as murder and rape are subject to prosecution (Parrin, 2016).

In domestic law enforcement systems, tools to assess a convict's risk of future violence have been in use since the late 1980s. In the United States of America, for example, risk assessments are used by courts to make decisions on pretrial release and bail, by prison staff for security-level classifications and to offer appropriate services, as well as by parole boards to determine eligibility for release.

[10] This scenario and related discussions were drawn from Richards, 2018.

Risk assessment for violent extremism poses a range of challenges. First, the empirical basis is not established. Evidence on risk and resilience factors is weak, due in part to their contextual specificities and in part to the relatively low occurrence of extremist violence (Copeland and Marsden, 2020; Sarma, 2017). Further, none of the existing methods, which are outlined in chapter 2, has been fully validated (Research Triangle Institute (RTI) International, 2017). The potential for mislabelling someone as "at risk" and taking unnecessary and harmful "preventive" action raises serious ethical and legal concerns (Sarma, 2017).

1.2.2. Level of involvement

Research and experience in multiple conflict settings involving VEOs show a broad variety of involvement in such groups, ranging from active voluntary participation with ideological conviction, to secondary roles and in many cases forced participation. Determining the nature and degree of participation of former associates is relevant to understanding their criminal culpability for the group's conduct. In the past, States have applied this criterion to amnesties, for example, by exonerating rank-and-file personnel while requiring military and political leaders to face prosecution. In the context of VEOs, a distinction can be drawn between those who joined voluntarily (as adults) and those who were forcibly recruited or abducted. The level of involvement also speaks to an individual's risk of future violence and their rehabilitation and reintegration needs.

1.3. ALTERNATIVES TO PROSECUTION AND PRISON

This section looks at measures that may be applied at multiple stages of a judicial process, including as pretrial alternatives to prosecution in appropriate cases or post-conviction alternatives to prison. Due process and the paramount importance of voluntariness for all rehabilitative efforts require that any alternative that involves a waiver of legal rights be fully and freely consented to by the offender.[11]

1.3.1. Legal bases for rehabilitation and reintegration

As States develop their own legal framework for the treatment and handling of former associates, there is a common need to establish pathways of rehabilitation and reintegration that are compatible with applicable law. Recognizing that the availability of these alternatives to prosecution or traditional sanctions will vary among legal regimes and conflict contexts, the following examples serve to illustrate the approach.

- **Pre- and post-conviction measures.** A judicial authority, typically a prosecutor or judge, may be authorized to propose alternatives for prosecution or traditional sentencing. In some legal systems, a prosecutor may offer to defer prosecution if the accused consents to alternative conditions. After a conviction, a judge may have a legal basis to offer an alternative sentence, which could include participation in non-prison transitional rehabilitation.
- **Waiver of prosecution.** A State may waive criminal prosecution in certain circumstances, such as when the accused reports a planned crime, tries to prevent its occurrence or cooperates in the identification of co-offenders and accomplices. In this case, the person is exempted from criminal prosecution despite being suspected of certain crimes.

[11] Following the formulation set out in the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), this document refers to all persons subject to prosecution, trial or sentencing as "offenders", irrespective of whether they are suspected, accused or sentenced.

- **Pardon.** A third option is to pardon a person who has already been sentenced for crimes, resulting in the commutation or remission in whole or in part, with or without conditions or a penalty.
- **Amnesty.** If a State declares an amnesty, it puts an end to the enforcement of penalties and expunges any convictions. As summarized by the Office of the United Nations High Commissioner for Human Rights (OHCHR, 2009), amnesties are subject to certain limitations in international law and impermissible if they:

  (a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations;

  (b) Interfere with victims' right to an effective remedy, including reparation;

  (c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law.

  Additionally, amnesties that seek to restore human rights must be designed with a view to ensuring that they do not restrict the rights restored or in some respects perpetuate the original violations.

Moreover, and as discussed above, certain terrorism offences also impose prosecutorial obligations on the State and render reasonably suspected perpetrators ineligible for amnesties.

1.3.2. Conditional eligibility

In disarmament, demobilization and reintegration (DDR) and other amnesty contexts, State practice and scholarship support the establishment of preconditions on eligibility for legal leniency. The Belfast Guidelines (TJI, 2013) were compiled by a group of human rights and conflict resolution experts to address issues around amnesty and accountability. Guideline 11 recommends prior conditions on amnesty beneficiaries, drawing examples from State practice of disclosure on criminal acts and participation in restorative justice and reparations (ibid.).

Specifically discussing amnesties in DDR programmes, Freeman (2010) notes State experience with additional conditions, including participation in disarmament and demobilization, renunciation of violence, cooperation with law enforcement authorities, and acts of restitution. It bears repeating that to the extent these conditions presuppose a waiver of legal rights, including the right to a fair trial, due process necessitates free, informed and continuing consent by the offender.

Through the lens of traditional criminal justice, these arrangements may be best understood as agreements between the State and an offender, where the latter agrees to fulfil certain conditions in exchange for an exemption from criminal prosecution or particular sanctions. Specific examples of conditions from the literature on amnesties that may be relevant to a State considering legal benefits in DDRR contexts are provided below:

- Some processes have made fulfilment of DDR activities a precondition for legal benefits, such as in the Democratic Republic of the Congo and Aceh, by requiring surrender of weapons (TJI, 2013) and in Colombia, by requiring participation in reintegration programming (see below on revocation).
- Participants may be required to make a formal, sometimes written or ceremonial, renunciation of their group and violence.

- To support accountability and reconciliation, especially at the local level, offenders may be required as a condition for legal leniency or other benefits to participate in traditional or restorative justice practices. In Uganda, "cleansing" ceremonies were traditional at the village level (Duthie, 2010).
- Performance of community service may be provided for as an alternative sanction, a gesture of goodwill or as a contribution to reparations for harmed communities.
- Like amnesty applicants in South Africa, for example, participants may be obliged to confess their crimes or give full disclosure on their own and third-party involvement in criminal activity. Such truth-telling can go some way in satisfying victims' rights to truth and advancing reconciliation. Participants may also be required to testify at the trials of persons who are being criminally prosecuted.
- In Colombia where paramilitary and insurgent structures were heavily involved in lucrative criminal enterprises, offenders had to hand over illegally acquired assets in exchange for leniency.

Legal status and eligibility: Colombia

Until a new programme was agreed in the 2016 accords, the Colombian DDR programme had two different legal approaches for ex-combatants/ex-fighters from left-wing and right-wing armed groups. In the case of left-wing insurgents, the Government offered rank-and-file members who had not committed international crimes to be pardoned for the "political crime" of affiliation to an insurgent group and deemed them eligible for DDR benefits. On the contrary, rank-and-file right-wing paramilitaries who were likewise not accused of international crimes could not be pardoned because their crimes were not considered "political" in nature.

For this second group, some prosecutorial process was strictly required. Their process started with the suspension of any arrest warrants and a conditional exemption from imprisonment. The exemption lasted if the accused met certain conditions, including truth-telling, participation in the official reintegration programme, abstaining for any other crimes and 80 hours of community service. Once these conditions were fulfilled to the Government's satisfaction, a participant would appear before a judge for a conviction for conspiracy and a judicial determination that the participant's sentence had been fully served. Unlike the case with left-wing insurgents, a former paramilitary fighter would retain a criminal record.

1.3.3. Revocation

Even if a participant is exempted from prosecution, the State may establish legal grounds for revocation of eligibility. The Belfast Guidelines (Guideline 12 of TJI, 2013) recommend conditions of future conduct on amnesty beneficiaries that are "designed to ensure the offenders' continued engagement with processes of peacebuilding and reconciliation and to prevent recidivism". As to the retention of eligibility, Freeman (2010:59) concludes that "amnesty benefits should be explicitly revocable when an individual fails to comply with one or more of its central conditions, such as the failure to fulfill the requirements of a DDR program."

Commonly, recidivism triggers a loss of benefits and exposes the former associate to immediate prosecution for crimes perpetrated before and after the initial eligibility decision was made. The State may define recidivism for this purpose as involving serious crimes, violent crimes, conduct related to violent extremism or some combination of these.

Further, some of the conditions set out in the preceding section can remain in force even after the initial eligibility decision is made. For example, in Algeria, a failure to tell the truth could lead to a future revocation of benefits (Freeman, 2010:59, no. 127). In Colombia, participation in reintegration services was an ongoing condition of non-prosecution. If a person repeatedly failed to participate in assigned reintegration centre activities without good cause, that individual could be exposed to prosecution for pre-demobilization crimes.[12] Finally, the initial determination reflects information that is available at the time it is made, but the policy may allow this decision to be reverted if new information or evidence casts reasonable suspicion on that individual for serious crimes.

1.3.4. Further guidance on alternatives

There is a growing body of guidance on pre- and post-trial alternatives, which highlights the need to establish a sound legal basis for their application, adhere to human rights law, and achieve a "proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention" (United Nations, 1990). Selected sources are linked and summarized here:

- The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (1990) set out principles on the use of non-custodial measures for persons subject to prosecution. These are applicable at any stage of the administration of justice. The rules require the offender's consent prior to the imposition of these measures and the availability of judicial review on the offender's request. The rules recognize that a breach of agreed-upon conditions may result in modification or revocation of the alternative measure.
- The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (United Nations, 2010) complement the Tokyo Rules to address the distinct needs of women offenders. Rule 57 calls for "gender-specific options for diversionary measures and pretrial and sentencing alternatives ... taking account of the history of victimization of many women offenders and their caretaking responsibilities".
- Recommendations on the effective use of appropriate alternative measures for terrorism-related offences, issued by the Global Counterterrorism Forum (2016:2), underline the potential role of alternative measures in efforts to "reduce recidivism, prevent further radicalization to violence, promote disengagement and eventual reintegration". The recommendations note that alternative measures generally require the offender's consent and any sanctions that "materially restrict the offender's liberty should be subject to judicial review" (ibid., p. 8).
- The Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (Economic and Social Council, 2002) concern restorative justice involving processes in which the victim, the offender and other affected persons participate jointly in a resolution of the crime and its consequences. These principles would require both the victim and the offender to voluntarily consent to the process.

[12] *El Tiempo*, 2017. In the article, the director of Colombia's reintegration agency explains that the law that affords some demobilized persons freedom also obligates them to participate in reintegration activities: "If they don't fulfill their commitment to the agency, we should notify judicial actors" (unofficial translation).

Laying a legal foundation for eligibility for rehabilitation and reintegration

Policy and lawmakers may consider the guiding questions below towards establishing a legal basis for rehabilitation and reintegration support to eligible former associates:

- Does the legal framework in place allow for amnesty? How could it be applied to this group?
- Are prosecutorial discretion, pardon or other pre- or post-conviction alternatives relevant to this caseload or a subset of it?
- If required, what changes to the existing framework are feasible? What are the procedures and time frame for such changes?
- Will legal, rehabilitation and reintegration benefits be conditional on some future action by the participant? What effect does conditionality have on the applicability of legal alternatives discussed above?
- How does the choice of legal treatment and status affect the aims of transitional justice, including reconciliation and the rights of victims? How does it affect the incentives to VEO associates to defect and hand themselves over to authorities? Is this the right balance?

1.4. SANCTIONED GROUPS

Specific legal constraints and requirements come into force when the VEO in question is designated as a terrorist organization. An entity may be so designated by the United Nations, regional organizations and individual member States.

The United Nations' Al-Qaida Sanctions Committee was established on 15 October 1999, pursuant to United Nations Security Council resolution 1267.[13] Pursuant to resolution 1390 (United Nations, 2002), the Committee maintains a list of individuals and entities associated with Al-Qaida that are subject to sanctions. The sanctions ban the provision of financial or material support to listed entities, and any entity that provides such support is eligible to be listed and subject to measures. The United Nations requires Member States to bar funding to listed groups, prevent the supply of weapons, freeze assets and ban travel.

Numerous Member States, such as Australia, Canada, New Zealand, Turkey, Ukraine, the United Arab Emirates, the United Kingdom and the United States have established their own designation procedures with similar consequences. Under United States federal law for example, it is a crime to provide material support to a designated terrorist organization or a person or group that has committed or is committing terrorist offences. Material support is defined as including any property, service, monetary instrument, lodging, training, expert advice or assistance, communications equipment, personnel or transportation. The only stated exceptions are medicines and religious materials. The United States Supreme Court held that the ban would cover a non-profit organization providing a designated terrorist group technical assistance to prepare a petition for the United Nations.

[13] The official name of the committee is Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) (United Nations, 1999, 2011 and 2015b) concerning ISIL (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities.

Widespread concern among donors, financial institutions and implementing organizations that even neutral, humanitarian or development action could be construed as material support has led to a "chilling" effect and constrained the international response in certain crises. In response, the United Nations and some countries, such as the United States and Australia, have carved out limited exemptions or ad hoc derogation schemes to safeguard humanitarian activities by some organizations. In 2019, the Security Council called for Member States to counter financing of terrorism without impeding humanitarian activities (United Nations, 2019).

A VEO's listed status raises questions as to the extent to which DDRR services could be construed as material support. Traditional reintegration activities, like transport home, reinsertion packages and training, meet most definitions of material support. The more difficult questions are whether and under what circumstances a person channelled out of the prosecutorial system towards rehabilitation and reintegration ceases to be considered as an associate and becomes a former associate, as well as the effect, if any, of this transition from current to former status on the applicability of sanctions. In practical terms, designation may limit the ability or willingness of donors, other partners and even IOM to engage with certain caseloads. As to eligibility, donors may be able to support some former associates but not others or may be more comfortable providing financial resources if certain conditions are in place.[14]

[14] For example, USAID reintegration support to ex-combatants from Colombia's terrorist-labelled armed groups (prior to the recent peace accords) was predicated on their risking their lives to escape from their armed groups and surrendering to the Colombian authorities.

CHAPTER 2.

APPLYING ELIGIBILITY CRITERIA

The goal of applying screening criteria is to ensure that subsequent treatment is lawful and appropriate in view of each individual's criminal culpability, risk of future violence and level of involvement in the VEO.

In resolution 2396 (2017), the United Nations Security Council called upon Member States to employ evidence-based risk assessments and screening procedures, in accordance with domestic and international law, without resorting to profiling based on any discriminatory ground prohibited by international law.

Screening processes call for qualified personnel from authorized government entities, including trained investigators and psychologists. Screening will often necessitate collection and analysis of external evidence (outside of the interview process) and development of psychological profiles.

Screening practices: Lake Chad Basin

States in the Lake Chad Basin region, in partnership with international and regional organizations, are developing a two-phase screening procedure for associates of Boko Haram and Islamic State in West Africa Province (ISWAP).

Phase 1. In an initial screening, authorities who establish first contact with the associate collect and record preliminary information as comprehensively as possible in a short time period. This phase can result in immediate release of victims and persons with no ties to the group.

Phase 2. A multidisciplinary entity composed of professionals from diverse authorities at different levels of government conduct an in-depth screening. The multidisciplinary entity is designed to reflect the local context.

Good practice further requires that all adults associated with a VEO be screened, regardless of the manner in which they came in contact with the authorities.[15] Persons captured or arrested during military operations are often deemed more suspicious than people who have defected and may therefore be deemed ineligible for DDRR benefits. For example, those captured in combat cannot join Nigeria's Operation Safe Corridor transitional rehabilitation programme. However, the manner in which someone comes to the attention of and control by authorities is not determinative of their criminal culpability, level of involvement, future risk or even their desire to disengage. As Felbab-Brown (2018) explains, civilians who live in areas controlled by a VEO may not necessarily adhere to the group's ideology, goals or

[15] For example, the importance of screening all former associates was underscored in the subregional workshop for Lake Chad Basin countries on coherent approaches to the screening and prosecution of Boko Haram-associated persons, held with support from the United Nations Counter-Terrorism Executive Directorate and UNODC in N'Djamena in July 2018.

tactics, but be forced to participate and unable to flee. They may also be obliged to pay taxes to or be ransomed and extorted by the group. Screening enables State authorities to capture these nuances and categorize associates accordingly, which would further enable authorities to promptly release victims and others who are not suspected of criminal conduct (see International Crisis Group (ICG), 2021). The application of a legitimate screening process has a communicative effect as well: an individual released by authorities pursuant to a screening process that communities deem credible may be less likely to suffer stigma or suspicions based on their association.

The screening process involves the collection and analysis of large amounts of sensitive information. Special attention is warranted in the collection, processing and use of personal data, meaning any information relating to an identifiable data subject that is recorded by electronic means or on paper, and covers biographical, biometric and genetic data, an individual's background and material circumstances, as well as images and recordings, corroborating materials, personal and verification documents. Authorities involved in the screening process should adhere to data protection principles and take necessary precautions to preserve the confidentiality of personal data and the anonymity of data subjects.[16]

2.1. SPECIFIC GROUPS

International standards call on national authorities who interact with former associates to take into account the needs of specific groups, including but not limited to women, children, the elderly, LGBTQI+ people and those with disabilities. Appropriate measures include hiring female staff to interview women, providing training to address the needs of victims of gender-based violence and ensuring all staff understand and apply protocols for children.

2.1.1. Women

Disengaged women are routinely categorized as victims, based solely on their gender without consideration of their individual circumstances, and released immediately without provision for their support needs (see UNODC, 2019). The presumption is inconsistent with existing research that shows significant numbers of women are joining VEOs voluntarily in the pursuit of specific goals, with some reaching positions of influence within the groups.[17] By acting on gender stereotypes, governments risk releasing women who are guilty of serious crimes or promote violent extremism upon return to their communities. Moreover, denying eligible women the support and care offered in transitional rehabilitation programmes is discriminatory and reduces their chances of gaining community acceptance. The different treatment may further entrench women's positions of vulnerability in traditionally patriarchal societies.

2.1.2. Children (under 18 years)

International law prohibits and criminalizes the recruitment and use of children in any capacity by armed groups and requires that children associated with armed groups be treated as victims, irrespective of the circumstances of their engagement. In cases of doubt, there is a presumption that the young person is a child. Such children should be separated from the group and transferred to child protection agencies. This process should adhere to handover protocols on children associated with armed groups, where these are in place. These agencies are uniquely equipped to interview children and determine the next steps in

[16] See IOM, 2010. Note that the Organization's data protection principles are mandatory for all IOM missions.
[17] See IOM, 2021.

the best interest of the child. Note further that under the United Nations Convention on the Rights of the Child (art. 37), detention of children is a measure of last resort.

The above outlined recommendation on the treatment of children under 18 years does not imply that no children have committed crimes for which they may be held responsible, pursuant to a lawful and fair process in line with juvenile justice principles. Nor does it mean that children always pose a low risk of future violence or should be released without support and care. Certainly, children face particular challenges after their release, including "systematic and prevalent ostracism, rejection and persecution" (Felbab-Brown, 2018). As the Radicalisation Awareness Network (2017) reports in the context of Boko Haram, the involvement of boys and girls in new conflict contexts and VEOs raises complex issues:

> *Exposure to extreme levels of violence creates trauma and potentially desensitises children to brutalisation and violence. … This will traumatise them and lead to psychosocial problems and possibly major security risks for the future. Understanding the extent of indoctrination, the exposure to violence and the living conditions experienced is crucial to assessing these children.*

At the time of writing, transitional rehabilitation programming tailored to the needs of children is limited. Risk assessment tools for children are also in early development, for example in Denmark (Aarhus). Moreover, these tools tend to be so tied to their specific context that they cannot be transposed easily to other environments.

2.2. TOOLS FOR ASSESSING RISK

Recognizing the limitations on assessing risk of extremist violence summarized in the preceding chapter, this section aims to inform the reader on current developments in the field. There are three main approaches to risk assessment in criminal systems.[18] At one extreme, unstructured clinical judgement allows a psychologist to assess risk without guidance. This approach is criticized because different assessors generate very different results. At the other extreme, actuarial approaches use statistics and quantitative data to reach judgements without subjective input. Actuarial approaches are not well suited to contexts like violent extremism where the sample size is small and there is little hard data on risk factors.

Structured professional judgement (SPJ) approaches fall somewhere between these extremes. SPJ offers assessors detailed guidance on what variables should be considered and how each variable is to be rated. However, assessors apply their own judgement to decide on the relative weight of the variables and determine the final, comprehensive risk rating. SPJ emerged as the favoured approach to assess risk among violent extremists because it produces more consistent outcomes than unstructured approaches, does not require a psychologist and does not rely on statistics.

In 2009, the Violent Extremism Risk Assessment tool (VERA) was designed as a first effort to tailor the SPJ approach to violent extremist offenders. In 2010, the tool was revised with input from field applications. Indicators – all rated on a scale of low, moderate or high – were combined with demographic characteristics, like age and sex, to provide the assessor guidance in making a final judgement. A subsequent revision in 2016 produced the VERA 2R,

[18] Assessment tools are surveyed in RTI International, 2017; see also van der Heide et al., 2019.

which sets out 34 variables and aims to better address gender, age and mental health factors. The tool is applied, for example, in Australia, Austria, Belgium, Canada, Indonesia and the Philippines. Other relevant SPJ tools include the following: (a) Extremism Risk Guidance or ERG 22+, a British tool that centres on identity rather than ideology; and (b) Multi-Level Guidance or MLG, which looks at group membership and dynamics. Additional SPJ tools have been developed for violent extremist contexts, including the RADAR to assess the risk of violent radicalization and the IAT8 to evaluate the effectiveness of interventions in reducing vulnerability.

2.3. ADMINISTRATIVE DETENTION

Former associates of VEOs are often held for prolonged periods of time by military or civilian authorities while their legal status and eligibility is established (see ICG, 2021). As former associates are not free to leave, this practice meets the definition of "administrative detention", meaning any arrest and detention by State authorities outside of the criminal law context (United Nations, 2014b).

Such detention represent a deprivation of liberty, which is permissible under international human rights law only under certain conditions and with the guarantees enshrined in Article 9 of the International Covenant on Civil and Political Rights (OHCHR, 1966):

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (United Nations, 1988) further provides the following: (a) all persons under detention shall be treated humanely and with respect for their inherent dignity; (b) detention shall be carried out in strict compliance with the law and only by competent officials or authorized persons; and (c) those detained on criminal charges shall be entitled to pretrial release except in special cases, unless a competent authority decides the person be detained in the interest of justice.

Note that similar issues on deprivation of liberty also arise in the context of transitional rehabilitation services. Where these are offered in custodial, non-prison facilities, often as an alternative to prosecution or traditional sentences, participants who agree to this alternative may not be free to leave the facility without authorization. As such, their ongoing participation and presence at the facility would cease to be voluntary, and safeguards are strictly necessary to ensure that this deprivation of liberty is lawful. These issues are also discussed in IOM's *Disengagement, Disassociation, Reintegration and Reconciliation: Transitional Rehabilitation*.

ANNEX

UNITED NATIONS SPONSORED COUNTER-TERRORISM TREATIES

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963) (Tokyo Convention)

2. Convention for the Suppression of Unlawful Seizure of Aircraft (1970) (Hague Convention)

3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)

4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)

5. International Convention against the Taking of Hostages (1979)

6. Convention on the Physical Protection of Nuclear Material (1980)

7. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988)

8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)

9. Protocol for the Suppression of Unlawful Acts against the Safety of fixed Platforms Located on the Continental Shelf (1988)

10. Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)

11. International Convention for the Suppression of Terrorist Bombings (1997)

12. International Convention for the Suppression of the Financing of Terrorism (1999)

13. Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf

14. Amendments to the Convention on the Physical Protection of Nuclear Material (2005)

15. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

16. International Convention for the Suppression of Acts of Nuclear Terrorism (2005)

17. Convention on the Suppression of Unlawful Acts Relating to the International Civil Aviation (2010)

18. Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (2010)

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