



International Development Law Organization
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**SUPPORTING THE PEACEFUL
IMPLEMENTATION OF THE NEW
CONSTITUTION IN SOMALIA**

AN IDLO PRELIMINARY REPORT

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WITH SUPPORT FROM THE ITALIAN MINISTRY OF FOREIGN AFFAIRS

SUPPORTING THE PEACEFUL IMPLEMENTATION OF THE NEW CONSTITUTION IN SOMALIA

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Executive Summary

The Justice Sector

- A strong and independent judiciary is vital to the establishment of an effective and accountable democratic government.
- The Provisional Constitution lays out the foundations for a functioning judicial authority, with the establishment of a Judicial Service Commission, a Constitutional Court, and other Federal and Federal Member State courts.
- The powers, functions, composition and appointment of bodies of the judicial authority need to be clarified to ensure that they administratively function as well as remain independent.
- The Provisional Constitution affords primacy to the Shari’ah as a source of law yet the constitution remains silent on the extent of its use or its interpretation. This should be addressed.
- The Provisional Constitution raises a number of concerns regarding rights provisions laid out and it also remains largely silent on a number of principles of international human rights law.
- The constitutional and legislative review process needs to be clarified, established in protocols or legislation, and institutions need to be developed.
- Legislation concerning the establishment of the judicial authority should be of primary importance and judicial institutions should be developed at the outset of Somalia’s first term of parliament.
- Priority laws concerning criminal law and human rights law should be enacted to expedite the ongoing peacebuilding process as well as guarantee individual human rights.

The Security Sector

- The security situation in Somalia remains weak with continued crime and violence throughout the country.
- Somalia’s security forces remain understaffed, poorly equipped, poorly trained, and underfunded. Allegations of law enforcement corruption and extortion are common.
- Attention should be paid to how Somalia will deliver security services within the structure of the proposed federal system – particularly regarding the legal jurisdiction of federal and state police.
- There is insufficient guidance in the constitution as to how the security services are to enforce the constitution and laws.

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Introduction

Background

Somalia has lacked an effective national government since 1991 when the government collapsed following the ousting of President Mohamed Siyad Barre. Over the past twenty years, various armed groups have vied for political dominance in South Central Somalia, the most recent of which is *Al Shabab*, an *Al-Qaeda* linked armed group which has opposed the Transitional Federal Government and its efforts to put in place a new Provisional Constitution for Somalia. But the situation in Somalia has been improving from both a political and security perspective. Relatively peaceful political transition has taken place alongside the adoption on August 1, 2012 of the Provisional Constitution of Somalia, the first official new national constitution in 52 years, currently awaiting popular referendum. Furthermore, Mogadishu is also now under the direct control of the Somali government, with assistance from African Union troops. Major cities in the south of Somalia including Kismayu have been recovered from *Al Shabab*.

However, real challenges face the new Somalia, which President Hassan Sheikh Mohamoud¹ calls “the third republic”. These challenges will need to be addressed before the government is able to provide the people of Somalia with functioning and effective services and protection. Two of the most challenging issues which must be addressed as implementation of the Constitution goes forward are reconciliation and political reconstruction, and institution-building. Though it is true to a lesser extent in Somaliland and Puntland, at this point there are no functioning government institutions that can deliver constitutionally-mandated services to the people of Somalia, of which services upholding the rule of law is a cornerstone. Thus, the road to lasting peace in Somalia requires the re-establishment of the rule of law in Somalia through effective government.

The adoption of the Provisional Constitution by the National Constitution Assembly on the August 1 has marked a notable milestone. The Constitution is a progressive document based in Islamic principles that contains key elements of the rule of law and lays out a vision of democratic governance. It also establishes Federalism with a parliamentary system of government. In order to safeguard the constitution and the vision it puts forth for Somalia, effective federal

¹ Hassan Sheikh Mohamoud was elected by the new parliamentarians on 10 September 2012. This was the first such national election that has taken place within Somalia.

institutions must be in place. Chief among them are an effective justice system and an accountable security apparatus.

The constitution attempts to respond to historic injustices and appreciates that where security and justice are not available to all equally, grievances may develop that can cause or inflame conflict. Justice and security are also necessary for Somalia's economic and social development, and vital for the protection of human rights. The current institutions and organizations that make up the security and justice sectors (such as the police, armed forces and judiciary) are often unable to provide people with adequate services. In the past two decades, donor investment in the area of justice has been minimal and this has contributed to a paucity of qualified justice professionals in the three zones of Somalia: Somaliland, Puntland and South Central Somalia; the latter receiving less investment than the other two areas which are enjoying relative peace.

The election of the new president and the recent security progress against *Al Shabab* insurgents has made both the Somali people and the International Community hopeful for a recovery in Somalia. In order to translate that goodwill and abundant optimism, the government should put in place policies that will augment the security gains and advance rule of law in Somalia. Tellingly, the President has made Justice and Security a top priority for his new government.

After two decades of civil war, those involved in the rebuilding efforts have a unique opportunity to "get it right." Specifically, now is the time for those invested in the future of Somalia to support the development of structures and systems that are in line with democratic principles of accountability and transparency, and to make sure these systems respond to citizen needs while also matching the economic realities and the long-term sustainability of Somalia.

The Report

The following report is an excerpted, draft preview of a comprehensive analytical report addressing the entirety of the new Provisional Constitution of Somalia, which is currently being prepared by the International Development Law Organization (IDLO). The two sections contained herein provide an overview of the Justice and Peace & Security sections of the Provisional Constitution, with comparative analysis and suggestions for next steps for consideration by the Government of Somalia and international community in the ongoing transition and implementation phase of Somalia's constitutional process.

IDLO has been assisting the Transitional Federal Government of Somalia since December of 2011 as they developed the new Provisional

Constitution, and among other efforts, IDLO's Somalia project supported the drafting of the Provisional Constitution's chapters on Peace & Security and the Judiciary. After the Draft Provisional Constitution was adopted by the National Constituent Assembly on August 1, 2012, the Somali authorities and the international community asked IDLO to draft this report, which provides an analysis and suggestions for Justice and Security development under the new constitutional order. The report is divided into two sections:

Chapter One: Justice under the Provisional Constitutional Framework

This first section addresses the Justice portion of the Provisional Constitution, and provides an overview of Somalia's previous justice sector framework, the new justice system as laid out in the Provisional Constitution of Somalia including an analysis of gaps and areas of concern, and a description of steps to be taken during the implementation phase, including the establishment of institutions, development and revision of legislative frameworks, and capacity building.

Section I of this chapter begins with a brief thumb-nail description of the three dispute-resolution mechanisms extant in Somalia, *xeer*, Shari'ah, and the statutory judiciary. Section II describes the judicial system as envisioned by the Provisional Constitution of 2012. Section III considers the implementation phase, focusing on the establishment of institutions to uphold the rule of law, the development and revision of legislative frameworks, and capacity-building. An Appendix is also attached to this report, setting forth the history of the Somali judicial system as reflected in three prior Somali constitutional texts, the 1960 Constitution, the 2004 Transitional Federal Charter, and an un-adopted 2010 Consultation Draft Constitution.

Chapter Two: Security under the constitutional framework

The second chapter addresses the Peace & Security Chapter of the Provisional Constitution. It begins in Section I by providing an assessment of Somalia's security threats, the current status of its armed forces and police forces, and fiscal and resource constraints faced by the current security forces. Section II analyzes the Provisional Constitution and its founding principles, discusses gaps in its text and potential implementation problems related to peace and security, and provides recommendations applicable to the security sector. Section III provides a strategic plan for the short-term to long-term development of Somalia's military and police institutions.

Methodology

This report began with an in-depth assessment by a Study Team of the Provisional Constitution of Somalia as adopted on August 1, 2012. Researchers also undertook a review of available and relevant open-source literature on both the Security and Justice sectors of Somalia, including resources and data currently available on staffing and organization. The Study Team further undertook a broad survey of available academic and field research, developed comparative points of reference to other countries, and conducted a number of consultations with experts and senior Somali officials working in this field in Somalia and overseas.

The Study Team's ability to conduct field research under the time constraints was extremely limited. Interviews and assessments were conducted over the phone, and some members of the Study Team traveled to Nairobi to meet with interlocutors for one week. The Country Representative also conducted several interviews in Mogadishu.

While the subjects considered by this report frequently intersect with other related issues such as anti-corruption and human rights, a decision was made during early consultations with Somali partners to concentrate on the Justice and Security sectors for the purposes of this excerpted preview of the comprehensive study of the entire Provisional Constitution currently being developed.

Chapter One: The justice sector

Introduction

Somalia is a history beset by conflict, with short periods of peace interrupted by ferocious periods of oppression, civil war, militia activity, and foreign interventions² until the State finally collapsed in 1992.³ Yet it would be inaccurate to assert that *all* Somali institutions failed. As will be shown briefly, with respect to the justice sector, some traditional Somali institutions survived, in particular the customary *xeer* system of law and a system of the Shari'ah, the Islamic law.⁴ Beyond custom and the Shari'ah, however, and with the support of the international community, a Somali statutory legal culture has survived. It is a tattered system and much work must be done by both international and domestic actors to restore it, but distinct Somali statutory legal traditions at least survive in the four Somali constitutional texts considered in this study. There is thus a foundation upon which, in time, legal institutions worthy of the name can be built.

However, the Provisional Constitution passed by the Constituent Assembly in Mogadishu on 1 August 2012 envisions more than a system of customary law and a legal culture. It creates a federal and state judiciary, headed by a Constitutional Court and Judicial Service Commission; it promises a wide array of fundamental rights to Somali citizens which are to be protected by the judiciary and it calls for a series of laws to be promulgated to implement its provisions. However, the current reality in Somalia is of an enormous need for institutions and human capacity in order to ensure that the Provisional Constitution does not become a mere piece of 'parchment' irrelevant to the lives of Somalis.

Given the scale of actions needed to begin the implementation of the Provisional Constitution, IDLO's partners expressed a need for some

² Othman O. Mahmood, *The Root Causes of the United Nations Failure in Somalia: The Role of Neighbouring Countries in the Somali Crisis* (2011) 3-14; Afyare Abdi Elmi, *Understanding the Somali Conflagration: Identity, Political Islam, and Peacebuilding* (2010) 16-18; Iona Lewis, *Understanding Somalia and Somaliland* (2008) 71-91; *State Collapse and Post-Conflict Development in Africa: The Case of Somalia (1960-2001)* (2006) 119-153.

³ Terrence Lyons & Ahmed I. Samatar, *Somalia: State Collapse, Multilateral Intervention, and Strategies for Political Reconstruction* (1995) 23-24.

⁴ *Xeer* is a customary and informal legal system, whereby tribal elders resolve disputes between members of clans and between clans. Elmi, *supra* note 1, 31-32.

guidance in how to move forward in the various areas required under the Constitution, and how to prioritize each area of implementation. The following pages provide a brief overview of the justice sector under the Constitution and offers recommendations for the Somali Government in constructing the judicial system.

This forms a first draft of one section of a more complete report on the Implementation of the Provisional Constitution which will be forthcoming later in 2012.

Section I outlines the three dispute-resolution mechanisms extant in Somalia: *xeer*, Shari'ah, and statutory judiciary. Section II describes the judicial system as envisioned by the Provisional Constitution of 2012 and Section III will consider the constitutional implementation phase, focusing on the establishment of the rule of law institutions, development and revision of the legislative framework, and capacity-building, all with respect to the judiciary. Section IV will consider the judicial system in the larger constitutional framework, and will be followed by a brief conclusion - Section V. Finally, an Appendix is attached to this report, setting forth the history of the Somali judicial system as contemplated in the three prior Somali constitutional texts, the 1960 Constitution, the 2004 Transitional Federal Charter, and an unadopted 2010 Consultation Draft Constitution.

Section I: Overview of legal systems in Somalia

Xeer system

Given the total collapse of the State, it is perhaps not surprising that traditional forms of dispute resolution flourish. It is disputed whether the *xeer* is a highly localized phenomenon or whether instead significant aspects of it are constant across clans throughout Somalia.⁵ *Xeer* covers issues ranging from clan relations to personal injuries - including the spectrum from death to minor injuries, penalties for which are in the nature of payment of livestock.⁶ It also covers issues relating broadly to property matters, family law, territory, and hospitality.⁷ This system should not be thought of as arbitrary, as precedent is respected.⁸ Moreover, it has been highly successful, for instance, in settling land

⁵ Andre Le Sage, *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives*, Report of the Centre for Humanitarian Dialogue 32 (2005).

⁶ Ibid.at 33.

⁷ Ibid.

⁸ Ibid.at 34.

disputes and returning property to persons displaced during Somalia's wars.⁹ Nonetheless, the system has flaws, including potentially unfair or discriminatory results where clans are unequal in standing, the rejection of clan laws by returning expatriates, amongst other issues.¹⁰ Perhaps most problematic is the treatment of women under *xeer*. Forced marriage is one of the issues facing women, including the possibility of forcing a rape victim to marry her attacker.¹¹ Women are also forbidden by *xeer* to inherit certain "capital assets."¹²

Shari'ah

Sharia'ah has historically been applied in Somalia by the civil courts of first instance, in particular regarding issues of family law and inheritance.¹³ With the collapse of the State, however, Shari'ah courts began to appear throughout the country, and began to focus on both criminal and civil cases, including the apprehension and detention of criminals.¹⁴ These courts also dealt extensively with commercial disputes.¹⁵ Most of the judges in the Sharia'ah courts lack formal training, and religious leaders within the clans have tended not to support them.¹⁶ Again, considerations of clan affiliation appear to influence the judgments of the Shari'ah courts, just as was the case with the *xeer* process. Results can often seem arbitrary and capricious.¹⁷

Statutory system

The legislatively mandated structure of the judiciary in Somalia is reminiscent of states in the region.¹⁸ At the apex of the formal judiciary is a Judicial Service Commission (JSC), which supervises the entire judiciary. A Constitutional Court is created by the Provisional Constitution, with both exclusive and concurrent jurisdictions; the latter shared with a Supreme Court that functions as a court of cassation. Beneath the Supreme Court, there is a Court of Appeal, and beneath that two courts of first instance – the District Court and the Regional Court. The District Courts are further

⁹ Lewis, *supra* note 2, at 95 and 100.

¹⁰ La Sage, *supra* note 5, at 36-38.

¹¹ *Ibid.* at 38.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.* at 39.

¹⁶ *Ibid.* at 40.

¹⁷ *Ibid.*

¹⁸ Much of the following summary is a digest of Tahlil Haji Ahmed, *Follow-up Assessment of TFG Judiciary in Mogadishu* secs. 1.6.1-1.6.4 (UNDP Somalia, Jan. 2011). Two enactments govern the details of the Somali formal judiciary: Law No. 3 of 12 June 1962 and Law No. 34 of 11 August 1974. *Id.* sec. 1.6.1 n. 2. <<http://www.so.undp.org/docs/Somali%20%20Judiciary%20Organization%20Law%20No%203%20of%2012%20June%201962.pdf>>, accessed 22 October 2012

divided into criminal (for minor offenses) and civil divisions, and the latter is further divided into family and ordinary sections. The Regional Courts are also divided into civil and criminal sections. The civil section is further subdivided into ordinary and administrative and labor sections, while the criminal section is subdivided between criminal and assize sections. As noted below, however, the Provisional Constitution has altered that structure, and further legislation will be necessary.

As stated above, it is quite understandable that the informal institutions of dispute resolution arose when the State collapsed and could no longer support the formal mechanisms of the judiciary. The goal now must be to restore functioning State institutions, and especially to restore the rule of law through formal mechanisms.

Prelude to Section II: The importance of judicial independence to the democratization process

In modern day democracies the separation of powers between the executive, legislative and judicial powers of government has been a central tenet of constitutionalism. The role of the judicial body is to hold executive powers to account, uphold the rights of the individual against the power of majority rule, and generally act as the guardian of the constitution.

In the democratization or post-conflict context in particular, judiciaries have served as key organs to hold executive powers to account to implement the constitutional ideals. Separation of powers is an essential counterweight to the general rule, holding that the ruler abides by the law only when the cost of disobeying the law outweighs the benefits. Therefore the rule of law becomes possible when no single actor or group of actors has sufficient power to dominate.

Ideas of separation of powers and the importance of an independent judiciary in modern states can be traced back to England in the seventeenth century. Before the Revolution Settlement of 1689, abuses of sovereign power were common. The Settlement, however, introduced parliamentary supremacy and abolished many royal powers. The question then became, if parliament was now 'supreme', what was to prevent it from acting as the King had done previously? The answer is that another institutional change accompanied the shift in power from the King to parliament, and this was the decoupling of the courts of justice from the

King's court. The newly independent common law courts greatly limited the ability of the government to renege on its agreement, and thus secured the commitments it had made to citizens' rights.¹⁹

In contemporary contexts, the courts have acted as the bastion of international human rights principles and have been major actors in holding the executive to account;²⁰ thus limiting the executive and legislative power and inducing them to abide by democratic rule. From early constitutional jurisprudence in the United States, judiciaries worldwide have been given the power to review legislation and executive acts for constitutional compliance, thus acting as the guardian of the constitution.

To ensure that the judiciary utilizes this power, and contributes to the democratization process, the judicial branch must be independent from all other sources of power. This includes: independence from the other branches of government or politicians; independence from political ideology or public pressure more broadly and; independence of the individual judge from superiors in the judicial hierarchy, so that a judge can decide each case on his or her own best view of what the law requires.²¹

The constitution is the cornerstone in guaranteeing judicial independence.²² However, in nascent democracies principles laid down in the constitution need to be enforced with close attention paid to the practices and protocols that occur beneath the constitutional mandates. Judicial tenure, selection of judges, and control over salaries are key areas which can increase independence or, conversely, increase the influence of the executive vis-à-vis the judiciary. How implementing legislation and institutions regulate these issues will determine whether a constitutional goal of judicial independence is realized or not.

¹⁹ North, D., and Weingast, B. 1989. Constitutions and commitment: the evolution of institutions governing public choice in seventeenth-century England. *Journal of Economic History*, 49: 803-32

²⁰ Tom Ginsburg, Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (1st edn, Cambridge University Press 2008)

²¹ United States Institute Peace, 'Judicial Appointments and Judicial Independence', January 2009 <<http://www.usip.org/files/Judicial-Appointments-EN.pdf>>, accessed 22 October 2012

²² Other actors are civil society. Refer to Chavez, R.B., 'The Rule of Law and Courts in Democratizing Regimes' in Keith E. Whittington, R. Daniel Keleman, Gregory A. Caldeira (eds), *The Oxford Handbook of Law and Politics* (OUP 2008)

Section II: The judicial system in the Provisional Constitution of 2012

Chapter 9 (articles 105-109) of the Provisional Constitution details the Judicial Authority to be established in Somalia.

Structure of the Judicial Authority

The Constitution sets out the national court structure in three levels: the Constitutional Court, the Federal Government Level Courts, and the Federal Member State Level Court. The highest court at the Federal Government Level shall be the Federal High Court, whilst the highest court at the Federal Member State level shall be the Federal Member State High Court.²³

In addition, the Constitution provides for a Judicial Service Commission which is responsible for the appointment, discipline, transfer, remuneration and other administrative matters of the Federal Government judiciary.

Firstly, we will discuss the Judicial Service Commission. We will then proceed to discuss the Constitutional Court. We will finally discuss the other courts established in the Provisional Constitution.

Judicial Service Commission

The key balance to strike in systems of judicial appointment is between judicial independence and judicial accountability. Although the judiciary must maintain a level of independence it must also remain responsible and answerable to the citizens whom it is charged to protect. Judicial Service Commissions are therefore seen as a favorable solution to balance a degree of independence while maintaining accountability to the judiciary, executive, legislature and society. In their initial design in France and Italy, judicial councils were planned to enhance independence after periods of undemocratic rule by removing judicial management from politics.

²³ Article 108

In this section concerning the Judicial Service Commission we shall provide an overview of the constitutional provisions concerning the Judicial Service Commission. We will then highlight inconsistencies in the drafting of the constitutional text. We will finally provide an analysis of the Judicial Service Commission envisioned in the Provisional Constitution in a comparative context, focusing on the areas of ensuring independence of the judicial appointment process, powers assigned to the Commission, establishment legislation, funding of the Commission, and consideration for gender equity.

Overview

The function of a Judicial Service Commission is to serve to strengthen the independence of the judiciary and the judges in carrying out their judicial functions. The independence of the judiciary is not a privilege of judges but a right of citizens in a democracy based on the rule of law. Therefore, it is important that a Judicial Service Commission body enjoys a strong degree of independence or autonomy from other governmental powers. Where the Judicial Service Commission is not structured in such a way that promotes and protects the independence of the judiciary there is always a danger that it may undermine that independence.²⁴

The Provisional Constitution Article 109A establishes the Judicial Service Commission. Membership consists of nine members: the Chief Judge of the Constitutional Court, the Chief Judge of the High Court (presumably of the Federal Government Level), the attorney general, two members of the Somali bar, the chair of the Human Rights Commission, and three people of “high reputation within Somali society” proposed by the Council of Ministers and appointed by the President.²⁵

The term of office for members of the Judicial Service Commission is four years renewable once.²⁶ The Judicial Service Commission has a responsibility to appoint, discipline and transfer any member of the judiciary at the Federal Government Level; to decide on remuneration and pensions of members of the judiciary at the Federal Government Level; and to decide on other work matters concerning the judiciary system.²⁷

²⁴ Excerpt from the conclusions of the report on the role and function of the High Council of Justice: <http://www.iaj-uim.org/site/modules/mastop_publish/?tac=43>, accessed 22 October 2012

²⁵ Article 109A(2)

²⁶ Article 109A(4)

²⁷ Article 109A(6)

Inconsistencies in the Provisional Constitution concerning the Judicial Service Commission

There are conflicting provisions on appointment processes in different sections of the Constitution. In the section outlining parliamentary powers, Article 71(1)(i) states that the House of the People shall participate in appointing the members of the Judicial Service Council [*sic.*]²⁸ However, Article 109A, which describes the appointment process to the Judicial Service Commission is silent on the role of the House of the People.

Further, there are conflicting articles regarding the powers of the Judicial Service Commission. Article 109A gives the Commission the power to *decide* on work matters of the judiciary including remunerations, appointment, discipline and transfer. Whereas in the section covering independent commissions in general, the JSC is to *'advise the Federal Government* on the administration of justice including recruitment, dismissal and legal action taken against judges.'

The Parliament will need to pass a law establishing the Judicial Service Commission and it will be important for such legislation to clarify the appointment process and powers of the Commission.

Judicial Independence in the Provisional Constitution

As noted, judicial appointments should have relative independence from the other powers of government, most notably the executive. A third of the Judicial Service Commission in this case is made up of executive appointments. The composition of the JSC perhaps could have been designed differently in order to further protect the independence of the judiciary. It is not unusual for such commissions to feature members of the Bar, the Attorney General, members of other relevant independent commissions and representatives of the public in addition to members of the bench. However, limitation of the number of actual judges to only two out of nine is not in line with internationally accepted standards²⁹. Regionally, the most recent example would be the Kenya Constitution of

²⁸ From previous drafts of the Constitution it appears that Judicial Service Council and Judicial Service Commission fulfill the same function. Therefore although the Constitution does not mention the Judicial Service Council it is presumed that for the purpose of the Constitution these are one and the same.

²⁹ See *supra*. 24 for example the Recommendation 12(2010), Ch. 4 Section 27 of the Consultative Council of European Judges of the Council of Europe which recommends that not less than half the members of a judicial council should be judges or magistrates elected by their peers.

2010 which provides for five out of eleven members to be judges or magistrates.

In addition, the Provisional Constitution makes no mention of the appointment process of the Attorney General nor the Chair of the Human Rights Commission, both of these – particularly the former – could also be influenced by the executive. In a comparative perspective, the Attorney General is often appointed by the executive. In the UK it is the Prime Minister that appoints. In Kenya the Attorney General is nominated by the President and, with the approval of the National Assembly, appointed by the President.³⁰

Implementing legislation to ensure principles of independence are upheld

Implementing legislation to create the Judicial Service Commission can be achieved through a specific law (as for example in Uganda³¹) or in a more comprehensive law covering not only the appointment and procedures of the Judicial Service Commission, but also other areas of organization of the judiciary which are left to Parliament by the Provisional Constitution. For example, the 2011 Kenya Judicial Service Act serves not only to create the Judicial Service Commission, but also to define functions of Supreme Court justices, registrars and other staff as well as detailed appointment and disciplinary procedures.

Firstly, it should address the details of the appointment process of judges. Appointments must be undertaken through a competitive and transparent procedure. In the Kenyan example, the Judicial Service Commission established a selection panel to shortlist candidate applications.³² Implementing policies and procedures for performance review and potential dismissal are also highly important to ensure the high standard of judicial services and prevent bad practices such as impunity or corruption. In Kenya, a specially formed tribunal carried out dismissal of judges.³³

Powers of the Judicial Service Commission

³⁰ Article 156(2) Constitution of Kenya 2010

³¹ Judicial Service Act, 1997. Uganda Gazette No.29

³² Section 30 Judicial Service Act 2011, Kenya

³³ Section 31 Judicial Service Act 2011, Kenya

Powers of Judicial Service Commission vary from country to country and can include managing budgets, powers of appointment, regulation, discipline and dismissal.

The Provisional Constitution gives the Judicial Service Commission powers over appointment, discipline and transfer of judges, remuneration and pension and 'other work matters' of the judiciary. Implementing legislation will be required to elucidate procedures for appointment etc, as well as to clarify what is included in 'other work matters'. In Kenya and Uganda for example, the Judicial Service Commissions are charged with the continuing education of judges.³⁴

Funding the judiciary

Another area to be addressed is control of funding for the judiciary. To ensure the independence of the judiciary, many countries have adopted strategies to ensure that the judiciary is funded through mechanisms that deviate executive control. The Constitution of Kenya establishes a Judiciary Fund, which is administered through the Chief Registrar of the Judiciary for the purpose of administrative charges of the judiciary and any other purposes as may be necessary for the discharge of the functions of the judiciary.

The rate of pay is also an important factor in ensuring judicial accountability. Judges need to be paid highly enough as to not be tempted into corrupt practices. As Popkin notes, in many nascent democracies, members of the private sector with a monopoly on the means of production are a major threat. In the case of El Salvador, for instance, the judiciary has been more focused on preserving the privileges of the economic elite than on protecting the rights of all citizens.³⁵

Somalia has a wealth of natural resources with a number of groups with vested interests, it is imperative that the judiciary retains its independence from external control and fulfills its mandate as the guardian of the Constitution.

Gender empowerment in the Judicial Authority

³⁴ Article 172(1)(c) constitution of Kenya 2010; Article 147(1)(c) Constitution of Uganda 1995

³⁵ Popkin, M., 'Peace without justice: Obstacles to Building the rule of law in El Salvador' (2000) University Park: Pennsylvania State University Press

Article 3(5) of the Somali Constitution lists the founding principle that women must be included in all national institutions, in an effective way, in particular all elected and appointed positions across the three branches of government and in all national independent commissions. Although the quota of 30% women, used in previous iterations,³⁶ is no longer specified, constitutional provisions uphold women's participation in public life.³⁷ Women's representation in political processes in Somalia is limited, and there is equally little representation in the judiciary. However, it should be an imperative of legislators to encourage participation of women, either through policies of affirmative action,³⁸ or through greater education and outreach programs to raise awareness of opportunities.

The Constitutional Court

The Provisional Constitution establishes a Constitutional Court with the power to invalidate any "law or administrative action that is contrary to the Constitution."³⁹

In recent events of political transition, constitutional courts have played a vital role in holding governments accountable to their actions. The extent of their impact, however, depends largely on how the courts are set up, the competence of those appointed, and how judicial independence is secured.

Constitutional Courts largely feature in civil law legal systems whereby an independent court, outside the regular court hierarchy, is charged with the exclusive role of safeguarding the Constitution, normally in addition to resolving disputes between levels of government, and government organs.

This section firstly outlines the structure of the Constitutional Court envisioned in the Provisional Constitution. It then proceeds to list the powers of the Constitutional Court and seeks to analyze these powers in a comparative context, while highlighting challenges and opportunities for consideration by future decision makers. This section concludes by attempting to provide options for the future with regard to the role of

³⁶ Garowe I and II

³⁷ Note however, political opposition to women's involvement: <
http://www.mogadishutimes.com/index.php?option=com_content&view=article&id=475:marginalising-women-in-somali-politics-by-dr-cawa-abdi&catid=3:qoraalada>

<
<http://unpos.unmissions.org/LinkClick.aspx?fileticket=a5YrnFpbBCA%3D&tabid=9744&mid=12667&language=en-US>>, accessed 22 October 2012

³⁸ International IDEA and the Inter-parliamentary Union have each conducted extensive research studies on women's political participation in Africa and across the world.

³⁹ Article 4(2).

Shari'ah in the Constitution and lists comparative analysis of how the Constitutional Court could play a key role in its interpretation.

Structure and Appointment of the Constitutional Court

The Constitutional Court consists of five judges, including a chief and deputy chief judges.⁴⁰ Members of the Constitutional Court themselves choose the chief and deputy chief justice.⁴¹

The appointment procedure is of crucial importance to the independence of constitutional court judges. The appointment of the Somali Constitutional Court judges is laid out in Article 109B of the Constitution. The Judicial Service Commission should propose to the House of the People the person they want to choose as Constitutional judge. If the House of the People of the Federal Parliament approves the name proposed, the President of the Federal Republic shall appoint that person as judge of the Constitutional Court.

Thus, the legislation to enable the formation of the Judicial Service Commission must be passed prior to the formation of the Constitutional Court, and should include the procedures for implementing Article 109(b).

Powers of the Constitutional Court

The powers of the Constitutional are detailed in Article 109C(1):

- (a) Upon request from a member of the Council of Ministers, a committee from either one of the Houses, or ten members of either house of the Federal Parliament, the Court to review draft legislation, and determine its compatibility with the Constitution;
- (b) To hear and decide cases as stipulated in Article 86 (concerning challenges to the constitutionality of a law passed by the Federal Parliament;
- (c) To hear and decide a case and rule of cases resulting from matters stated in Article 109(3), concerning matters of interpretation of the Constitution not arising out of Court litigation;
- (d) To hear and decide cases arising out of disputes between Federal Government and the Federal Member State governments, and between Federal Members State governments;

⁴⁰ Article 109B(1).

⁴¹ Article 109B(5).

- (e) To hear and decide cases arising out of disputes between organs of the Federal Government, concerning their respective constitutional powers and duties;
- (f) To hear and decide cases arising in terms of Article 92 concerning the impeachment trials of the President.

This reflects quite broad powers of judicial review for the Somali Constitutional Court. The power to review draft legislation referred to in 109C(1)(a) is most closely associated with the French model of constitutional review⁴² which allows for the Constitutional Court to decide on the constitutionality of draft bills *before* they become law. The important aspect to note in this regard is that access to the Constitutional Court at this stage is limited to political actors.

The Provisional Constitution's delineation of access differs from that of the French Constitutional Court in allowing a far lower bar to question the constitutionality of a decision. Whereas in France a minority of sixty members of the House is required, a threshold of only ten members would allow parties with relatively small minorities in Parliament to challenge draft legislation before they become law. This strengthens protections for the rights of minorities, though the trade-off may be delays to legislation due to political maneuvering.

Article 109C(1)(b) and Article 86 allow for challenges to the constitutionality of legislation by specified groups in the absence of a particular 'case or controversy' where the constitutional issue is brought into play. In theory, this would be an important avenue through which the constitutionality of existing legislation, which according to Article 139 are still in force, could be challenged. However, Article 86(2) seems to limit its application to legislation passed under this Constitution, which leaves the question of how to change prior legislation open.

Article 109C(1)(c) allows for 'classical' judicial review powers, where a case whose outcome depends upon a question of constitutional interpretation is decided by the Constitutional Court. Again, access is a key question here and the Provisional Constitution follows the Italian model in allowing judges to act as 'gatekeepers' to the Constitutional Court (see Art. 109(2)).

Lastly, as is standard practice, the Constitutional Court is to act as the arbiter of dispute between of government and organs of government.⁴³

⁴² John Farejohn and Pasquale Pasquino, 'Constitutional Adjudication, Italian Style' in Tom Ginsburg (ed) *Comparative Constitutional Design* (Cambridge University Press, 2012)

⁴³ Article 109C(1)(e)

Regarding the different levels of government, federal and state, the provisional Constitution does not elaborate on the legislative powers of Federal Member States except that it shall be negotiated and agreed upon by the Federal Government and the Federal Member States.⁴⁴ Depending on the outcome of negotiations, the Constitutional Court could end up playing a vital role in upholding the principles of devolved powers in Somalia, indeed, depending on the timing of its formation relative to the agreement on federal versus state powers, it may be called into action to decide on the constitutionality of that very agreement, vis-à-vis the principles enunciated in Article 50.

Article 109C(1)(e) mandates the Constitutional Court to adjudicate on disputes between organs of the Federal Government, concerning their respective constitutional powers. This function given to the Constitutional Court may prove highly useful in settling matters between executive and legislative functions – in particular defining, in practical scenarios, what the separation of powers are within the Federal Government. Historically, however, constitutional courts have towed a fine line between upholding the rule of law, while refraining from exerting, or appearing to exert, any political influence. In doing so could damage the court's reputation and public respect in the institution. The United States Supreme Court provides an example of such judicial restraint. In fear of exerting political influence, the court has limited its adjudication to settling disputes between private parties in which the question is raised of whether the executive or legislative power has stayed within its constitutionally defined boundaries. It refrains, however, from accepting petitions from political actors for a direct review of measures, which those actors alleged to be in violations of their specific constitutional status or powers.⁴⁵ In this regard, therefore, Article 109C gives the Constitutional Court a wide-ranging power and so should exercise its defined powers within government with extreme caution.

The Constitutional Court's interpretation of Shari'ah

One power that the Constitution is silent on is the express power to interpret the Shari'ah. This is potentially significant, given that the Shari'ah trumps the Provisional Constitution as a source of law. While it is clear that no constitutional provision may be interpreted in contravention of the Shari'ah, it remains entirely possible, in the absence of language to

⁴⁴ Article 54

⁴⁵ Rainer Grote, 'Models of Institutional Control: The Experience of Islamic Countries' in Rainer Grote, Tilman J. Rod er (eds) *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (OUP 2011) 234

the contrary, that the interpretation of the Shari'ah itself could be left to an exogenous religious body. This lacuna must be filled.

Another option is for the Constitutional Court to play a role in the interpretation of Shari'ah law. The Constitutional Court is not prescribed any power to adjudicate on Shari'ah law. However, judges to be appointed to the Constitutional Court should hold appropriate qualifications in law and Shari'ah.⁴⁶ No reference is made to the role of Shari'ah except to the effect of Article 2(3) prescribing that no law, which is not compliant with the general principles of Shari'ah, can be enacted and that "after the Shari'ah", the Constitution of the Federal Public of Somalia is supreme law of the country.⁴⁷

The traditional separation of powers in Muslim countries has been largely different to that of western countries. The balance, rather than between the three organs of government – executive, legislature and judiciary – has been between government and the academic community. Their separate realms of authority, in traditional Islamic society, have largely acted as a check and balance against one another. Traditional *fiqh* (Islamic jurisprudence) scholars were seen as another arm of equal power to the rulers and their interpretation of the Shari'ah was final. Rulers did not have the authority to create or change the content of *fiqh* scholars' articulation of God's law. Although *fiqh* scholars interpreted God's law they did not have, or did not want to, forcibly impose *fiqh* doctrine on the population. Historically therefore, Muslim rulers made *siyāsah* law, which was seen as largely different to *fiqh* law. It emerged not from scholarly interpretation of scripture, but ruler determination of what was necessary for social order. *Siyāsah* most closely resembles secular legislation in Muslim countries today. To interpret secular law in such a light therefore might give legitimacy to secular law, against the Shari'ah, and enables individuals to place secular legislation in cultural and historical context.⁴⁸

As such, many constitutions of Muslim-majority countries today give one branch of government the authority to perform a Shari'ah check on the laws of the land. This however is largely a different conception of the traditional separation of powers. In some states, supreme courts are given authority to adjudicate on matters of Shari'ah. However, in contrast to historical separation of powers, between state and academia, the judiciary remains an element of the state. They are therefore not entitled to the level of academic freedom that scholars achieved in the past and can

⁴⁶ Article 109B

⁴⁷ Article 4(1)

⁴⁸ A. Quraishi., 'The Separation of Powers in the Tradition of Muslim Governments' in Rainer Grote, Tilman J. RodérIbid (eds) *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (OUP 2011)

therefore essentially not perform an independent check on government because it is in fact part of the *siyāṣah* government structure.

However, in contemporary constitutionalism, the case of Egypt gives greater understanding on the role of the judiciary in the interpretation of the Shari'ah. In the 1971 Constitution, Article 2 placed Shari'ah as a principal source of legislation and in 1980 this provision was further developed to provide that Shari'ah was not only a principal source but *the* principal source of legislation. This provision has been maintained unchanged in the interim constitution promulgated by the Supreme Council of the Armed Forces on March 30, 2011. In the constitution, the judiciary was not specifically identified to be the sole interpreter of the Shari'ah, however it played a leading role in interpreting the meaning of Shari'ah in ordinary legislation. Although the Supreme Constitutional Court interpreted the provision of Shari'ah in a liberal manner, in light of the basic guarantees of human rights and freedoms, other lower courts have taken a more conservative approach, adhering to a classical interpretation of the Shari'ah. The Supreme Constitutional Court has however taken a proactive approach in exercising its judicial review powers on constitutional issues and has developed thought on the interpretation of Shari'ah and has developed a liberal jurisprudence allowing for, amongst others, religious freedom within Egypt.⁴⁹

The lacuna in the Somali constitution represents a large concern if the Shari'ah is to be interpreted as above the constitution, as prescribed by Article 4(1), without any prescribed body to interpret the Shari'ah. Without any external body to interpret the Shari'ah detailed in the Provisional Constitution, the Constitutional Court could play a large proactive role in the interpretation of the Shari'ah and its interaction with the Constitution. Historically, Shari'ah has always played a role only as far as the courts of first instance within the formal justice system in Somalia, and been applied in civil cases, including family matters, marriage, divorce and inheritance.⁵⁰ The new relevance of the Constitutional Court, and experience in other parts of the Islamic world, however, offer different approaches to the interpretation of Shari'ah. These are all considerations to be made in the implementation phase of the Constitution.

Other Courts

⁴⁹ A.O. Sherif, 'The Relationship between the Constitution and the Shari'ah in Egypt' in Rainer Grote, Tilman J. Rod rIbid (eds) *Constitutionalism in Islamic Countries : Between Upheaval and Continuity* (OUP 2011) 127. Interestingly, the latest draft of the new Egyptian Constitution reinstates the independence of Al-Azhar University and affirms its role in the interpretation of Shari'ah

⁵⁰ H. Elleiesie, 'Strathead and Constitution-Building in Somalia: Islamic Responses to a Failed State' in Rainer Grote, Tilman J. Rod rIbid (eds) *Constitutionalism in Islamic Countries : Between Upheaval and Continuity* (OUP 2011) 572

Structure

In addition to the Constitutional Court, the Provisional Constitution establishes a national court structure with Federal Government Level and Federal Member State Level court systems. Each of these systems must have a High Court presiding over inferior courts.⁵¹ Cases involving the federal government must be referred to a Federal Government Level court, regardless of where the case is initiated.⁵² The Constitution requires the Federal Parliament to enact a law providing details or how the interaction between the Federal Government Level courts and federal member state level courts are to interact.⁵³

Mandate

When interpreting provisions of the bill of rights in the Provisional Constitution, courts are instructed to “take an approach that seeks to achieve the purpose of the rights and the values that underline them.”⁵⁴ A court interpreting these rights “may consider the Shari’ah, international law, and decisions of courts in other countries,” though foreign decisions are not binding.⁵⁵ The Provisional Constitution states that the rights set out in the bill of rights does not “deny the existence of any other rights” that are recognized or conferred by the Shari’ah, or by customary law or legislation to the extent that they are consistent with the Shari’ah and the Constitution.⁵⁶ With regards to previous discussion of the Constitutional Court’s interpretation of the Sharia, it will be necessary to consider whether its decisions on Shari’ah would therefore serve as precedent for both the lower courts and the High Court. The Egyptian case could serve as a useful example.

Jurisdiction

Article 108 details the national court structure. The Constitutional Court’s formation and powers are defined in Articles 109B and 109C. However, there are no provisions as to the Federal Government Level Courts, as established by Article 108(1)(b), the Federal High Court (Article 108(1)(c), or the Federal Member State High Court (Article 108(1)(c)). There are no details on the means of establishment, composition, or the powers specific to these courts. There are also no details as to their interaction or the precise jurisdiction that the courts’ have. The courts of Uganda, as

⁵¹ Article 108

⁵² Article 109(2)

⁵³ Article 109(4)

⁵⁴ Article 40(1)

⁵⁵ Article 40(2)

⁵⁶ Article 40(4)

outlined by the 1995 Constitution consist of a Supreme Court, Court of Appeal, High Court and subordinate courts to be established by Parliament. Chapter 8 of the Uganda Constitution proceeds to outline the establishment, composition and jurisdiction of these courts.

In the present state, the various judicial bodies under the Somali Provisional Constitution will come into conflict over matters of jurisdiction between the courts as well as the interaction between the Federal Government Level Courts and the Federal Member State Courts. However, Article 109(3) states that these provisions shall be decided by law – a high priority for legislators in the new Parliament.

Rights Provisions Implicating The Judiciary

The Provisional Constitution contains a problematic provision that has the potential to be used to curtail civil rights in the future. In what may be too broad an exemption, it provides that the rights set forth in the bill of rights “may be limited by law, provided that the law is not targeted at particular individuals or groups.”⁵⁷ It also requires that the limitation on the exercise of a right must be “demonstratively reasonable and justified according to the values underlined in this Constitution.”⁵⁸ In deciding whether a limitation is reasonable and justifiable, courts must consider take all relevant factors must into account, including the importance of the right limited, the importance of the purposes to be achieved by the limitation, whether the limitation is suitable for achieving the purpose, and whether the same purpose could be achieved while being less restrictive of the right limited.”⁵⁹

This test replicates the internationally used principle of proportionality. In the European Court of Human Rights, the principle of proportionality requires that there be a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective. The European Court of Human Rights in *Handyside*⁶⁰ outlined a four questions test where a restriction of human rights is at stake: i) is there a pressing social need for some restriction of the Convention; ii) If so, does the particular restriction correspond to this need?; iii) If so, is it a proportionate response to that need?; iv) In any case, are the reasons

⁵⁷ Article 38(1)

⁵⁸ Article 38(2)

⁵⁹ Article 38(3)-(4)

⁶⁰ *Handyside v the United Kingdom* (1976) (Application no. 5493/72)

presented by the authorities, relevant and sufficient? The proportionality test has also been adopted in the common law context of the United Kingdom, whereby the judiciary may review an administrative act of government, which restricts an individual human right. The test is summarized that 'the intensity of review, in similar cases, is guaranteed by the twin requirements that the limitation the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.'⁶¹

Judges, and in particular the Constitutional Court justices, will need to develop their own jurisprudence in this area, but any international training programs developed would do well to bear this point in mind.

Equality

All citizens have equal rights and duties before the law, irrespective of "sex, religion, social or economic status, political opinion, clan, disability, occupation, birth or dialect."⁶² Government is specifically prohibited from discriminating on the basis of age, race, color, tribe, ethnicity, culture, dialect, gender, birth, disability, religion, political opinion, occupation, or wealth.⁶³ Discrimination is deemed to have occurred if the effect of the action impairs or restricts a person's rights, even if the actor did not intend the effect.⁶⁴ Government programs, however, designed to achieve full equality for individuals or groups who are disadvantaged, or who have suffered from discrimination in the past, "shall not be deemed to be discriminatory."⁶⁵

Due process

The Provisional Constitution guarantees the right to personal security, prohibiting illegal detention, or forms of violence, including violence against women, torture, or inhumane treatment.⁶⁶ The inviolability of homes is assured, and entry, search, or surveillance is prohibited "without a reasoned order from a judge."⁶⁷ The Provisional Constitution allows children to be detained "only as a last resort, for a limited time, in appropriate conditions," but they must be detained separately from adults

⁶¹ Lord Steyn in *R v. Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26

⁶² Article 11(1)

⁶³ Article 11(3)

⁶⁴ Article 11(2)

⁶⁵ Article 11(4)

⁶⁶ Article 15(2)

⁶⁷ Article 19 (1)

other than the child's immediate family.⁶⁸ The child's immediate family must be informed of the child's detention as soon as practicable.⁶⁹ Every child has the right to legal aid paid for by the state if the child might otherwise suffer injustice.⁷⁰ A child is defined as anyone under the age of 18.⁷¹

The Provisional Constitution contains a list of the rights of the accused. An accused is presumed innocent until proven guilty in a final manner by a court of law.⁷² The accused has the right to be informed "promptly" of the reason for his arrest "in a language which the person understands."⁷³ The detained has a right for his family and relatives to be informed of his situation.⁷⁴ There is a prohibition against compulsion to self-incrimination, as well as a prohibition against a verdict based on evidence acquired by coercion.⁷⁵ The arrestee must be brought before a capable court within 48 hours of the arrest.⁷⁶ Criminal liability is personal, and no person may be convicted of a criminal offense for an act committed by another.⁷⁷ Illegal detention centers are prohibited and visits must be granted to the accused of his family, doctor, or lawyer.⁷⁸ Extradition is only permitted in a case in which Somalia is obligated to extradite pursuant to an international treaty.⁷⁹

The Somali Provisional Constitution gives the right to every arrestee or detainee to choose and to consult with, a "legal practitioner" and if he cannot afford one, the government must appoint a "legal practitioner" for him.⁸⁰ The right to a fair trial is guaranteed, as is the right to be present at trial, and to challenge the evidence presented.⁸¹ There is a right to an interpreter in the proceedings if the accused does not understand the language used in court.⁸² One cautionary note must be sounded. To the extent the Somali system is based on the European inquisitorial system, provision must be made for the right of the accused to be present, to be represented by counsel, and to an interpreter at all significant phases of the proceedings (including the investigation), not just at the trial.

⁶⁸ Article 29(4)

⁶⁹ Article 29(4)

⁷⁰ Article 29(5)

⁷¹ Article 29(8)

⁷² Article 35(1)

⁷³ Article 35(2)

⁷⁴ Article 35(3)

⁷⁵ Article 35(4)

⁷⁶ Article 35(5)

⁷⁷ Article 35(12)

⁷⁸ Article 35(11)

⁷⁹ Article 36(1)

⁸⁰ Article 35(6)

⁸¹ Article 35(7-9)

⁸² Article 35(10)

It is worth noting that the Provisional Constitution, compared to Constitutions around the world, is extensive in its protection for due process and other fundamental rights. An IDLO empirical analysis of rights protected from an index of the 45 most common fundamental rights put Somalia in the top 5 countries in the Organization of Islamic Conference. While this can only be viewed positively, it also indicates that much will need to be done to ensure the Somali State is capable of living up to its constitutional obligations in this regard.

Quasi-judicial independent commissions

The Provisional Constitution creates a number of independent commissions. These bodies are independent of government or political control, and able to make use of relevant expertise to the tasks they are assigned.⁸³ They are charged with a duty of embodying and reflecting “the spirit of human rights, democracy, and transparency.” The independent commissions that are relevant to the judicial system, are the Judicial Service Commission,⁸⁴ the Human Rights Commission,⁸⁵ the Anti-Corruption Commission,⁸⁶ the Truth and Reconciliation Commission,⁸⁷ the Office of the Ombudsman⁸⁸, and the Interstate Commission.⁸⁹ The Judicial Service Commission was covered extensively in the previous section.

Human Rights Commission

The Provisional Constitution mandates Parliament to establish this Commission.⁹⁰ The duties of the Commission include investigating alleged violations of human rights, and to take “steps to secure appropriate redress where human rights have been violated.”⁹¹ It is also charged with promoting knowledge of human rights, the Shari’ah, setting implementations standards and parameters for the fulfillment of human rights obligations, monitoring human rights within the country.⁹²

⁸³ Article 110(1)

⁸⁴ Article 111A

⁸⁵ Article 111B

⁸⁶ Article 111C

⁸⁷ Article 111I

⁸⁸ Article 111J

⁸⁹ Article 111F

⁹⁰ Article 41(1)

⁹¹ Article. 111B(2)(a) and (b).

⁹² Article 41(2)

Anti-corruption Commission

Another quasi-judicial body is the Anti-corruption Commission, which has the obligation to prevent, investigate, and publish corruption allegations.⁹³ It should be noted that the publication of corruption allegations is problematic, where it may an investigation results in either insufficient evidence or in evidence of actual innocence of the accused. In any event, this Commission has the power to freeze, seize, confiscate, or return any gains from criminal activity.⁹⁴ This power is also problematic in the absence of judicial determination.

Forgiveness and Reconciliation Commission

The Provisional Constitution establishes a Forgiveness and Reconciliation Commission (FRC), whose duties include fostering national healing, reconciliation, and unity, and ensuring that matters relating to “impunity, revenge and other triggers of violence are addressed through a legal and state directed process.”⁹⁵ The mandate of the FRC includes “bearing witness to record[ing] and in some cases grant[ing] amnesty to perpetrators of crimes relating to human rights violations, as well as reparations and rehabilitations.”⁹⁶ The FRC is also to promote forgiveness reconciliation and national unity.⁹⁷ The FRC will need to have its mandate elucidated by legislation.

Office of the Ombudsman

The Provisional Constitution creates an Office of the Ombudsman, whose specific responsibilities must also be further defined by statute.⁹⁸ The Ombudsman is to investigate complaints regarding allegations of violations against basic rights and freedoms, abuse of power, unfair behavior, mercilessness, lack of clemency, or indiscipline/disrespect towards a person who lives in Somalia by an officer who works at the various levels of government.⁹⁹ It also encompasses investigating and official’s acts that are characterized as unfair behaviour, or corrupt, or behavior by an officer deemed as illegal by a democratic society, or regarded as mischief or injustice.”¹⁰⁰ The Ombudsman may forward a matter to the attorney general, bring the matter before the court, or

⁹³ Article 111C(4)(a)

⁹⁴ Article 111C(4)

⁹⁵ Article 111I(1)

⁹⁶ Article 111I(3)(a)

⁹⁷ Article 111I(3)(b)

⁹⁸ Article 111J(1)(2)

⁹⁹ Article 111J(5)(a)

¹⁰⁰ Article 111J(5)(a)

forward to the attorney general a matter involving corruption.¹⁰¹ There is obvious overlap between this function and the Anticorruption Commission.

The Ombudsman has the authority to accept complaints lodged by the public against abuses committed by the members of the security forces as well as the government administration.¹⁰² The Ombudsman also has the authority to initiate an investigation if he suspects the existence of a violation committed by the security forces, and, if sufficient evidence of a violation is found, the matter can be referred to the “relevant court of law.”¹⁰³ In the event that human rights abuses are alleged to have been committed by members of the armed forces against civilians, the case must be brought in a civilian court.¹⁰⁴ Again, legislation is required to determine the precise powers and duties of the Ombudsman.¹⁰⁵

Interstate Commission

The last quasi-judicial independent commission is the Interstate Commission. The duties of the Interstate Commission include the resolution of administrative, political, or jurisdictional disputes between the Federal Government, or between one or more governments of the Federal Member States.¹⁰⁶ Obviously, the Interstate Commission does not have jurisdiction over legal disputes involving these various organs of government. That jurisdiction lies exclusively in the Constitutional Court.

It should be noted in passing that the existence of independent commissions with quasi-judicial functions in the 2012 Provisional Constitution was no innovation. Though absent from the 1960 Constitution, both the 2004 Charter and the 2010 Consultation Draft contained such commissions. The Charter created two such commissions, a Federal Constitutional Commission and the National Commission for Reconciliation.¹⁰⁷ The Consultation Draft established a Human Rights Commission,¹⁰⁸ whose functions included promoting knowledge of human rights generally “and specifically of Shari’ah,” setting standards for the fulfillment of human rights obligations, monitoring human rights, and investigating allegations of abuses.¹⁰⁹

¹⁰¹ Article 111J(5)(c)(iii-v)

¹⁰² Article 129(1)

¹⁰³ Article 129(2)

¹⁰⁴ Article 128

¹⁰⁵ Article 129(3)

¹⁰⁶ Article 111F(2)(b)

¹⁰⁷ Somalia Transitional Federal Charter (2004) Article 68(3)(a)(b)

¹⁰⁸ Somalia Consultation Draft Const. (2010) Article 45(3)

¹⁰⁹ Somalia Consultation Draft Const. (2010) Article 46(2)

Lacunae in the Provisional Constitution

Several problem areas of the Provisional Constitution have been identified in the above section. It will perhaps suffice to restate them here only briefly. They are:

- There is confusion over the mechanism for appointing judges of the Constitutional Court, with the interplay between Articles 71(1), 109B(4), and 90(10) unclear, specifically the role of the Upper House is quite ambiguous
- Articles 109A and 111A are in conflict over the composition of the Judicial Service Commission and will need to be reconciled
- The Provisional Constitution does not indicate whether the Constitutional Court has authority to interpret the Shari'ah, or, if it does not, what body has such authority
- Article 38 creates the potential for virtually unfettered derogation of the rights ostensibly protected in the Provisional Constitution
- Article 86 provides for the process of challenging legislation passed under the procedures of this Constitution, but it would seem this does not include prior legislation
- The *nullum crimen* provision in Article 35(13) is troubling to the extent it has the potential for causing an act to become criminal long after it was committed if it can be categorized at the subsequent time as a crime against humanity under international law
- It is not clear that the accused has the right to be defended by counsel in the investigative phase, as that right is stated only for the trial itself
- The Anti-corruption Commission is authorized to publicize allegations of corruption and to freeze or seize assets even in the absence of a judicial determination of guilt, an apparent violation of fundamental due process guarantees
- The Forgiveness and Reconciliation Commission must have enabling legislation passed that elucidates its mandate, especially in respect to matters relating to impunity and amnesty

- The duties of the Ombudsman will need to be clarified through legislation

There are additional rights relating to the rights of the accused, required in the International Covenant on Civil and Political Rights (ICCPR) that are not contained in the Provisional Constitution. These rights are considered basic. The Constitution should incorporate them, even if they are a part of the law on criminal procedure. They are:

- The lack of a *habeus corpus* provision (detained must be presented to a court)¹¹⁰
- The lack of a speedy trial provision or of a right to bail¹¹¹
- The lack of a *non bis in idem* provision (double jeopardy)¹¹²
- The lack of a provision stating that an accused must be tried in his presence¹¹³
- The lack of a provision relating to examination and compulsion of witnesses¹¹⁴

Section III: The implementation phase

Now that the Provisional Constitution is in force and the Somali Parliament has been established, implementation of the Constitution must proceed without delay. This is all the more urgent as the Provisional Constitution adoption does not signify the end of the constitutional review period. Its *provisional* nature refers to the fact that it is to undergo additional review and consultation by parliament in order to develop a proposed constitution to go to the public in a referendum. In addition, there are large areas which are left to be defined by parliament, including the powers of the federal government relative to the states.

In this part we will discuss the most pressing issues. Firstly, we will discuss the process for constitutional and legislative reform, and provide guidance on what the international community's involvement could be in this process. Secondly, we will discuss the legislation required to establish a fully functioning judicial authority of Somalia. Thirdly, we will discuss the

¹¹⁰ International Covenant on Civil and Political Rights Article 9(4).

¹¹¹ ICCPR Article 9(3) and 14(3)(c).

¹¹² ICCPR Article 14(7).

¹¹³ ICCPR Article 14(3)(d).

¹¹⁴ ICCPR Article 14(3)(e).

priority laws to come into place in order for the judiciary to be able to adjudicate on the most pressing legal issues in Somalia, namely, laws in place to ensure the continued peace and security of Somalia, and to uphold individual fundamental rights. We will provide guidance for decision-makers as well as the international community on appropriate methods for reforming the existing body of law, and implementing new legislation. Fourthly, we will discuss the physical capacity of the judicial institutions of Somalia. Fifthly we will provide options for judicial and institutional capacity building in Somalia to strengthen the rule of law within the country.

Constitutional and Legislative Reform Process

Constitutional and legislative review will be of great importance over the new Parliament's first term and beyond. This section will highlight the constitutional and legislative review process and aims to provide guidance on the process the Parliament will take and advice to both decision making bodies as well as the international community on implementing the constitutional and legislative review process.

Committees on the review and implementation of the Provisional Constitution

The Provisional Constitution establishes an 'Oversight Committee', the Provisional Constitution Review and Implementation Oversight Committee, and the 'Review and Implementation Commission', the Independent Provisional Constitution Review and Implementation Commission.¹¹⁵ In sum, these bodies, formed by the selection of the executive and legislative branches of government, are charged with constitutional revision, as per Schedule One (C) and legislative implementation, as per Schedule One (D). They are also charged with considering other areas which will arise in the report produced by the National Constituent Assembly, which will document outstanding constitutional issues to be reviewed in further negotiations, as per Article 7.3.1(d) of the Protocol Establishing the Somali National Constituent Assembly.

¹¹⁵ Article 133 and 134

Process

Oversight Committee

The Oversight Committee is established as a Committee of the Federal Parliament to oversee, direct and approve the work of the Review and Implementation Commission, and, generally, the implementation of the Constitution.¹¹⁶ The Oversight Committee shall from time to time, assign to the Review and Implementation Commission a drafting project based upon the requirements of Schedules 1(C) and 1(D) and such other requirements as shall be deemed necessary pursuant to the outcomes of the National Constituent Assembly provisional adoption as set forth in the Protocol Establishing the National Constituent Assembly.¹¹⁷

The Oversight Committee is then charged with internally reviewing a draft Constitutional amendment or draft bill and accompanying report,¹¹⁸ informing the public of the proposal and the report,¹¹⁹ so far as possible, ensure that adequate opportunity exists for public debate,¹²⁰ consult with members of the public and other members of the Federal Parliament of the Federal Republic of Somalia,¹²¹ and engage Federal Member State legislatures and incorporate harmonized submissions into the proposed amendment, where the matter concerns the Federal Members State interests.¹²²

Review and Implementation Commission

The Review and Implementation Commission shall, as the Oversight Committee may direct, draft a proposed constitutional amendment in terms of Schedule One (C), or a proposed bill as mentioned in Schedule One (D), or as otherwise required pursuant to the outcomes of the National Constituent Assembly.¹²³ It shall prepare a research report to accompany that proposed amendment or bill, which report, in terms of evidence, both justifies the proposed amendment or bill and predicts the probability that the proposed amendment or bill will induce its prescribed

¹¹⁶ Article 133(2)(b)

¹¹⁷ Article 133(5)

¹¹⁸ Article 133(8)(a)

¹¹⁹ Article 133(8)(b)

¹²⁰ Article 133(8)(c)

¹²¹ Article 133(8)(d)

¹²² Article 133(8)(e)

¹²³ Article 134(7)(a)

behavior, and that those behaviors will ameliorate the social problem at which the proposed amendment or bill aims.¹²⁴

Technical Facilitation Committee

It should also be noted that priority institutions and independent commissions to be established shall also be tasked to the Oversight Committee and the Review and Implementation Commission to finalize and submit draft legislation, prepared by the Technical Facilitation Committee, to the Federal Parliament.¹²⁵

Establishment procedures

Oversight Committee

Each House of the Federal Parliament of the Federal Republic of Somalia shall elect five (5) of its Members as members of the Oversight Committee. In addition, each existing Federal Member State of the Federal Republic of Somalia that qualifies as a Federated State under the Federal Constitution of Somalia shall nominate one Federal Member State Delegate as a member of the Oversight Committee.¹²⁶ The members of the Oversight Committee shall select its Chairperson from among the members of the Oversight Committee.¹²⁷ Not later than one month after the Oversight Committee selects its Chairperson, the Oversight Committee shall by majority vote adopt its rules for functioning.¹²⁸

Review and Implementation Commission

Article 134

(2) At the beginning of the first term of the Federal Parliament of the Federal Republic of Somalia, the relevant Minister shall nominate to the Prime Minister five members of the Review and Implementation Commission whom the relevant Minister selects from short lists prepared by the Council of Ministers. In addition, existing Federal Member States should nominate one additional delegate to the

¹²⁴ Article 134(7)(b)

¹²⁵ Article 135(3)

¹²⁶ Article 133(2)(a)

¹²⁷ Article 133(3)

¹²⁸ Article 133(4)

Review and Implementation Commission, based on the same selection criteria.¹²⁹

(The selection criteria are listed in the Provisional Constitution.¹³⁰)

...

- (4) The Prime Minister shall place the names of the nominees before each House of the Federal Parliament of the Federal Republic of Somalia within 15 days after the Cabinet is formed, which shall, within fourteen (14) days, approve all or reject one or more of the nominees.
- (5) If either House rejects a nominee, the relevant Minister shall in terms of Clause (3) nominate a replacement, and thereafter follow the procedure prescribed in clauses (4) through (6).
- (6) After the Federal Parliament of the Federal Republic of Somalia has selected (5) nominees in terms of clauses (4) and (5), the Prime Minister shall designate one of the nominees as Chairperson, and forward the nominees' names to the President, who shall forthwith appoint the Prime Minister's designee as Chairperson, and the other two nominees as members of the Review and Implementation Commission.

Comparative analysis of constitution implementation commissions

Article 142 of the Iraqi constitution made provision for a similar committee charged amendments to the constitution:

The Council of Representatives shall form at the beginning of its work a committee from its members representing the principal components of the Iraqi society with the mission of presenting to the Council of Representatives, within a period not to exceed four months, a report that contains recommendations of the necessary amendments that could be made to the Constitution, and the committee shall be dissolved after a decision is made regarding its proposals.

The committee in Iraq set to work two months after its prescribed completion date with a report that offered revisions to the constitution.

¹²⁹ Article 134(2)

¹³⁰ Article 134(3)

However, the report was never acted on. The Somali example however differs greatly from the Iraq one, however, as the Provisional Constitution provides much more detail on the constitutional review and legislative implementation procedure. Equally, the Oversight Committee and the Review and Implementation Commission provide a broad base of political representation between both houses of the Federal Parliament as well as representation of Federal Member States. Therefore, it is difficult to assimilate the envisioned constitutional review and implementation process with other examples. However, the provisions are sufficiently detailed to ensure the effective administration of the process.

International technical assistance involvement in the process

The Oversight Committee and the Review and Implementation Commission will both require establishment legislation to mandate the process for their membership and function. International technical assistance can be provided in the form of supporting the drafting of establishment legislation, as well as providing strategic plans to the bodies and drafting provisions for staffing and secretariat services the bodies will need. Once establishment documents are in place, technical assistance can take the form of providing governance guidance in terms of rules of procedure for decision-making. Substantive trainings of members in negotiation techniques, constitutional principles and legislative drafting will also ensure greater capacity of the decision-makers. The Provisional Constitution also prescribes for a public information and consultation process. Due to the technical difficulty as well as complex environment in which to conduct such a campaign, technical expertise could be drawn in to offer advice. Throughout the drafting stages, and once final drafts are produced, technical expertise could be brought in to offer comparative advice on the structure and wording of the text and offer lessons learned in how such constitutional or legislative design has played out in other cases.

Legislative reforms concerning the Judicial Authority

Establishing the Judicial Authority will require a number of laws to be implemented to outline the formation and function of the respective institutions. This section will analyze the next stages for implementation of

such laws. It will also discuss timelines for the process as well as highlighting the outstanding issue of federalism in Somalia and how this will affect the structure of the Judicial Authority, particularly over the first term of Parliament.

The next stages of implementing a functioning judiciary in Somalia would be to establish the institutions laid out in the Judicial Authority chapter of the Provisional Constitution. This includes the Judicial Service Commission, the Constitutional Court and the rest of the judicial authority including the Federal Government level courts and the Federal Members State level court. Within these court systems there shall be a Federal High Court and a Federal Member State High Court.¹³¹

It should be noted that legislation concerning the Judicial Authority is considered to be of vital importance in the Provisional Constitution with Article 135 stating that a Judicial Service Commission is to be formed 30 days after the Council of Ministers is formed¹³² and the Constitutional Court to be formed 30 days thereafter.¹³³ In order to reach these goals, legislation will be necessary.

Laws establishing the Judicial Authority

Judicial Service Commission

Although briefly touched on in Part I, a Judicial Service Act would need to come into force to establish the Commission and detail its functions and powers. This can involve administrative powers to buy property, enter into contracts, and to borrow money. It should also be charged with the power to delegate to outside expertise as well as provisions on human resources, including recruitment, contracting, resignation and retirement legislation. Provisions on the budgeting and financing procedures should also be laid out.

Judiciary

Legislation will also need to come into place regulating the administration of the judiciary. This shall include the mandate and functions of the Chief Judge of the Constitutional Court and the High Court, the relationship between the two Judge's and the Chief Judges' relationship with other

¹³¹ Article 108

¹³² Article 135(2)(a)

¹³³ Article 135(2)(b)

members of the judiciary. Legislation will also prescribe their recruitment, detailed powers, resignation and retirement. Other members of the judiciary will also need to be defined by law including registrars, recorders, legal researchers and other administrative and secretariat services. Provisions for oath of office, code of conduct and judicial integrity and ethics will also need to be founded in legislation.

Legislation dealing with the Somali judiciary dates from 1962 and 1974 and is pegged to the 1960 Constitution. The judiciary has been profoundly changed in the 2012 Provisional Constitution, which has now established two separate judicial systems, Federal Level and Federal Member State Level. Existing laws will need to be amended to reflect this change. Indeed, to the extent that much power has been diverted to Federal Member States, legislation and capacity-building will need to occur at that level.

Timelines for the legislation process

The Constitutional Court should be established with urgency. As noted in the previous part, Constitutional Courts have played a pivotal role in the democratization of the country, holding all political actors to account. The legislative procedure over the first term of parliament has been noted, and although there is not strict provision regarding the Court's role, it is undoubted that it shall be of high importance.

Judiciary and federalism

Despite the prevalence of federalism in the constitution making process to date, the Provisional Constitution is still largely inexplicit on the matter.¹³⁴ It might therefore be likely to be of high importance over the first term of Parliament, considering what problems will be highlighted in the report from the National Constituent Assembly.¹³⁵ Therefore the provisions of the federal judiciary will largely be a matter for negotiations with the Federal Government and Federal Member State Governments. The one delegate that each Federal Member State will nominate on to the Oversight Committee,¹³⁶ and the Review and Implementation Commission respectively¹³⁷ will likely be the forum in which these discussions take place. Negotiations should focus on what jurisdiction Federal Members State courts hold vis-à-vis Federal Government level courts. Once these discussions are finalized a full scale mobilization of Federal Members State courts can go underway. In the interim, however, decision makers may

¹³⁴ However, some provisions and principles are set down in Chapter 5 and Chapter 12 of the Provisional Constitution.

¹³⁵ Schedule One (C) and Schedule One (D) do not highlight any outstanding issues for further consideration by legislative bodies.

¹³⁶ Article 133(2)(a)

¹³⁷ Article 134(2)

focus on implementing a provisional law governing the judiciary in Federal Members States to ensure that the provision of justice is secured for individual citizens.¹³⁸

Given the lack of capacity, parliamentarians at both the Federal and Federal Member State levels may want to consider whether it makes sense entirely at this moment to establish two tiers of court systems. Of course, it may well be that the Member States have greater capacity on this level, but that may serve to create a perceived difference in abilities on the two levels of courts. Presumably, the courts already functioning in Somaliland and Puntland will continue to function as Member State levels. But that raises the issue of where to find, in the short term, the capacity to staff Federal level courts in those areas. Otherwise, the legislative reforms suggested above will need to be taken up seriatim.

Reforming priority laws

Schedule One (D) outlines the priority laws that are to be enacted in the first term of parliament. Many of these provisions are important to establish the fully functioning Somali state. In terms of facilitating peace building measures in the shorter terms, legislators should pay particular regard to human rights and criminal laws to ensure the protection of individuals, prosecute serious crimes, and mitigate escalation into violence. Such laws would fall under the scope of legislation prescribed in Schedule One (D) concerning criminal laws,¹³⁹ and human rights laws.¹⁴⁰

The priority laws we discuss will fall under the categories of serious crimes, judicial procedure, and human rights. We shall then continue to analyze how the Somali legal framework could be reformed and describe instances in which legislators can search for sources of law.

Serious crimes

Serious crimes represent a threat to the establishment of post conflict peace, order, and the general security of the population and greatly hinder economic, legal, and political reform efforts. Serious crimes may also spark major public unrest, exacerbating societal division and even provoking a resurgence of open conflict. This is especially likely in cases of crimes committed by members of one ethnic group against those of

¹³⁸ With regard to post-conflict constitutions, Bosnia, Nigeria and Iraq adopted Federal Court structures. Nigeria detailed the jurisdiction of the federal courts within the constitution whereas Bosnia and Iraq left the structures and jurisdiction to legislation.

¹³⁹ Somewhat touched on in Schedule One (D)(4),(5),(15)(16),(17),(18), and (19)

¹⁴⁰ Schedule One (D)(7)

another.¹⁴¹ Disillusionment with the governing authority's ability to thwart these crimes may result in the population relying on parallel power structures such as militias, which may be seen as able to protect people from the effects of serious crimes (even though militias themselves are involved in these crimes).

Judicial procedure

New rules of evidence and procedure will need to be considered. Although some major inconsistencies of the Provisional Constitution with the ICCPR's provisions relating to the rights of the accused have been identified above, there are others. In the event, all such inconsistencies can be, as an intermediate measure, resolved through appropriate amendments to the codes of criminal procedure. While doing so may not be regarded by the international human rights community as being adequate (as opposed to amending the Provisional Constitution), it will at least have the salutary effect of memorializing these rights in what is likely to be a far less contentious process, i.e., the legislative, rather than through constitutional amendments.

Human rights framework

The Provisional Constitution, like all constitutional texts preceding it, requires that judicial remedies be available for the violation of human rights. Close examination of statutes relating to the exercise of such rights will need to be carried out, to ensure compliance with modern standards, also enshrined in the Constitution. Of course, this is a problem connected with judicial capacity. In the absence of an adequate number of judges and lawyers practicing in civil courts, it may seem that developing this area of legislation is of secondary importance. In reality, however, a civil system is equally as important as a criminal justice system fully to enfranchise the citizenry.

Reforming the legal framework

The legal framework is the backbone of defining and prosecuting criminal activity and upholding individual rights. Without appropriate laws classifying criminal conduct the police and prosecutors have no power to challenge such acts. Perpetrators can carry out such activities without any recourse to criminal prosecution. Without human rights protections enshrined by law, individuals will be disenfranchised and may seek

¹⁴¹ Colette Rausch., *Combatting Serious Crimes in Postconflict Societies: A Handbook for Policy Makers and Practitioners* (United States Institute of Peace Press 2006) 6

alternative, non-state, methods to seek redress. Codes of criminal procedure and evidence are necessary for access to justice and the redress of human rights violations or infringements of criminal law.

Identifying the legal framework

Domestic laws

Some postconflict societies have multiple potential bodies of law. In such case, a political decision may be needed to determine what body will be applicable in the postconflict period. In Afghanistan, for example, the laws in effect in 1964 were deemed applicable under the postconflict agreement, despite many of them having been replaced, supplemented, or amended over almost forty years by a series of communist and Taliban laws and then by presidential decrees.

Domestic laws relevant to the enforcement of criminal justice include: the constitution; the criminal code in force in the state; any legislation implementing this criminal code; presidential decrees; case law (in the context of common law jurisdictions); customary law; criminal procedure code.

As noted, the statutory Somali system has been in place under Italian colonialism, independence and the Siad Barre regime. The next steps would be to document all such existing law in place, then it would likely be a decision by the legislature or executive on what body of law should be utilized. The international community can play a large role in this part in terms of research capacity and technical assistance to legislative bodies on how to utilize such laws.

International and regional treaties

Somalia is a signatory to several treaties including the International Covenant on Civil and Political Rights. Although the domestic laws of Somalia are not fully functioning, international treaties as such have direct effect. Such treaties are therefore to be considered as a source of law by decision makers.

Capacity of institutions in Somalia

The lack of capacity in the judiciary in the three zones (Somaliland, Puntland and South Central) is profound. Even in the best of circumstances, the number of university-educated judges is relatively low. Too many judges and legal practitioners, have only informal training. In

many instances, employees in the judicial branch are unpaid, obviously raising a spectre of corruption and other areas of unprofessionalism. There are however developments taking place in the country. International programs designed to train legal professionals in the rudiments of international standards over the span of months appear to be quite successful. They should be continued and expanded.

This section is largely taken from the UNDP assessment reference below and aims to present a digest of capacity assessment in Mogadishu, Puntland, and Somaliland.

Mogadishu

As will be demonstrated in greater detail below, it is generally fair to say that capacity is at best quite limited. Judges and lawyers with university degrees in law are relatively few in number, a situation likely to continue to be problematic for the foreseeable future. It should be noted that international organizations have been instrumental in contributing to capacity building within the judicial system, and their efforts should be encouraged by the international community. Amongst such programs one involves a six-month training course for judges, prosecutors, and staff, the first such course in Mogadishu “for several years.”¹⁴² Such programs certainly are indispensable if Somalia’s judicial system is to be brought closer to modern standards, and training of this type should be encouraged and expanded. The Government of Somalia appears to have bought into such programs, as evidenced by the attendance of the Chief Justice and other high-ranking officials of Somalia’s judiciary and legal academicians to such trainings.¹⁴³

The extent of formal legal education varies greatly throughout the Somali judicial system, depending in great part on the level within the system. Thus, for instance, at the top of the pyramid, the Judicial Service Commission in Mogadishu consists of a total of six members, each of whom is a graduate of a university law faculty.¹⁴⁴ Even the clerk of the JSC is a university-trained law graduate.¹⁴⁵ The Benadir Court of Appeal, by contrast, has a total of six judges, one of whom has a university law degree, one has a university degree in Shariah law, one a university degree in Islamic studies, and three having what the report terms an

¹⁴² See *First judicial training in years commences in Mogadishu*, Press Release, UNDP Somalia, available at <<http://www.so.undp.org/index.php/Somalia-Stories/First-judicial-training-in-years-commences-in-Mogadishu.html>> accessed 3 September 2012

¹⁴³ Ibid.

¹⁴⁴ IDLO Somalia, Short assessment of the state of the Somali judiciary, September 2011

¹⁴⁵ Ibid.

“informal education.”¹⁴⁶ Three clerks of this court have only a secondary education.¹⁴⁷

The situation for courts of first instance remains weak. It is true that the Benadir Regional Court has three of five (3 of 5) judges who are university-trained in law, with two members who are informally trained.¹⁴⁸ The level of education of judges in the Mogadishu District Courts¹⁴⁹ is less developed. There are a total of twenty-two judges in the Mogadishu District Courts.¹⁵⁰ Of these judges, six have university legal training, three have Shariah training, and thirteen have no formal education whatsoever.¹⁵¹ Not a single judge in the Hodan, Hamarweyne, Wardhigley, and Dharkenley districts has a university-level law degree.¹⁵²

An assessment of the judicial infrastructure in Mogadishu indicates severe deficiencies, aside from the educational ones noted above. There are severe shortages in staffing, budget, computer systems, etc.¹⁵³ Many court personnel, including judges, are not currently being paid, though assurances have been made that that situation will be remedied.¹⁵⁴ Among the urgent needs noted by IDLO Somalia were the lack of distribution of basic legal texts (e.g., various codes and commentaries on the codes),¹⁵⁵ desks and chairs, even at the level of the JSC.¹⁵⁶ The case management system is outdated, and it is a matter of concern that a filing fee of 10% of the value of civil cases is required to commence an action.¹⁵⁷ Although the courts appear to be functioning in Mogadishu, they appear to be doing so “without the necessary facilities, salaries, and reference books to function effectively.”¹⁵⁸

It should be noted that the UNDP Somalia has expressed a continuing concern about intimidation of officials within the judicial system in Mogadishu. Its report notes that judges, prosecutors, and support staff have been killed, arrested, or intimidated into resigning, though it states that such targeting was done by the insurgency, not the Government of

¹⁴⁶ Ibid. section 2.16.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid. section 2.18.

¹⁴⁹ Mogadishu is divided into sixteen districts, Ibid. section 1.6.1 n. 1, eight of which were surveyed by the UNDP Somalia Report.

¹⁵⁰ Ibid. section 2.21.

¹⁵¹ Ibid.

¹⁵² Ibid. Hamarweyne and Wardhigley districts have one (1) and two (2) Shariah-trained judges, respectively.

¹⁵³ See, e.g., Ibid. section 2.11.

¹⁵⁴ See Ibid. section 2.20.

¹⁵⁵ IDLO Somalia, Short assessment of the state of the Somali judiciary, September 2011

¹⁵⁶ Ibid.

¹⁵⁷ Ibid. There is also an additional stamp fee of 2% of the filing fee. Such fees must surely act as a deterrent for filing cases for those in the lower economic strata.

¹⁵⁸ Ibid. section 6.

Somalia.¹⁵⁹ The last such instances, at least where judges and prosecutors targeted because of their judicial function, are noted to have occurred in 2008,¹⁶⁰ the time at which UNDP Somalia suspended its operations in support of the judiciary.¹⁶¹ The UNDP Somalia report states that the Mogadishu court system operates now (at least as of January 2011) with “no protection.”¹⁶²

Similar concerns can be raised with respect to the prison system in Mogadishu. Essentially all physical facilities are in a state of disrepair and in need of minor or major rehabilitation, or outright reconstruction.¹⁶³ The prison commander himself recognizes the need for urgent training in international norms of human rights and of a revision of prison standing orders.¹⁶⁴ There is also a long list of urgent needs, including uniforms, medical supplies, electric generators, etc.¹⁶⁵

Puntland

In broad parameters, the situation in Puntland does not markedly differ from that in Mogadishu. There are currently 52 judges, 10 prosecutors, 39 registrars, and 3 bailiffs working in the courts of first instance, court of appeal, Supreme Court, and the office of the attorney general of Puntland.¹⁶⁶ Of these judicial officers, 5 have university law degrees, 13 have university degrees in Shariah, and 15 have informal or “police” training.¹⁶⁷ Again, UNDP Somalia has been undertaking, in co-operation with Puntland State University and East Africa University, a program of six-months of training for these individuals, training that has been ongoing since 2010. Over the past two years, 43 of 62 judges and prosecutors have successfully completed this training, which focuses, *inter alia*, on such topics as criminal and civil law and procedure, constitutional law, Shariah, jurisprudence, sentencing, and trial transcription and recording.¹⁶⁸

UNDP also provides internship opportunities in the criminal justice system for law students.¹⁶⁹ Of 34 current participants in this program 16 are

¹⁵⁹ Tahlil Haji Ahmed, *Follow-up Assessment of TFG Judiciary in Mogadishu* sec. 2.12 (UNDP Somalia, Jan. 2011).

¹⁶⁰ *Ibid.* section 6.

¹⁶¹ *Ibid.* section 1.3

¹⁶² *Ibid.* section 6.

¹⁶³ *Ibid.* section 5.2.

¹⁶⁴ *Ibid.* section 5.3.

¹⁶⁵ *Ibid.*

¹⁶⁶ Report, *Snapshot, Puntland Access to Justice* (January—June 2012) at 5. This report is on file with the author and was provided by the IDLO staff.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.* at 9.

female.¹⁷⁰ Indeed, it is noteworthy that 22% of the law students at Puntland State University are women.¹⁷¹ The participants in the internship program constitute one-third of the student body of the Puntland State University law faculty.¹⁷²

Security, however, is a major cause for concern in Puntland. 11% of Puntland's judges and prosecutors have been assassinated since 2009, with the latest assassination having occurred in June 2012.¹⁷³ In addition to officials actually assassinated, there have been attempts on the lives of three other judicial officers (the Attorney-General, a prosecutor, and the Deputy Chief Justice).¹⁷⁴ Obviously, working under such threats is problematic for any judicial system anywhere in the world.

Court statistics indicate a marked increase in the number of cases handled in Puntland over a five-year period. Whereas the Puntland court docket system indicates typical case loads to approximate 2500 civil and criminal cases disposed of on average between 2007 and 2010, those records indicate that nearly 4200 cases were disposed of in 2011.¹⁷⁵ These efficiencies were possible in part thanks to the existence of so-called mobile courts that travel to rural areas throughout Puntland.¹⁷⁶ A new prison in Gardo is expected to be open in Autumn 2012.¹⁷⁷

Somaliland

Prior to 2009, of 120 judges, only 7 possessed university degrees in law.¹⁷⁸ Somaliland, working with UNDP and the University of Hargeisa, initiated a nine-month training program.¹⁷⁹ To date, 34 judges, 20 prosecutors, and 24 lawyers have completed this training.¹⁸⁰

In addition, the Law Faculty of the University of Hargeisa and Amoud University have produced 312 law graduates (including 78 women).¹⁸¹ This fact has, in turn, allowed Somaliland to strengthen its judicial institutions. For instance, the Judicial Service Council dismissed 26 judges (accused of corruption), and replaced them with 17 law graduates.¹⁸² The

¹⁷⁰ Ibid.

¹⁷¹ Ibid. at 7.

¹⁷² Ibid. at 9.

¹⁷³ Ibid. at 6-7.

¹⁷⁴ Ibid. at 6.

¹⁷⁵ Ibid. at 10.

¹⁷⁶ Ibid. at 3.

¹⁷⁷ Ibid. at 9-10.

¹⁷⁸ *Presentation on Current Capacity of the Judiciary*, Somaliland UNDP/University of Hargeisa/Attorney-General (no date) at 2.

¹⁷⁹ Ibid. at 4.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid. at 5.

Council has also appointed 10 law graduates as prosecutors (including 5 women).¹⁸³ Thus, nearly half of Somaliland's judges are either law graduates or certified by the UNDP program, and all but 3 of Somaliland's 40 prosecutors have one or the other.¹⁸⁴

There remain inadequate preparation skills on the part of prosecutors, and their general inability to lead the investigation.¹⁸⁵ This is partly due to inadequate training in evaluation of evidence, and partly due to the inadequacy of the prosecutors' forensic training.¹⁸⁶ Judges suffer from poor case management techniques and their recording of the trial and analysis was also inadequate.¹⁸⁷ Judges are also generally inadequately trained in substantive and procedural laws, as well as in judicial ethics.¹⁸⁸

Options for capacity building

Both the judicial and legal professions are extremely weak, as described above. Accordingly, rebuilding these institutions is essential. While a Constitutional Court is necessary, it can seem remote from the lives of ordinary citizens in need of the court system. Programs, described below, to help to train judges and lawyers should be strengthened. These programs work with existing professionals in relatively short courses in an attempt to increase the level of professional competence of judges and lawyers. While it is obviously desirable in the long term that all such professionals graduate from university programs in law and in Shari'ah, this is simply not practicable over the short and intermediate terms.

As the goal must be ultimately to modernize the Somali legal system, attention will need to be paid to reforming and modernizing the Somali legal education curriculum. Many law schools in the United States and Europe have experience in working with countries in need of such modernization, as do International Organizations. Once again, this is a valuable opportunity for such organizations to work with Somali partners to upgrade curricula with respect to producing practicing lawyers. While no doubt some Somali law graduates might benefit from advanced degrees from countries with advanced legal systems, the emphasis here should not be on producing legal academics. Rather, as an intermediary stage, it is important to review existing law school curricula on practical courses, courses that will make a professional practitioner. Thus, for instance, course focusing on forensic skills, drafting, critical thinking, as

¹⁸³ Ibid.

¹⁸⁴ Ibid. at 6.

¹⁸⁵ Ibid. at 7.

¹⁸⁶ Ibid. at 7-8.

¹⁸⁷ Ibid. at 8-9.

¹⁸⁸ IDLO Somalia, Short assessment of the state of the Somali judiciary, September 2011

well as substantive law (especially international human rights law and ethics) will be essential to improving the competence of ordinary practitioners. Continuing legal education programs, perhaps co-ordinated between professional associations and law schools, are essential to maintain professional competence.

International organizations, including International Development Law Organization have built much experience in the past two decades or so in assisting countries to develop rule of law institutions. They should be encouraged to do so in Somalia. One cautionary note, however, must be sounded in favour of respecting Somalia's organic, surviving rule-of-law structures. Too often, volunteers from donor countries arrive armed with the best intentions to re-shape the host nation in the image of their own. This approach, discredited in places like Iraq, amongst others, can serve to weaken further whatever existing rule-of-law infrastructure may exist. Due regard must be taken of Somalia's own existing formal legal system. Still, international organizations with experience working with countries having legal systems similar to Somalia's will be invaluable.

Too often international training courses "stovepipe" training. Thus, judges are trained separately from prosecutors, defense lawyers, and police. Yet each of these groups play essentially integrated functions within any justice system. These professionals would mutually benefit from having at least some training together. Equally essential is the training of courtroom staff in case management and related issues.

Postscript

Gender considerations in the process

There are weaknesses in the Provisional Constitution that not previously discussed, principally because they are beyond the remit of this report. One such obvious weakness is the lack of protection of women's rights in the Constitution. Unlike in other nascent democracies, for instance, there is no provision for a floor for women's representation in public offices, such as in the judiciary. Some rights advocates might, therefore, press this matter during a constitutional review process and public participation campaigns should seek to include this consideration in their consultations.

Strengthening accountability in customary law (*Xeer*)

The only reference to customary law in the Provisional Constitution is in Article 40(4) which recognized rights existing under customary law provided that they are not in conflict with the Constitution or Shari'ah, and unlike in other recent Constitutions in the region (e.g. Republic of South Sudan) customary law as a source of legislation is not constitutionalized. Nevertheless, the prevalence of customary law as the principal dispute resolution mechanism for most Somalis dictates that efforts to develop/reform the formal justice system should bear in mind the existence and practices of the customary system as well.

Thus debate will likely continue on the actual operation of the legal system in relation to the application of customary law, an issue which has been recognized as potentially affecting the human rights. In other countries where such constitutional recognition exist (South Africa) the difficulty of finding easy solutions to problems associated with the application of customary law has been persisting. Should the system on the ground dictate that recognition or incorporation of customary law is desirable; such systems of law would still need to be brought in line with the fundamental rights of the Constitution. Possible areas for reform may include:

- Restoring internal accountability mechanisms, such as methods for selecting customary justice institutions and the possibility of appeal to higher authorities, where such mechanisms have been distorted—perhaps council of elders.
- Training customary justice practitioners in mediation techniques and familiarizing them with formal law and international standards.
- Empowering parties to criminal disputes to insist on just results by making them aware of their rights, both under customary and formal law, or training community members to help advocate for women and vulnerable people.
- Encouraging the recording of cases and their resolution so as to promote consistency of decisions and provide a basis for appeal.
- Improving linkages to the formal system. While resolving the relationship between the customary and the formal criminal justice systems is a question for the longer term, it may be possible to improve matters on a local level in the immediate term.
- Mitigating harmful practices. One of the more challenging issues is how to bring customary justice systems in line with international human rights norms and standards. Top-down prohibitions tend to be ineffective at best and counterproductive at worst. While developing progressive legislation is a positive step, it is important not to overestimate the ability of law to change deep-seated beliefs and cultural practices. Programmatic options should be aimed at protecting the vulnerable and promoting change from within, such

as by:

- Working with communities to encourage the development of culturally acceptable alternatives to harmful practices; and
- Developing meaningful alternatives to customary justice for those who are victims of harmful practices and violations of international standards by these systems, for example, by providing legal aid and additional resources to enable them to access the formal system.

Chapter Two: The security sector

Executive summary

Somalia has reached a critical transition point in its history as a country. The new government must rapidly protect and implement its new Constitution, as well as immediately begin to lay the groundwork for improved security and justice systems. The purpose of this chapter is to address the question of how Somalia's Peace and Security sectors would ideally be laid out ten or twenty years from now. What kind of military and police forces would best serve Somalia's security needs? What types of laws will be required to meet these goals? The paper includes three sections: a security assessment and status of forces for the military and police; an analysis of the Constitutional provisions for Somalia's security sector; and a conceptual strategic plan for developing the security forces over the next 10+ years.

Five principles undergird the analysis and recommendations of the section. These are constitutionality, affordability, feasibility, sustainability, and accountability. Major findings and recommendations of this assessment are discussed below.

Security sector assessment

- Two years ago the greatest security threats facing Somalia included a rise in asymmetric conflict, terrorism, piracy, kidnapping, and violent crime across the country, risks to critical infrastructure from attack or deterioration, inadequate and poorly coordinated support from the international community, large gaps in funding and resources for security sector development, and weak political foundations to promote good governance and accountability within the security sectors. Today, Somalia has seen some improvement in its security situation. In 2011, the TFG/AMISOM launched a counter-insurgency offensive that pushed Al-Shabab out of Mogadishu. Citizens of Mogadishu are expressing hope that security is improving in their city. Refugees are

returning to Mogadishu in rising numbers. International aid and cooperation has improved. The transition to permanent government with the election of a new Parliament is a political sign of progress.

- However, major challenges still exist. Crime and violence remains a problem in Mogadishu, Somaliland, and Puntland. Allegations of law enforcement corruption and extortion are growing more common. Clan rivalries, particularly in Somaliland and Puntland, continue to remain a problem, and there are a number of armed militia forces unaligned with the central government spread across the country. Piracy has also become a major domestic and international security issue.
- The National Security Forces remain understaffed, poorly equipped, poorly trained, and poorly funded. Expansion of the armed forces in line with previous SSA and NSSP reports should be reassessed, with due consideration given to issues of affordability, sustainability, and mission objectives.
- The police forces across Somalia also remain understaffed, poorly equipped, poorly trained, and poorly funded. Allegations of corruption and extortion are a major concern for rule of law. Somalia should consider prioritizing the improvement in the quality of its police forces, its integration with the justice sector, and strong anti-corruption measures.

The new Provisional Constitution

- Somalia's Provisional Constitution creates a federal, democratic Islamic republic. Power is shared between the federal and the state governments according to law and by adhering to principles of equality, fairness, and practicality. However, the implications and application of the Constitutional language remain vague and open to interpretation. Due consideration should be given to the political challenges of implementing resource and service delivery.
- The federal government is granted jurisdiction over the armed forces and is able to raise a federal police force. State governments are granted power to raise their own police services. There are no explicit limitations on the creation of a Gendarmerie (paramilitary) federal police force, a National Guard, or a Coast Guard.
- Legal guidance for clan-based militias is weak and unclear. This oversight should be clarified Constitutionally. Militia forces should be considered for integration into state or federal security forces.
- Constitutional guidance about proportional representation of Somalia's population in the security forces is lacking.
- The legal jurisdiction of federal and state police is unclear. In addition, legal guidance regarding the use of the military to enforce the laws of

the land is absent from the Constitution. These issues should be discussed clarified by law.

- The Constitution is unclear about national operations during times of emergency. The roles of the Executive and Legislative branches are not clearly defined during emergencies.
- Checks and balances for national budgets, particularly security budgets, are weak. These checks should be strengthened, and more accountability powers should reside within the Parliament.

Strategic security sector planning

- **Immediate recommendations (0-12 months):** prioritize anti-corruption, salary adjustments, police forces development. Implement a national biometric data system to track payroll distributions and absenteeism. Secure long-term commitments from international community partners to support Somalia's security needs.
- **Short-term recommendations (1-3 years):** prioritize security expansion, quality improvements to existing security forces, and the development of a Gendarmerie police force. Continue to improve law enforcement training, equipping, and public outreach. Expand the size of the Somalia Police Force to 8,000 officers, and equip and deploy existing Navy personnel on limited anti-piracy missions.
- **Medium-term recommendations (3-7 years):** prioritize quality improvements (training, equipment, and salaries) to existing security forces, and continue to expand the size and mission of the police services. Deploy Gendarmerie police force. Reactivate Somalia's inactive Air Force personnel and repair or replace necessary equipment; consider expansion of the service to 500-1,000 officers. Conduct a new security assessment and reappropriate the national budget to meet specific security needs.
- **Long-term recommendations (8-10+ years):** prioritize the transition of AMISOM troops out of Somalia, and expand the size of the armed forces. Deploy a state level unarmed National Guard force for emergency response, natural disaster, and community service missions. Complete procurement and staffing objectives for the Somali Navy, Coast Guard, and Air Force. Assess the need for expanding the National Army to 20,000 troops.

Introduction

Two decades of inter-state conflict, sectarian insurgency and clan-based violence have produced a weak central Somali government and the loss of public confidence in that government. Trust in leadership is now viewed

through the prism of security, and security is viewed through the prism of clan identity. Clan, not government, holds the trust of the Somali populace. Unless this paradigm is changed, and until the Somali State is perceived as being the sole entity to exercise a monopoly on the legitimate use of physical force in the enforcement of its order, the Government of Somalia will lack legitimacy and public support.

Somalia is at a crossroad. The peace process which began in 2004, and was followed by the 2008 Djibouti Agreement and the 2011 Kampala Accords, provided a roadmap for a return to stability and human security. The implementation of this Somali-led, International Community-supported roadmap has now resulted in the successful convening of the Somali National Constituent Assembly, the adoption of a Provisional Constitution, the investiture of a new Parliament, the relatively tranquil termination of the Transitional Federal Government's (TFG) mandate, and the election of a Speaker of Parliament, as well as a new President.

At this writing, there is cause for optimism. One indication of this is that there has been a general acquiescence of governing elites to the changes in governmental leadership, as well as in governance structure. For example, as outgoing TFG President Sheik Sharif Sheikh Ahmed noted in his election concession speech, "I am happy to see the first free and fair election happen in Somalia after 40 years. I want to congratulate the new president for the fair election, and I want to declare that I am fully satisfied with the results." As importantly, it currently appears the fledgling Somali security forces are continuing to uphold – to the best of their ability – their responsibility for maintaining order and peace, they appear outwardly respectful of the new administration, and they are refraining from political activity, partisan behavior, and the abandonment of their posts.

As encouraging as these signs may be, if the recent gains of the political reconciliation process are to be maintained and strengthened, much needs to be accomplished; a fact highlighted by UN Special Representative for Somalia, Augustine Mahiga, when he noted, "Somalia must now focus on *stabilization*, reconciliation, and *building sustainable and accountable institutions of governance* capable of providing services to its people." More particularly, as Mr. David Cameron recently observed, "Somalia's leaders must now work together to build a more representative and transparent system, tackle corruption, and *strengthen security and stability*."

While the challenges facing the new government are immense, the immediate priority for the new government of Somalia – as well as for its international supporters – must be to leverage current optimism by

quickly implementing an effective agenda for improving security, enhancing good governance, and securing the allegiance of a critical mass of the Somali public and its diaspora. Simultaneously, the international community must be prepared to support Somali legislators as they face the inevitable calls of “spoilers” to roll-back progressive provisions currently contained within the Provisional Constitution, to help them strengthen the Provisional Constitution where it is weak, to assist them to effectively implement the Constitution through the expeditious development of organic laws, and to mentor them as they engage in a realistic effort to establish governmental agencies that will respond to and serve Somali civil society. In short, the International Community must be prepared to effectively guide the government as it attempts to answer the question of, “what happens next?”

At the outset, one thing is certain: the Somali Government and the International Community cannot succeed if they attempt to embark on this endeavor alone. Simply put, if the political reconciliation process is to maintain its claim of legitimacy, it must quickly incorporate the support of the Somali populace. This will require the new government and its international supporters to immediately reach out to a coalition of engaged Somali civil society organizations both at home and abroad. There is reason to believe that many Somalis from both inside and outside the country are beginning to find their voice and form a shared vision for the future of their country. Yet this hope can quickly dissolve if the Somali public does not perceive a change in priorities of governmental leaders, as well as the beginnings of a new Somali security strategy.

The most recent iteration of the Somalia National Security and Stabilization Plan (NSSP) created in 2011 during the transitional Somali administration, established the underlying context for a way forward. It reads, “(W)ithout security there can be limited scope for sustaining the political peace process: Peace needs security just as security needs peace.” Thus, the first priority for the new government must be to quickly articulate its vision for achieving durable and sustainable security. But vision alone will not be enough; enhanced security will only be achieved through the implementation of a realistic plan. This, in turn, can only be achieved if the government develops an effective strategy for organizing, training, and equipping its security sector forces. If this strategy is developed wisely, it will serve as the foundation for success of this new government.

This section outlines a realistic “way forward” in helping to develop Somalia’s new security strategy. The primary thesis posited herein is that in order for it to be effective, any security strategy formulated must be strategically-focused and sustainable. Pleas for support of short-term,

overly kinetic, and demonstrably unsustainable security strategy(ies) will go unheeded. The Somali public has heard these pleas before and will not succumb to them now. Thus, the key issues to be addressed by the new government should not only – or even primarily – be related to Somalia’s immediate security situation. Rather, the appropriate question to be put to the Somali people is where they want to be in 5, 10, or 20 years. This will require public engagement. It will require exercising political skill in first establishing and then meeting reasonable public expectations. It will require obtaining public commitment for enduring the tribulations and sacrifices that will be necessary to win the peace. Most importantly, it will require balancing short term transient gains against long term sustainable peace.

Guiding principles

Without a vision, it is difficult to formulate a plan. Transitional Federal Government President Sheik Sharif Sheikh Ahmed provided a basic vision for the development of Somalia’s peace and security sector when he wrote in 2011:¹⁸⁹

We have reconstructed our national security vision as follows: A secure and enabled federated Somalia which is in lasting peace with itself and with its neighbors; ensuring restoration of security, access to justice and the rule of law institutions such as police, judiciary and custodial corps; upholding of the human rights of its citizens; accountable, and able to defend its Constitution, people, territorial unity and integrity.

This vision was complemented by the international community during the 2012 London Conference when the organizers stated in the event communiqué:

We agreed that Somalia’s long-term reconstruction and economic development depended on a vibrant private sector, and that both aid and Diaspora finance could develop Somalia’s considerable potential in livestock, fisheries and other sectors. We noted that stability is a prerequisite for most sustainable investment in infrastructure such as electricity, roads, and water systems.

These two visions, connecting the local to the international, and the public sector to the private sector, are the long-term goals of this project. Somalia needs to achieve a certain degree of peace and stability to allow

¹⁸⁹ NSSP 2011: see forward.

the private sector economy to flourish and to get the engine of development fired up. The Constitutional groundwork for this process has been laid—now Somalia must implement policies to achieve these goals.

This paper's suggestions for implementing the Somali Provisional Constitution and developing its security sector forces must adhere to various criteria. First, “any sustainable security and stabilization plan has to meet citizens’ expectations of provision of basic services.”¹⁹⁰ Civil society is the paramount partner in guiding the development of the Constitution and implementing its laws. Without participation from Somali civil society on the ground and from the Somali Diaspora abroad, policy initiatives will fail to achieve legitimacy and the nation building task will wither. Thus, public participation is vital and policymakers must be keenly aware that citizens expect and demand that the government provide them with basic personal safety and security.

Second, the May 2012 London Conference on Somalia communicated key principles for supporting the security and justice sectors. These include:

A staged, Somali-led, internationally coordinated approach building upon existing structures which work towards an appropriate, accountable, adequate, and affordable security and justice sector. Such support should: reflect the political reality; be Somali-led and citizen-owned; be context specific and realistic; balance short-term interests and long-term sustainable capability; build on existing structures (e.g. NSSP, NSC, JSC); and respect and promote human rights and the rule of law.

These principles must be incorporated into the strategic plans for Somalia’s military and police forces. To this end, the following principles are considered in guiding the recommendations of this paper:

- **Constitutionality:** does the Provisional Constitution allow this? If not, can it be amended to comply with the recommendations?
- **Affordability:** can Somalia’s economy and national budget afford these plans, both in the short and long term?
- **Feasibility:** is it possible for future national security laws to be effectively implemented in order to achieve a reasonable measure of success?

¹⁹⁰ National Security and Stabilization Plan 2011:

https://www.cimicweb.org/cmo/medbasin/Documents/Horn%20of%20Africa/Somalia/20111111%20T%20FGOVERNMENT%20NSSP%2018%20October%202011%20including%20FOREWO_1.pdf

- **Sustainability:** does the policy allow for recurrent, Somali-based funding, training, and growth of the institutions and individuals affected?
- **Accountability:** does the policy provide for oversight of an external (i.e., non-military) civilian authority?

This paper comprises three sections. The first section provides an assessment of Somalia's security threats, the current status of its armed forces and police forces, and its fiscal constraints. Section two analyzes the Provisional Constitution and its founding principles, discusses gaps in its text and potential implementation problems, and comments on application to the security sectors. Section three provides a strategic plan for the short-term to long-term development of Somalia's military and police institutions.

Section I: Security assessment

This section provides an open-source assessment of Somalia's military and police capabilities, and examines the current gaps and challenges facing these institutions.

Threat assessment, security challenges, and general observations

The latest assessment of Somalia's security situation came under the auspices of the Somalia Security Sector Assessment (SSA), published in 2010.¹⁹¹ At the time, the report noted that the chief threat facing the Transitional Federal Government (TFG) was a classic insurgency, propagated by the armed insurgent groups Al-Shabab, its junior partner Hizbul Islam, and other allied militias across Somalia who were attempting to overthrow or derail the transitional government. The conflict was initially conventional, but over time, it evolved into an asymmetric war with the use of terrorism, propaganda, intimidation of the media, violence towards civilians, and suicide bombings. The TFG, in coalition with the African Union Mission in Somalia (AMISOM) and other members of the international community, implemented a counter-insurgency strategy

¹⁹¹ Somalia Security Sector Assessment (SSA) 2010

centered in Mogadishu, Somalia's capital and largest economic hub. During this period, crime and violence were common throughout the city.

The northern regions of Somaliland and Puntland faced their own security challenges and were left (to some extent) to fend for themselves, while the TFG focused the brunt of its attention on the task nearer at hand. Consequently, the Somaliland and Puntland regional governments developed and maintained their own security forces. Somaliland faced human security concerns such as poverty, crime, and food insecurity.¹⁹² In Puntland, similar trends evolved further where the limited economic opportunities incentivized many young men to engage in piracy and kidnapping off the Horn of Africa.

The 2010 SSA report made a number of general observations about the security decline across Somalia. These observations included:¹⁹³

- Rise in asymmetric conflict, terrorism, piracy, kidnapping, and violent crime across Somalia.
- Widespread missing or inadequate infrastructure for government institutions across Somalia, with much of the critical infrastructure at risk from attack or deterioration.
- Inadequate and poorly coordinated support from the international community.
- Erratic and non-transparent bilateral support from coalition partners.
- Little unity of effort within the TFG.
- Large gaps in adequate funding and resources for security sector development.
- Weak political foundations to promote good governance and accountability within the security sectors.
- Dependency on international aid and human capital.

By August 2011 in Mogadishu, the TFG/AMISOM counter-insurgency strategy had pushed Al-Shabab out of the city. By May and June of 2012, Al-Shabab had lost an additional three cities—Elasha Biyaha, Afgoye, and

¹⁹² Somalia Joint Needs Assessment Macro-Economic Policy Framework and Data Development Cluster Report dated August 2006. See also SSA 2010: pages 40-42.

¹⁹³ SSA 2010: page 5.

Bal'ad—forcing them to relocate most of their equipment and personnel to the northeastern quasi-state of Puntland. Once relocated in Puntland, Al-Shabab linked up with the Galgala militia, a clan-based militia who have sworn allegiance to Al-Shabab. These two groups are now deeply embedded in the Golis Mountains of the Sanaag region, dubbed the “Tora Bora” of Somalia.¹⁹⁴ Most recently, in September 2012, Kenyan Defense Forces, AMISOM, and Somali troops launched a new offensive against Al-Shabab in the southern city of Kismayu along the Kenyan/Somali border. New outlets report that Al-Shabab rebels have been eradicated in that region, resulting in their abandoning the last major bastion of the five-year revolt.¹⁹⁵ While this does not spell the end of the Al-Shabab threat, it is a major blow to the organization's capabilities.

With the ouster of Al-Shabab from Mogadishu, many citizens began expressing the widespread perception that the security situation was improving. This public trend coincided with a decline in terrorism and insurgency-related violence following implementation of the TFG/AMISOM strategy undertaken against Al-Shabab. Consequently, civil society organizations and participation are now growing and are now exerting more influence on the direction of sociopolitical development.¹⁹⁶

Nevertheless, significant security challenges remain across Somalia. The primary task of the new Somali President, Hassan Sheikh Mohamud, along with appointing a new Prime Minister and overseeing the creation of a competent government, will be security in Mogadishu and areas newly recovered from Al-Shabab. Security remains fragile, as was evident by an assassination attempt on Mr. Hassan's life two days after election. Al-Shabab militants continue to infiltrate Mogadishu, and vast northern portions of the city remained poorly governed and unsecured. Security around Mogadishu may be the litmus test for President Hassan. Unless President Hassan succeeds in stabilizing the city and improving the lives of its inhabitants, his national stature will be diminished and the legitimacy of the new government and Constitution will be in jeopardy. He must succeed in extending his right to govern over the rest of the country. To do so, his focus must not only be on security but also on generating substantial new development initiatives that clearly demonstrate his ability to improve the living conditions of the Somali people.

¹⁹⁴ “Mogadishu Rising? Conflict and Governance Dynamics in the Somali Capital.” Saferworld: August 2012.

¹⁹⁵ “Somalia's al Shabab Rebels Pull Out of Kismayu Bastion.” Abdi Sheikh and Feisal Omar. *Reuters*: September 29, 2012.

¹⁹⁶ One key sign of the security improvement in has been the average return of up to 15,000 people per month to the capital since January 2012. Other key signs of progress include the transition to a permanent government, increased international aid and support, better international coordination with partners (in particular with AMISOM forces and anti-piracy missions), and improvement in human security conditions across Somalia (primarily better access to food and international humanitarian aid). See UNCHR Somalia. See also Saferworld 2012: page 15.

Within Mogadishu, there is a growing disparity in crime between the northern and southern portions of the city. Southern parts of Mogadishu receive more police presence due to the concentration of government, international organizations, and business interests in the area. Somalia Police Forces and TFG troops have largely concentrated their patrol efforts in the south, leaving the northern parts of the city almost entirely unpatrolled at times. This trend has led many northern city neighborhoods to develop vigilante and militia style security forces as a stand-in for police activities in their neighborhoods. Consequently, rule of law has suffered as citizens have taken law enforcement duties into their own hands.

Criminal violence and violent deaths remain high in Mogadishu and across Somalia. In addition, there are widespread allegations of police torture, illegal arrests, and extortion by law enforcement officers. For example, according to a recent survey undertaken by Saferworld, there are currently some 70 permanent and 30 mobile checkpoints manned by police, army and militia forces in Mogadishu that are being used to not only provide security but also to extort money from public transport service providers and citizens. In another example relating to illegal arrests and police torture, out of 800 households surveyed in late July by Saferworld, 159 reported that at least one member of their household had been illegally arrested in the last 90 days.¹⁹⁷ This decline in the rule of law and the increase in law enforcement corruption is striking, suggesting that security threats in Somalia are not limited to insurgents and asymmetric threats but also to the security forces themselves.

In other regions of Somalia, particularly in Somaliland and Puntland, clan rivalries continue to persist. Ahlu-Sunna Wal-Jama (ASWJ), a militia closely associated with Ethiopia, and former warlords and private businesses are arming themselves to provide security for their personal interests. Public perceptions of clan-based bias among public office holders has also caused many Somalis to criticize the evolution of the Constitution as non-Somali driven, thus decreasing its perceived legitimacy as the law of the land. Such perceptions increase the likelihood of widespread unrest and sectarian violence.

For the international community, Puntland has become a major security concern with the rise of piracy off its coast. Highjacking and kidnapping are on the rise. In 2011, pirate attacks cost the shipping industry between \$5.3-5.5 billion in security and re-routing costs.¹⁹⁸ Kidnapping costs are also on the rise, with the average ransom in 2011 at \$5 million,

¹⁹⁷ Saferworld 2012: page 10.

¹⁹⁸ "The Risk of Chasing Pirates on Land," by Judy Dempsey. *The New York Times*: April 2, 2012.

up from \$4 million in 2010, and the average hostage total up from 1,090 in 2010 to 1,118 in 2011. Twenty-four hostages were killed in 2011. Allegations of elected officials in Puntland with links to piracy is a concerning trend suggesting graft and corruption. Moreover, local police forces in Puntland may be compromised in fighting pirates due to their local indigenous nature: some of the pirates are family or friends within their home communities.

Anti-piracy is now a key mission for international security forces. The European Union launched Operation Atalanta, and NATO deployed Operation Ocean Shield and the Combined Task Force to deter and prevent piracy and robbery of international shipping lanes off the coast of Somalia. The results have been mixed, with piracy on the Horn of Africa a major security concern for the international community and for the Somali government.

In sum, the major contemporary security threats facing Somalia are:

- Insurgency and asymmetric threats propagated by Jihadist extremist groups.
- Armed clan-based militias, sectarian violence, and individual or group vigilantism.
- Crime and violence due to the lack of rule of law.
- Corruption and abuses of power by security forces and law enforcement.
- Piracy off the Horn of Africa.
- Stability and security of critical infrastructure and resources.
- Political legitimacy for the new government.

Despite these emerging and persisting security threats, it is important to emphasize that there is nonetheless a growing sense of improvement in security conditions since 2010. This signifies an inflection point that must be seized upon and amplified by the new Somali government. The opportunities open to it must be immediately leveraged to maintain/strengthen security gains around Mogadishu, to lay the foundations for security expansion in other regions of Somalia, and to deepen the public's trust in the power and legitimacy of the central government.

Assessment of Somalia's armed forces and police forces

The 2009 and 2011 National Security and Stabilization Plans laid out a long-term vision for the size of the Somalia security forces. According to this vision, the TFG wanted to achieve the following personnel totals:

- National Security Forces (including Army, Navy, Air force): 25,000
- National Police Force: 10,000

At the time, these figures were based on estimates of the size and composition of the national security forces necessary to maintain the (then recently accomplished) security gains and to expand security to outlying regions. However, at this juncture, a reassessment of this vision, in line with sustainable standards of affordability and feasibility, is necessary. In short, it is one task to propose a security strategy/force structure that would only be sustainable if the International Community was willing to "foot the bill" for the indefinite future; it is quite another to develop a strategy/structure that pre-supposes the Somalis will eventually be required to maintain their forces at their expense. Before addressing these matters, we must first determine the current status of Somalia's armed forces and police forces.

Somalia national security forces

The current size and status of the National Security Force (Somalia's armed forces at large, including its Army, Navy, and Air Force), is far off the mark from the original goal set in 2009. In this regard, official and semi-official reports put the current number of trained and *untrained* National Security Forces at between 13,000-16,000 troops. Likewise, the 2011 NSSP estimated that Somalia had about 7,000 "well-trained" soldiers (predominantly Army), with an additional 9,000 "untrained" soldiers, rising to a combined total of 16,000 soldiers.¹⁹⁹ However, these estimates appear to be optimistic, as evidenced by the fact that informed Somali news reports estimate the National Security Forces to actually contain between 4,000 to 7,000 well-trained soldiers,²⁰⁰ and off-the-record interviews of Somali military officials, conducted in August 2012, suggest a total force of about 13,000 troops, including both well-trained and untrained soldiers. Thus, the Somali military is both smaller and less trained than planned-for or officially conceded.

¹⁹⁹ NSSP 2011: see Appendix 2.1.

²⁰⁰ "Special Forces in Mogadishu." *Hiiraan Online*: September 7, 2011.

International partners have been critical in the process of training new Somali soldiers as well as providing financial support for the Somali military (including stipends). For example, the EU announced in 2009 that it would train up to 2 battalions (2,000) additional troops outside of Somalia, and maintain up to 150 EU personnel in Bihanga Camp in the Ibanda district of Uganda.²⁰¹

In the meantime, current Somali military mission parameters include counter-insurgency, border security, strengthening the national government, and information operations. In addition, a small 300-person Somalia National Army Special Forces Unit is tasked with protecting relief shipments and distribution centers in Mogadishu, and in aiding anti-crime initiatives.²⁰²

The Army is equipped primarily with older equipment purchased from Italy and Russia. A dated inventory list of historical arms transfers to Somalia is available through the Stockholm International Peace Research Institution.

Beyond recognized Somali National Army troops, there are a number of independent militias loyal to the Mogadishu TFG, but the total number is not verifiable at this time.²⁰³ Currently, there are plans to integrate 1,160 clan militiamen residing in Mogadishu into the National Security Forces. These would be supplementary troops to the totals referenced above.

Somalia air force

Little open-source information is available regarding the current status of the Somali Air Force. Following the civil war, the Air Force was disbanded and, today, there are roughly 200 inactive Air Force personnel stationed around Mogadishu.²⁰⁴ Further, the mission of the Somali Air Force prior to the civil war was primarily troop transport, surveillance, and reconnaissance. This said, most of its equipment was dated, inoperable, or in need of repair. Of this equipment, a review of the historical inventory list shows that the Somali Air Force was made up of troop transport helicopters, fixed wing training aircraft, fixed-wing transport aircraft, and Russian MiG 21 fighter jets. At this juncture, it is unlikely that this equipment or its supporting infrastructure remains operational

²⁰¹ SSA 2010: page 56.

²⁰² “Special Forces in Mogadishu.” *Hiiraan Online*: September 7, 2011.

²⁰³ NSSP 2011: page 47.

²⁰⁴ NSSP 2011: page 48.

and it will take years to organize, train, and equip a “new” Somali Air Force.

Somalia Navy

The Somali National Navy is in a state of disrepair. A Somali Marine Force of up to 5,000 marines is envisioned in the long-term, of which a sizable component would be added from the Puntland Marine Police Force. The short-term vision is a force of about 2,000 marines. (Notably, there is no mention of “sailors” in the Somali Navy force projection plans. All references to personnel revolve around marine’s totals. This suggests a land-based operational bias to the development of the naval forces.)

In reality, our estimates are that the Somali Navy is comprised of around 500 marines.²⁰⁵ Undermanned and underequipped, this small contingent of marines was forced to join the Army in the counter-insurgency fight against Al-Shabab, leaving Puntland, Somaliland, and other Somalia regions to fight their own sea battles.

The Somali Navy has no warships. Instead, it is comprised of a total of 5 boats (fishing boats with heavy machine guns mounted mid-ship), of which only one is currently operational.²⁰⁶ Weapons are scarce and the only piece of operable communication equipment it has appears to be Admiral Farah Omar Ahmed's cell phone. Salaries are around \$60/month, well below costs of living, resulting in high absentee rates.²⁰⁷ Navy mission objectives include controlling illegal fishing, toxic dumping, illegal immigration, and protecting shipping and commerce. Nevertheless, without sufficient manpower and equipment, it is little wonder that few if any of these mission objectives are achieved. The Somali Navy is based in Shangaani, a northern district of Mogadishu. The base, currently in a state of disrepair, serves double duty as a naval base and as a shelter for internally displaced people.

Other states in Somalia, unable to rely on the National Navy, have provided for their own coastal protection. The Puntland Maritime Police Force (PMPF), a component of the Puntland Police Force, is based in Qaw Village. Its mission objectives include fighting piracy, illegal immigration, and illegal fishing. The PMPF is a separate force in addition to the 2,600 man Puntland Police Force. However, accurate PMPF personnel totals and equipment inventories are unavailable and may not be large given naval trends in other parts of the country. The PMPF has planned new base

²⁰⁵ “Puntland, Somaliland Prepare to Fight Pirates.” *Somalia Report*: January 20, 2012.

²⁰⁶ “Somalia Navy: Training Without Boats.” *Somalia Report*: December 10, 2011.

²⁰⁷ “Navy Celebrates 50 Year Anniversary.” *Somalia Report*: February 2, 2012.

construction in Bandar Syada, Puntland, funded by the Puntland administration and Saracen International.

Somaliland maintains a small 300 maritime police force contingent trained to fight pirates and to protect commercial vessels and shipments near Berbera and the surrounding coastline. Its funding comes exclusively from the Somaliland government, which provides salary and equipment expenditures—described as boats, cars, and weapons.²⁰⁸ The Somaliland Navy is deployed to three bases in the Saahil region.

The National, Puntland, and Somaliland navies are poorly equipped and financed, and lack basic coordination and cooperation protocols to combat a number of maritime threats. As a byproduct of the high intensity counter-insurgency strategy, there was a clear trend for the TFG to prioritize Army funding over Navy funding. Consequently, most of TFG and international funding has been diverted towards the land battle with Al-Shabab. Meanwhile, the international community has been calling for greater anti-piracy policing of Somalia's coastal waters, and many international actors have stepped in to support Somalia in this endeavor. Kuwait and the United Arab Emirates, for example, have promised funding for anti-piracy programs that would involve a Coast Guard but not a Navy.²⁰⁹

The perceptions of threats and their sources have been impediments for naval development. For example, an ongoing debate about how best to fight piracy—be it on land or at sea—has constrained the financial options available to the Navy. The funding gap persists given the other priorities for the national government and the international community.

Somalia National Security Agency and intelligence

The National Intelligence Agency is an agency overseen by the Somalia National Security Agency (NSA). A proposed 250 person staff, spread throughout 18 regional intelligence offices, is envisioned. This would correspond to Somalia's 18 regions. Current staffing totals are unavailable in this forum.

Somalia's police forces

²⁰⁸ "Puntland, Somaliland Prepare to Fight Pirates." *Somalia Report*: January 20, 2012.

²⁰⁹ A navy is a military force to guard the maritime region. A coast guard is a police force that guards the shoreline and interfaces with the justice system.

The 2010 SSA and 2011 NSSP envisioned a federal Somalia Police Force of 10,000 officers. To date, *there is no national unified Somalia Police Force (SPF)*. The closest entity to a federal police force is the Mogadishu-based TFG police force. This force appears to be a hybrid local-level Mogadishu police service and a federal level police service, although the distinction of roles and missions is ambiguous. The Mogadishu SPF employs 5,564 police officers, of which 150 are estimated to be female officers.²¹⁰ The SPF is commanded by the Chief of Somali Police, General Sharif Shekuna Mayee.

Mogadishu-based SPF are paid between \$100/month for constables to \$150-200/month for senior-level police officers.²¹¹ The UNDP Somalia Support to Somali Institutions Support Project (SISP) and the Japanese government are providing the funding stipends for SPF salaries and allowances. Current equipment inventories include: 16 Land Cruisers, 2 ambulances, 2 lorries, bullet proof vests and helmets, and AK-47s. New SPF stations are being built in parts of Bay and Bakool recently liberated from insurgents. Existing police stations include Afar Irdood, Bondheere, Daniile Hurwaa, Dhagkenley, Hawlwadaag, Hodan, Kasabelbalaare, Hurwaa, Karaan, Madina (Sandhiga Galbeed), Shangaani, Waberi, and Wardhigley.²¹²

SPF patrols have not expanded far beyond Mogadishu's borders. Consequently, the outlying regions of Somalia developed their own state-level policing forces, the largest of which are in Somaliland and Puntland.

The **Puntland Police Forces (PPF)** reports 2,600 policemen on its payroll, overseen by the Chief of the Puntland State Police, Ali Nur Omar Salah.²¹³ Puntland government funded salaries are brought to the police station(s) for distribution, but there is no reliable data on the pay scale. PPF mission parameters include criminal investigation, protection of civilians, law enforcement, and social interaction. The Puntland Marine Police Force (PMPF) is a supplementary force in addition to and overseen by the PPF. PPF and PMPF equipment lists are largely unknown, with most sources reporting only small arms and light equipment.

The **Somaliland Police Force** is sponsored by the Somaliland government, and overseen by the Chief of Police General Saqadi Dubad. Its mission parameters include criminal investigation, criminal law, law enforcement, patrolling, and traffic management. Operational zones are limited to Hargaisa, Buroa, Erigavo, Sheikh, and Berbera. Exact personnel figures are unavailable in this forum, but open-source estimates

²¹⁰ "The Police of Somalia, Somaliland, Puntland." *Somalia Report*: May 31, 2012.

²¹¹ Ibid. See also SSA 2010: page 66.

²¹² <http://www.police.somaligov.net>

²¹³ "The Police of Somalia, Somaliland, Puntland." *Somalia Report*: May 31, 2012.

appear widely overblown—a problem that occurs often between competing states in Somalia. For example, one source estimated the combined Somaliland Police Force (including the custodial corps, traffic management, patrolmen, and special police squad units) at 50,000.²¹⁴ This is almost certainly hyperbole. Salaries are around \$100/month, with senior level officers earning slightly higher. The Somaliland Police Force also employs two special forces units. The Special Protection Unit (SPU) is tasked with safeguarding foreign expatriates and the offices and guesthouses of international aid agencies. SPU members are paid an additional \$40 on top of regular salary. The Resistant Reaction Unit (RRU) provides emergency response capabilities to fire, first aid, and bomb squad duties. They also function in the capacity of an anti-terror and anti-riot unit, for which they received training from British police officers.

Working mini-states including Galmudug, Himan, and Heeb have their own forces, whose orders are taken from clan leaders instead of the state governments. It is likely that clan-based militias and vigilante-style police forces are also operating in these mini-states, although the status of these forces is unknown.

In general, the separation and legal distinction between police and military forces remains unclear.²¹⁵ During much of the post-civil war insurgency, police were often called up for joint duty with the military. This history suggests the potential for a Gendarmerie style police force to be deployed in the future, as a bridge between the local police system and the national military.

Among emerging law enforcement challenges are allegations of police corruption and abuse, a problem increasingly a threat to the establishment of the rule of law. There is urgent need for the police to regain credibility and to earn the support of the local population. Without local support and trust, effective law enforcement and societal internalization of the rule of law will remain a pipedream.

There are similar problems and challenges cited across police jurisdictions. Material concerns include the following:

- Low-tech equipment including communication equipment
- Lack of diversified vehicles in different categories and for different functions
- Poor training and knowledge of the laws of the land

²¹⁴ “The Police of Somalia, Somaliland, Puntland.” *Somalia Report*: May 31, 2012.

²¹⁵ This may be due to the legacy of the 1973 Police Act under former President Barre.

- Lack of non-lethal public order management equipment
- Weak access to fuel and spare parts for existing vehicles
- Stations and barracks in various states of disrepair
- Intermittent access to electricity at police stations
- Poor command/control and oversight of the police force
- Salaries and stipends below the standard of living

Economic analysis

A key prerequisite for any successful national security strategy is consolidating economic security. The goal of achieving predictable and stable government revenue-flows, as well as well-managed national budgets, are critical pillars of good governance, and if achieved, lay the groundwork for security and socioeconomic development. In order to become a reality, the current and long-term vision projections for Somalia's security forces must first meet two requirements of economic security: affordability and sustainability. Thus, before proceeding further, two questions should be addressed: Can Somalia's government afford the security forces it has now? Can Somalia sustain security sector expansion in the future?

The following section discusses two issues. First, it provides an economic analysis of Somalia's national budget and addresses the issue of affordability. In this regard, the analysis highlights the need to minimize corruption within the security forces. Second, it applies the concept of affordability to a strategic organization of Somalia's military and police forces. Consideration must be given to balancing immediate threats with long-term force structure.

Budget and revenue analysis

The Somalia Audit Investigative Report 2011, issued by the former head of the TFG's Public Finance Management Unit, outlines Somalia's

budgetary restrictions and governmental revenue streams.²¹⁶ This report serves as the data source for current budget and revenue figures, unless otherwise stated. Figures are in U.S. dollars.

Somalia's GDP has grown since the civil war period from a low in 1994 of \$3.3 billion to around \$5.9 billion in 2011. Prior to the civil war, and during the 1984-1990 period, government corruption and mismanagement limited government revenue collection to between 5-7% of GDP. By 2011, under TFG management, total domestic tax revenue was reported at \$23,152,339, equating to 0.5% of GDP collected as government revenue.²¹⁷ Most revenue sources are derived from customs duties at ports, airports, and road tolls.

Total international aid funding for 2011 reached \$34,900,864, down from an estimated \$68,660,000 predicted at the beginning of the year.

Combined domestic and international revenue equaled \$58,053,203, approximately 30% from domestic revenue streams and 70% from international donor streams.

The budget breakdown for the military and police services follows:²¹⁸

		Armed Forces	Police Service
Personnel	Budget	\$12,432,000	\$3,300,000
Expenditures			
Goods and	Services	\$1,686,000	\$990,000
Expenditures			

Combined military and police budgets equaled \$18,402,000 in fiscal year 2011, roughly 32% of the national budget for that year (including domestic and international aid sources).²¹⁹ All armed forces and police force salaries are paid for by funds from international donors; Somalia

²¹⁶

Available

at:

http://www.somaliareport.com/downloads/Audit_Investigative_Report_2011_Consolidatedx.pdf

²¹⁷ Estimate tax revenue at the beginning of 2011 was \$29,909,900, a shortfall of around \$6.8 million.

²¹⁸ Audit Investigative Report 2011: pages 19-22.

²¹⁹ Comparative projections of revenue-to-expenditures is useful. Historical government revenue collection from 1984-1990 was around 5-7% of GDP. Using this revenue intake figure as a hypothetical normative government revenue level, and comparing it to the 2011 security sector expenditures (\$18,402,000), security funding would have equaled roughly 6.2% of the national budget for that hypothetical year. This suggests that increasing sustainable government revenue intake levels would decrease the total share of the defense budget to the national budget.

could only cover goods and services expenditures through nationally derived funding sources.

Cost of living, salaries, and corruption

Somalia's military and police salaries are in the range of \$100/month for low-level personnel, rising to upwards of \$200/month for senior-level personnel. By comparison, African Union soldiers are paid around \$1,200/month. These figures fail to take into account cost of living expectations for Somali soldiers.

The average minimum cost of living, per month, is around \$400.²²⁰ Based on the \$100/month salary, a gap of around \$200-300 per month exists for personnel to try to make up to meet basic costs of living. Anecdotal reports indicate this gap is often made up through corruption, extortion, or outside jobs (which contributes to poor employee productivity and absenteeism).

Payroll corruption/skimming also runs rampant among officials charged with payroll distribution.²²¹ Little oversight and accountability exists for tracking personnel in general, and hours worked in particular. Public human resource records are in shambles, and civilian oversight and accountability for budget misappropriations is virtually non-existent. These problems have caused an enormous crises of legitimacy and have contributed to corruption among senior and lower-level security officers.

Recommendation: Immediately implement biometric data collection and accountable payroll systems. Bring military and police salaries in line with costs of living around \$400. Implement oversight.

Estimated affordability costs for short-term and long-term force vision

The NSSP 2011 and the SSA 2010 reports provided strategic guidance for the expansion of the armed forces to 25,000 and police forces to 10,000. Salary calculations of current status and future force projections help

²²⁰ Source: Somali interviews. For example, the following is a basic breakdown of major costs of living in Somalia. Rent \$100-150; 50kg of sugar \$41; 50kg of rice \$26; 20kg of olive oil \$27; 50kg of flour \$24; incidentals not included; medical costs not included; clothing not included; the total (without other basic daily incidentals such as meat, produce, clothing, medical, education, etc.) is above \$268.

²²¹ "TFG Corruption: An Exclusive Report." *Somalia Report*: February 27, 2012.

determine expected personnel costs of expansion. What is affordable?
Note: these figures do not take equipment purchases into account.²²²

		Salaries at \$100/month	Salaries at \$400/month
16,000-troop (current)	Military	\$19,200,000	\$76,800,000
25,000-troop (envisioned)	Military	\$30,000,000	\$120,000,000
5,564-officer (current)	Police Forces	\$6,676,800	\$26,606,200
10,000-officer (envisioned)	Police Force	\$12,000,000	\$48,000,000

By combining vision cost estimates for a military of 25,000 and a police force of 10,000, combined total expenditures are between \$42,000,000 (for \$100/month salaries) to \$168,000,000 for (\$400/month salaries). As a percentage of 2010 GDP, the former is roughly less than 1% of GDP and the later is around 3% of GDP.²²³

The government of Somalia cannot currently afford the security forces it has on its payroll, nor can it afford to expand military and police forces, regardless of salary ranges. Moreover, if one considers the problem of corruption and the need to bring salary expectations in line with standards of living (from \$100 to \$400), expanding the size of the security forces becomes not only unaffordable but also unsustainable.

Consider which is more useful: a larger security force with poorly trained and ill-equipped soldiers, who contribute to corruption? Or a smaller security force with better training, better equipment, and salary incentives that minimize corruption? For these strategic visions to become reality, the Somali government must urgently improve its revenue collection mechanisms, limit misallocations and mismanagement of public finances, and increase its financial oversight capacity to minimize corruption and graft.

²²² Comparing these estimates to the reported 2011 budget figures reveals that the expected figures do not match actual figures. The gap is likely explained by pay not reaching soldiers, misallocation of funds, absenteeism, corruption, or poor record keeping and data collection.

²²³ One percent of GDP equals roughly \$59,000,000. Total Somali government revenue in 2011, as a perception of national GDP and including foreign aid, was less than 1%.

Section II: Somalia's Provisional Constitution

The June 2012 draft of the Somali Constitution was Provisionally adopted by the National Constituent Assembly (NCA) in July 2012. A new Somali government was established on August 20, 2012, with a mandate to implement and enact the principles enumerated in the Constitution, and to build upon its structure (where needed) through the addition of organic laws.

This section analyzes the Constitution through the lens of national security strategy. How does the Somali form of government affect its military and police services? What are the Constitutional principles directly affecting the security sectors? What does the Constitution imply for the direction of Somalia's security forces in the future? The following section describes and analyzes these Constitutional issues when relevant to the security sectors, with awareness of the distinction between what is stipulated and what is implied by its verbiage. On issues where the Constitution is vague or needs clarification, suggestions are offered.

Notably, there may be a temptation for the new Parliament to open the Constitution to a complete revision. This process should be avoided. Somalia needs to urgently begin rebuilding the country, and to do so it should begin to implement the Constitution that it now has. The rule of thumb should be: first do no harm to the Constitution. It is strongly recommended that political motivations to scrap the Provisional Constitution and start over be avoided. All necessary amendments can be made within the existing document according to the due processes implied by its text.

Structure of the Somali government

Somalia is structured as a "(f)ederal, sovereign, and democratic republic founded on inclusive representation of the people and a multiparty system and social just." (**Article 1**) The boundaries of this political entity extend from the Gulf of Aden to the north, to Djibouti in the northwest, to Ethiopia in the west, to Kenya in the southwest, and to the Indian Ocean in the east. (**Article 7**) All regions within this territorial boundary fall under the jurisdiction of the federal government, and are subject to their protection and limited administration.

Supporting this framework is the state religion of Islam and the predominance of Shari'ah law over Constitutional law. **(Articles 1 & 4)** Somalia's Constitution establishes Islam as the official religion. The government is tasked with enacting laws that conform to Islamic morality and Shari'ah law, and to develop civil liberties statutes that were limited in accordance with Islamic public morals. Policing Shari'ah law has not historically been a smooth transition. Short-term difficulties in establishing rule of law and administering accountable law enforcement can be expected. In this regard, Iraq's democratic transition experience offers a few insights. For example, some members of the Iraqi police forces and the Ministry of the Interior had ties to Islamic fundamentalists, paving the way for some police and law enforcement officials to take legal punishment into their own hands.

According to rule of law principles, there should be clear distinction between policing, law enforcement, and judicial punishment. Police don't punish people; that is the role for the judicial system. In Iraq's early transition stages, however, this was not always the case. In Basra, for instance, police guarding a local park made no attempt to stop an armed group of men from severely beating two women and then killing a male Iraqi friend of theirs, allegedly for violating the Islamic principles of mixing men and women in public.²²⁴ In other instances, the Iraqi government was accused of using or tolerating the police and other groups to carry out sectarian killings and kidnappings of Sunni Iraqis.²²⁵ These reports were confirmed by U.S. Department of State.²²⁶ Consequently, the rule of law and police legitimacy in Iraq deteriorated. Somalia may face similar issues in implementing law enforcement and the judicial system in accordance with Islamic Shari'ah law.

Suggestion: *Legal analysis is needed to fuse the concepts inherent within Shari'ah law to the federal structure. Consider conducting a comparative study of Iraq's experience with Shari'ah law and adapting lessons learned regarding rule of law and law enforcement to Somalia's experience.*

The Somali Constitution also stipulates the separation of powers between various branches of government and between the federal government and those of the states and municipalities. **(Article 3: 3, 4)** There is clear distinction between the structure of government at the federal level and the structure at the state level; both are incorporated within the republic. **(Article 48: 1, 2)**

²²⁴ "Death at 'immoral' picnic in the park." By Catherine Philp. Times Online London: March 23, 2005. <http://www.timesonline.co.uk/tol/news/world/iraq/article434762.ece>

²²⁵ http://www.nytimes.com/2006/03/09/international/middleeast/09abuse.html?ex=1299560400&en=70d26db1515533b6&ei=5090&partner=rssuserland&emc=rss&_r moc.semityn.www

²²⁶ <http://www.state.gov/j/drl/rls/hrrpt/2005/61689.htm>

The number and boundaries of states shall be determined by parliamentary approval, following a national study by an oversight commission. (**Article 49**) To date, Puntland and Galmudug have declared their intention to become states, pending parliamentary review and adoption. Other states including Somaliland, Mareeg state, Bay and Bakool, Jubaland, Xubi iyo Xeeb, and Ex-Banadir have not yet declared their intention to become states, but could do so at a later time.

Suggestion: *Non-declared states contain clan-based militia forces, albeit of limited size, and no formal police or military force. These militias may need to be disbanded and disarmed. Consider formalizing laws regarding the presence of militias, including disbandment and disarmament.*

Implications of a federal system

The relationship between levels of government impacts the distribution of national resources and services. In this regard, **Article 50** outlines key relationships within Somalia's federal system:

(a) Every level of government shall enjoy the confidence and support of the people; (b) power is given to the level of government where it is likely to be most effectively exercised; (c) the existence and sustainability of a relationship of mutual cooperation and support between the governments of the federal member states, and between the government of the federal member states and the federal government, and in the spirit of national unity; (d) every part of the Federal Republic of Somalia shall enjoy similar levels of services and a similar level of support from government; (e) fair distribution of resources; (f) the responsibility of revenue shall be given to the level of government where it is likely to be most effectively exercised; (g) the resolution of disputes through dialogue and reconciliation.

There are several important stipulations and implications of Article 50. First, the granting of police power (or most any power) is given to the unit of government (local, state, or federal) most capable of carrying out that duty (part 50:b). The security implication is that local and state governments could raise and oversee standing police forces within their jurisdictions.

Second, while local and state governments reserve the right to raise police forces, they are also levied with the responsibility for funding these police forces. If funding is unavailable to provide adequate law enforcement, it

is unclear what the role of the federal government will be for ensuring law and order.

Third, the Constitution mandates in part 50:d that all regions of Somalia must receive similar levels of services and similar levels of support from the government. In practice, this will be difficult to implement and could face domestic political challenges. For example, what happens if one state faces a surge in criminal or insurgent activity? Should equal federal police and/or military powers still be distributed to this region? Or should there be a proportionate shift in security resources to the state to deal with the immediate problem? The implication is that the federal government must remain vigilant in how it spreads security resources around the country. The Constitution stipulates equal distribution; practicality may imply unequal distribution.

Fourth, in the case where a local or state government is unable to carry out that responsibility, the powers and resources of the federal government are to be distributed to them in a fair manner (part 50:b and c). It is possible to read this as a proportional distribution of resources, given the language indicating “most effective” and with a “spirit of national unity.” These distinctions will be key for defining the roles, responsibilities, and missions of the military and police forces across Somalia, a discussion requiring further Parliamentary debate and legislation to clarify. As written, parts 50:b-d may conflict and/or leave room for practical interpretation.

In this spirit of unity, **Article 51 (1, 2, 2b)** describes the collaborative relationships between the various levels of government as follows:

- (1) Every government shall strive for a cooperative relationship with other governments, whether at the same level or at another level of government;
- (2) every government shall respect and protect the limits of its powers and the powers of other governments, and shall (b) inform governments of other levels of policies and activities it implements within its boundaries which have an impact on the other areas of other levels.

To some extent, this provision could be relevant to information and intelligence sharing across security sectors. This suggests that local, state, and federal levels of government could integrate their police and military intelligence activities, and share information across different units of security forces. However, legislative guidance would be needed in the future to clarify how information and intelligence is shared, what

information is required to be shared, and who would oversee the information gathering and distribution mechanisms.

Allocation of Federal and State Powers

Not all powers are shared between federal, state, and local levels of government. According to **Article 54**,

The allocation of powers and resources shall be negotiated and agreed upon by the Federal Government and the Federal Member states (pending the formation of Federal Member States), *except* in matters concerning (A) Foreign Affairs; (B) National Defense; (C) Citizenship and Immigration; and (D) Monetary Policy, which shall be the powers and responsibilities of the Federal Government.

This passage makes two important distinctions. First, the Federal Government is responsible for national defense, which includes border security and threats from foreign aggressors. This implies that its mandate is control and funding of the armed forces (army, navy, air force). Second, police powers are not the sole jurisdiction of the federal government; states and local governments also retain power to develop law enforcement services. In addition, there is Constitutional space for negotiating and creating a federal police force as a supplement to local and state police forces.

Suggestion: *Funding a national army is expensive. Most current funding is drawn from the Mogadishu-based economy. Future legislation must address the taxation of financial resources from state and local economies to provide funding for the national military. How will the central government derive revenue from the states to pay for a standing military?*

The role, selection, and responsibilities of the President are discussed in **Articles 87-90**. Selected by both Houses of Parliament in a 2/3rd total majority vote, s/he is elected to be the head of state, a symbol of national unity, and a guardian and promoter of Constitutional principles. His/her powers related to national security are the ability to declare a state of emergency, to serve as the Commander in Chief of the armed forces, to appoint and dismiss Commanders of the Forces at the federal level on the recommendation of the Council of Ministers, and to appoint the Prime Minister. (**Article 90: a, b, c, d**)

The executive powers of the federal government are vested in the Council of Ministers (**Article 97: 1, 2**), which is the highest executive authority of

the Federal Government. The Council is composed of the Prime Minister, deputy prime ministers, and state and deputy-state ministers. They are responsible for formulating government policy and implementing it, preparing the annual budget and finalizing accounts, setting the national development plans, implementing laws, ensuring national security, and protecting state interests. (**Article 99: a, d, e, f**) The Prime Minister, selected by the President, appoints and dismisses members of the Council of Ministers. (**Article 100**)

Notably, the selection of the President and the Prime Minister are linked. The President is elected by the Houses of Parliament. In practice this means the majority party or parties have greater influence in selecting this leader. S/he is, therefore, politically accountable to the legislature. The President is responsible for appointing the Prime Minister. To some extent, this is a redundant bias: the ruling parties in the Houses have significant leverage over the selection of *both* the President and Prime Minister. This is significant in the security context for several reasons.

First, perceptions of clan bias may occur, whereby both the President and the Prime Minister show favorability towards their preferred constituents. Second, the Prime Minister and Council of Ministers are responsible for drafting laws, preparing the national budget, and setting the national development plans. This ensures rapid decision-making, particularly for budget formation, but it may undercut financial accountability without civil society participation. What checks a Presidential-Prime Minister bias from implementing legislation that favors certain constituents? Third, a great deal of power is allocated to the President, Prime Minister, and the Council of Ministers. What checks and balances exist relating to national security strategy and national development? Fourth, Parliament has no powers to affect the national budget, which is formulated by the Council of Ministers under the leadership of the Prime Minister. (**Articles 69 and 99**) Consequently, there is almost no accountability for national budgets and security budgets between the Executive Branch and the Legislative Branch of government. Therefore, the implication is less civilian oversight and accountability of national security policymaking. Fifth, the President is the commander in chief of the armed forces (he directs the armed forces and their administration), but the Prime Minister and the Council of Ministers have the responsibility to “ensure national security” (the execution of the national defense). This overlap of responsibilities may create friction within the Executive Branch.

Suggestion: *Develop civil oversight mechanisms over the national budget and national development plans. Avoid perceptions of overlapping responsibilities and bias between the President, Prime Minister, Council of Ministers, and the House of Parliament on the issues of national security,*

particularly as it relates to security forces expenditures, recruiting and deployment of forces. There should also be better synergy and oversight connecting the Executive Branch of government with the Legislative Branch of government.

Strategic planning and oversight of the police and the military

The National Security Commission (NSC), established under **Article 111H**, provides valuable oversight and monitoring of the legislative and executive branches of government. The NSC is envisioned to act as an independent committee of security experts from “all sectors,” presumably from a combination of public and private sectors. Its mandate is to (**Article 111H: 2a, 2b, 2c**):

- Study and develop an integrated security framework to address the present and future needs of Somalia;
- Present proposals to ensure that human security is prioritized and incorporated into the national security framework; and
- Develop a framework through which the public may provide oversight and monitor security related expenditures.

The NSC must also establish a “Civilian Oversight Sub-Committee comprising of security experts, members of the Federal Parliament, academics, and civil society representatives from all sectors of Somali society. The mandate of the Civilian Oversight Sub-Committee shall be to: present proposals to ensure that human security is prioritized and incorporated into the national security framework, develop a framework through which the public may provide oversight, monitor security related expenditures, and seek redress from abuse by security personnel.” (**Article 11H: 4a, 4b, 4c, 4d**)

The practical authority of the Civilian Oversight Sub-Committee will be a work in progress. In particular, its power to monitor security related expenditures and redress security force abuses will be vital for both ensuring civilian control of the armed forces and limiting corruption.

Suggestion: *Consider strengthening the linkage between the Civilian Oversight Sub-Committee and the judicial sector to improve the ability to indict corrupt officials of the security forces. Linkage with the Anti-Corruption Commission may provide the necessary legal oversight.*

Suggestion: *Ensure a strong link between the Council of Ministers and the National Security Commission (see below), which has the power to provide oversight and monitoring of security related expenditures. Consider strengthening the oversight power of the NSC as a check on the executive branch. Do they have the power to block legislation?*

The priorities to be addressed by the National Security Commission include: piracy, demobilization of militias, policing, and ensuring civilian control of the armed forces. (**Article 111H: 3a, 3b, 3c, 3d**)

Suggestion: *Consider focusing short-term NSC priorities on policing and civilian oversight of the security forces. Both the strength and quality of the police forces, and the accountability of its members, are major security threats to Somalia. It is possible that by taking care of these issues first, that secondary priorities (e.g., piracy and militias) will be easier to address.*

Structure of the security services

The Constitution outlines the general structure of the Somali security forces in **Article 126**:

- (1) The Federal Government shall guarantee peace, sovereignty, and national security of the Federal Republic of Somalia and the safety of its people through its security services, including:
 - (a) The armed forces
 - (b) The intelligence services
 - (c) The police force
 - (d) The prison forces
- (2) The deployment of the security forces shall be determined by law.
- (3) The armed forces of the Federal Republic of Somalia have the mandate to guarantee the sovereignty and independence of the country and to defend its territorial integrity.
- (4) The federal police force has the mandate to protect the lives and property, the peace and security of the citizens and other residents of the Federal Republic of Somalia.
- (5) The police forces established by the laws of the Federal Member States have the mandate to protect lives and property and preserve peace and security locally, alone or in cooperation with the federal police force.
- (6) The armed national security agencies shall be controlled by civilian agencies.

Six implications stand out in the text. First, the Constitution allows for the creation of a government intelligence service. Such an agency was previously vital to the ousting of Al-Shabab from Mogadishu, but its formal structure and mission was not well-defined. What is less clear from the text is the role the “new” intelligence service will play in the absence of a declared war or emergency situation. What will be its future role? How will the intelligence service gather intelligence? What privacy laws will govern its operation? How will information be shared across government levels? How will the intelligence agency integrate with law enforcement? These questions must be addressed at their appropriate time through the legislative process and with oversight/guidance from the National Security Commission.

Suggestion: *Consider language similar to Iraq’s Constitution (Article 9: part D) that says the intelligence services, “shall collect information, assess threats to national security, and advise the Iraqi government. This service shall be under civilian control, shall be subject to legislative oversight, and shall operate in accordance with the law and pursuant to the recognized principles of human rights.” Similar language could be added to Somalia’s Constitution to clarify the role of the intelligence service.*

Second, the mandate of the armed forces is limited to the protection of Somalia’s sovereignty, independence, and territorial integrity. This language loosely defines limits to what, where, and how the armed forces will operate within Somalia. For example, the text implies a limit to the military’s mission: territorial protection; border security; and external threat deterrence. Enemies of the state (such as insurgents) would also be within the armed forces jurisdiction since they are a threat to sovereignty. However, at some point, this definition will reach a limit with ongoing counter-insurgency operations, when the need to shift from a counter-insurgency to a counter-terrorism strategy is handed over to the police forces. There are already indications that new security gains in Mogadishu and southern Somalia may require this transition soon. Consequently, Parliament and the NSC should remain cognizant of this impending transition. MPs should also consider the legal issues of *Posse Comitatus*—the use of the military to enforce the laws of the land.²²⁷ Under what circumstances would the military be asked to enforce

²²⁷ The *Posse Comitatus* Act is the United States federal law (18 U.S.C. § 1385, original at 20 Stat. 152) that was passed on June 18, 1878, after the end of Reconstruction. Its intent (in concert with the Insurrection Act of 1807) was to limit the powers of local governments and law enforcement agencies in using federal military personnel to enforce the laws of the land. Contrary to popular belief, the Act does not prohibit members of the Army from exercising state law enforcement, police, or peace officer powers that maintain “law and order”; it simply requires that any authority to do so must exist with the United States Constitution or Act of Congress. In this way, most use of the Army and the Air Force at the direction of the President does not offend the statute, even though it may be problematic for political reasons. (Source: Wikipedia)

Constitutional laws? How would this action be conducted? What are the legislative guidelines? Should this power be granted only by an act of Parliament?

Third, the explicit composition of the armed forces and police forces are not limited and thus are open to interpretation. This implies the option of creating a supplementary National Guard force organized at the state level responsible for emergency response, reserve military duties, and civil service; a Gendarmerie Police Force at the federal level responsible for counter-terrorism, riots and civil disobedience, and inter-state federal law enforcement; and a Coast Guard tasked with maritime law enforcement duties. These forces are not Constitutionally prohibited in the text. Somalia will need to assess whether these new forces are worthwhile and how to implement them.

Suggestion: *Consider adding at a future point new legislative language written governing the mandates of these new security institutions to ensure that they do not conflict with existing police or military guidelines. These forces and their roles are discussed briefly below:*

- A **National Guard** is a reserve military force under the jurisdiction of the state or territories. These forces can also serve as reserve Army units in times of crisis. National Guard troops do not serve full-time; they are typically civilians with full-time jobs who train for service on a non-regular basis (for example, training one day per month). The appealing application to Somalia is that a National Guard force would 1) bolster domestic emergency response capabilities; 2) allow states more control over their security; 3) provide a reserve military force that could be called for duty by the National Army, but at substantial cost savings; and 4) a politically useful decentralization of security power to the states. The National Guard mission objectives could include emergency response.
- A **Gendarmerie** force is a military force charged with law enforcement duties among civilian populations. They are essentially a far more robust police force capable of heavier kinetic applications, federal law enforcement, inter-state law enforcement, riot control, and counter-terrorism. More stringent recruitment and training regimens typify selection for service. Such a service branch would greatly enhance the law enforcement and counter-terrorism capabilities of Somalia's security forces in the future, particularly as the military hands over security and law enforcement duties to the police services. The 2011 NSSP (pg. 55) recommends developing a counter-terrorism unit within the existing Somali Police Force, but this recommendation is limited in that it does not

provide for a separate legal jurisdiction governing the counter-terrorism force nor does it allow for more robust operations beyond counter-terrorism missions. It may be more effective and useful for Somalia to employ a separate Gendarmerie police force with legal jurisdictions and mission objectives that are capable of straddling state and federal law enforcement protocols.

- A **Coast Guard** is a maritime security and law enforcement agency. It is distinct from a Navy in that it is not a pure military force; its mission is civilian law enforcement. Typical Coast Guard roles include enforcement maritime law, search and rescue, safety of the seas, environmental protection, and border security. Its legal jurisdiction would fall under both state and federal statutes. Somalia's current Navy has contradictory mission parameters by attempting to serve as both a military force and as a law enforcement agency. Delineation of services, with explicit legal jurisdictions and defined mission statements, are strongly recommended. Maritime priority should be given to Coast Guard development, with a jurisdictional mandate falling under the oversight of the Somalia Police Force.

Fourth, Article 126 clearly defines the roles of separate federal and state/local police forces. The federal police force is mandated with upholding national laws and protecting the peace and security of the country at an inter-state level. The non-federal police forces are mandated with protecting their local populations either alone or in cooperation with the federal police force. This hierarchy of police services suggests important legal issues. What are the legal linkages between enforcement of federal and state laws? (Or, for that matter, between the Federal Constitution and various state Constitutions?) Which court has jurisdiction over legal offenses? How far do the jurisdictions of the local police extend? When are local police required to act in cooperation with the federal police? When should the local police call for aid from the federal police? What are the rules governing sharing of information? Which judicial courts should prosecute federal and local crimes? What about military crimes? These issues require further consideration, elaboration, and eventual de-confliction.

Fifth, the Somalia Constitution allows the President to establish a state of emergency and to use special executive powers to address a crisis situation. (**Article 131**) However, Article 126 is unclear about the assignment of police forces to serve in military operations during times of constitutionally declared war or emergencies. It is also unclear about how long states of emergency last, how the Constitution is implemented during times of emergency, and who is responsible for ending the state of

emergency. Legislative guidance should clarify oversight and execution of this issue.

Finally, Article 126 states that the deployment of forces will be determined by law. Currently, “the law” is unclear regarding the distribution of security resources throughout the country. Article 50 requires that national resources be distributed in a manner of fairness, but there is no indication of the practical implementation of this requirement. Parliament should be aware of the highly contentious nature of this issue and how security inequality will be perceived by the public.

Gaps in Somalia’s Provisional Constitution and civil-military relations

The term “civil-military relations” describes the relationship between the public sector and the security institutions. Somalia’s Constitution implies civilian oversight and control of the armed forces and police services. However, there are important issues that need to be addressed during the implementation phase.

First, there is no language explicitly describing the limits of how the military can be used by government to protect the people. This should be rectified. For example, consider emulating Iraq’s Constitution, Article 9: part A, which states that the military, “shall not be used as an instrument to oppress the Iraqi people, shall not interfere in the political affairs, and shall have no role in the transfer of authority.” Similar limitations on the use of the military and on its relationship to domestic politics may be valuable additions to consider for Somalia’s Constitution.

Second, Somalia has a number of existing armed clan-based militias spread throughout the country. These have been important local-level security providers when the TFG had limited security control of the country. However, as the new federal government grows in power and expands the security umbrella to other areas of Somalia, there may be conflict with existing militias. Somalia needs a plan to deal with these militias, either through disbanding them or by integrating them into the national security forces. For example, there is an agreement with Al-Sunna Wal-Jama (ASWJ) to integrate this militia into the Somalia military structure.²²⁸ One key to successfully integrating such militias will be the establishment of effective, unified command and control systems within the National Security Force structure. Another key milestone will be generating widespread support for integration measures among the

²²⁸ See NSSP 2011, page 45.

existing militia forces. Consider adding clarifying language to the Constitution such as “the formation of military militias outside the framework of the armed forces is prohibited,” or “existing militia forces must be disbanded or integrated into the Somalia security forces.” Further review and consideration should be given to the value of the existing Somali militias and whether they can be useful to the security sectors. In addition, lack of language on militia forces may create conflicts with state's rights to fund and deploy their own internal security forces. Without legislative guidance, states may abuse their power to raise security forces and clash with national security forces.

Third, the current Constitution is lacking language discussing the proportional representation of the various regions in the military and police forces. This is particularly relevant to the federal police force, which will be deployed around the country and responsible for federal law enforcement. The goal should be to avoid perceptions of bias, or of an all-powerful, out-of-touch, central government that disrupts local law enforcement. Allow wide berth for local and state governments to raise their own police forces from their communities. The recruitment of troops for the Somalia security forces must be accomplished in a manner that minimizes perceptions of clan bias and control.²²⁹ Military and federal police force recruitment should take into consideration the issue of proportional population draw. Consider adding language such as, “(t)he Somalia armed forces and police services will be comprised of the components of the Somali people with due consideration given to their balance and representation without discrimination or exclusion.”²³⁰

Fourth, Somalia’s Constitution offers little distinction between the civilian justice system and the military justice system. What is the legal difference between civilian and military tribunals? How will these trials be conducted? Consider adding language that regulates the military judiciary, specifies the jurisdiction of military courts, and limits jurisdiction to crimes of a military nature committed by members of the armed forces. It may even be reasonable to do without a military judiciary given the Somali military’s localized mission.

Fifth, it is notable that Somalia has been operating under a state of emergency for some time, and that the Provisional Constitution will be implemented under this framework. This may be a significant hurdle in the short term because the Provisional Constitution was meant to operate during normal times. Amendments may be required to address key issues, including:

²²⁹ The four major clans are the Hawiye, Darod, Digil Mirifle, and Dir. In addition, there are a number of minor clan groups throughout Somalia.

²³⁰ Similar language appears in Iraq’s Constitution, Article 9: part A.

- The prosecution and enactment of emergency laws: what laws are needed immediately during emergency operations that both safeguard the intent of the Provisional Constitution while also expanding upon its written text? When and how should these emergency laws be terminated?
- What civil rights may or may not need to be terminated during this time of emergency? When will these rights be reinstated?
- Does Parliament have jurisdiction to end states of emergency if certain mandatory reporting requirements are not met, or if Parliament wishes to terminate the state of emergency for other reasons?²³¹

Sixth, no Somali Ministry of Defence was created in the Constitution. Ideally, this would be a ministry of government, headed by a civilian (the Minister or Secretary of Defense), who would serve as a political link between the military and civil society. Key roles for the Ministry of Defense would be the oversight and transparency of civil-military relations, and as a liason between Parliament, the Executive, and the military services. If Somalia wants to encourage civilian control of the military, a Ministry of Defense is vital to this effort. Without this key ministry, responsibility for these roles is unclear, but is assumed to reside with the Executive branch and/or the National Security Council.

Seventh, the Constitution is silent regarding the establishment of other publically accountable and transparent security sector operational/administrative civilian oversight mechanisms. This could be rectified through legislation clearly delineating efficient civilian command and control mechanisms over the security forces, as well as establishing robust civilian governance and oversight support systems. Such civilian-led “check and balance” systems could include:

- Robust non-defense cabinet oversight committee(s) designed to work with the Ministry of Defense and enable the executive branch to craft a “whole of executive” approach to security; and
- Robust Parliamentary defence oversight mechanisms, including the establishment of a Parliamentary portfolio committee on defense

²³¹ See U.S. War Powers Act of 1941 for reference. Under this act, Congress has the power to require the Executive to meet certain obligations when declaring emergency war powers and/or deploying the armed forces. The key Congressional oversight authority is from the Necessary and Proper Clause, which states that Congress has the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution. Although Congress rarely checks Presidential power during a time of emergency, this legal basis provides important checks on the Executive branch of government.

with significant administrative capacity and broad security sector oversight authority.

Section III: A new strategic vision for Somalia's security sectors

The preceding analysis outlined the historical visions for the Somali security forces and analyzed the key Constitutional article related to security. This section offers a conceptual framework and timeline for implementing the suggestions of the overall paper. Implementation within Constitutional constraints requires adherence to several principles and a balance of short-term and long-term visions.

Long-term visions sometimes lack consideration for affordability, sustainability, and accountability. What can Somalia afford to do now and in the future with its military and police forces? How does affordability translate to the size, scope, and mission objectives of the armed forces and police? What is sustainable given Somalia's long-term economic trajectory? What is feasible within the context of Somalia's unique situation? How can the government minimize corruption and increase legitimacy of political and security institutions? Goals and objectives are meaningless without the ability to afford these plans and to sustain their development into the future.

Somalia needs military forces capable of carrying on the fight against insurgent forces. The combination of AMISOM and Somalia armed forces appear to be making progress on this front. Does the Somalia military need to expand in size at this time to meet these objectives? Anecdotal evidence suggests that this is not necessarily the case, because recent offensives have been effective in providing new security gains. Consequently, it may be realistic to suggest that Somalia prioritizes other key security sector developments short-term.

Somalia also needs police forces capable of law enforcement, limited counter-terrorism operations, and riot and civil disobedience control. Violations of the rule of law, allegations of corruption, and police abuse are degrading the public's perception of the legal system in Somalia. This must be reversed. Low pay and financial accountability, poor training,

and weak oversight are root causes of these issues. Should the police force be better staffed, better trained, and better paid?

Priorities must be outlined and planned into national development. What security concerns are most pressing? What solutions are affordable and sustainable? What strategies can be implemented in the short term? Where should Somalia's security sector be 10, 20 years from now?

The most pressing security related challenges facing the Somali government are:

- Insurgents and asymmetric warfare: suggests the need for effective counter-terrorism.
- Crime, rule of law, and law enforcement: suggests the need for robust anti-corruption.
- Corruption and abuse of authority: suggests the need for a revision of law enforcement culture, anti-corruption, and training.
- Crisis of Political Legitimacy: suggests the need for President Hassan to prioritize security sector developments that provide direct service improvement to the citizens, rather than unrealistic promises of military projections.
- Fiscal constraints: suggests the need for a realistic national security strategy that upholds the principles of affordability, sustainability, and accountability.

The following strategic plan is based on the preceding security sector assessment and on the analysis of the Constitution. Given the contemporary security situation in Somalia, the plan prioritizes minimizing corruption and enhancing the quality and size of law enforcement in the short-term. The quality of the existing military is also prioritized, but rapid military expansion is deemed a subordinate objective at this time. The recommendations are a conceptualization of how Constitutional organizing principles could be applied to issues of affordability and sustainability in order to organize the development of the military and police services. The strategic outline is meant to serve as a guideline at this time.

Immediate strategy (0-12 months)

Goal: Minimize corruption.

Recommendation: Immediately implement a national biometric data collection center, overseen and organized by the government, than can serve to track federal, state, and local employees information, payroll, and hours worked. This serves five purposes: 1) improves data collection; 2) improves accountability; 3) improves transparency; 4) improves the efficiency of pay; and 5) helps limit corruption.

Corruption and lack of accountability are insidious problems hindering Somalia's transition to a stable and legitimate government. These must be addressed immediately; reforms to the police and the military will fail to produce the legitimacy desired by the Federal government without effective oversight and accountability.

Civil society must be the paramount power during the transition and beyond. The barrier and potential trap for those who are setting policy is that government concerns must be subordinate to and be responsive to civil society concerns. The drafters of Somalia's Constitution, those who have been and are now involved in the transition, must empower civil society and recognize that government and those who serve in government must be constrained.

Goal: Increase standard salaries for the military and police services.

Recommendation: Increase salaries in relation to cost of living adjustments. The current \$100/month salaries are significantly below the level required to support a family. Consequently, police and military personnel are often absent from work, corrupt, or working for the private sector.

Delay military and police service personnel expansion until minimum standards of living adjustments can be made to salaries, and until such a time that government revenue can sustain these forces.

Secure financial commitments from the international community to help pay for security sector expenditures until such a time that the Somali government can increase its revenue collection.

Goal: Secure Mogadishu and expand the security umbrella outside of Mogadishu.

Recommendation: Work to secure the long-term commitment of AMISOM forces. Work to secure an increase in the level of AMISOM troops in Somalia in order to continue security expansion. Work with the international community to develop the capacity for Somali-led anti-piracy missions off of Puntland's coast.

Goal: Establish clear legislative guidelines governing federal and state law enforcement, and military operations.

Recommendation: Develop organic laws that clarify the role of the judicial system and its linkage to the military and police forces.

Develop laws and regulations that emphasize the principles of accountability, human rights, and equality.

Clarify that the military and police are agents who serve and protect the people, rather than as forces that control the Somali public.

Elevate the power and prestige of the central government through good governance and outreach campaigns.

Short term strategy (1-3 years)

Goal: Develop the Mogadishu-based Somalia Police Force.

Recommendations: The Somalia Police Force is centralized in Mogadishu. It is the visual arm of the central government and the one most likely to receive the best training and resources in the short-term. Prioritize the training and equipping of this force.

Establish a national federal police training program in Mogadishu, and implement proportional recruiting tactics across Somalia to pull in the best and brightest recruits for law enforcement. Long term, these recruits could become part of a Gendarmerie force.

Expand Somalia Police Forces in Mogadishu to 8,000 officers with higher pay.

Goal: Professionalize the Police Services.

Recommendation: Implement public relations training for police officers, which are currently poorly trained to deal with the public.

Improve law enforcement education about the laws of the land.

Support development of police culture as transparent and accountable to outside forces. Adhering to internal standards of good governance is not enough to ensure anti-corruption.

Goal: Limit expensive procurement requests.

Recommendation: Avoid large scale and expensive military equipment orders. Somalia does not need F-22s or battleships; it needs trained and equipped ground soldiers with expertise in conducting counter-insurgency operations. The objective is to shift resources to better trained, better equipped, and better motivated personnel.

Goal: Incrementally build the Somalia National Navy.

Recommendation: Develop a plan for equipping a Somali “brown water” Navy. Seek international aid to provide a limited number of watercraft for coastal patrols. Deploy 500 existing Somali marines to bases in Somaliland and Mogadishu; try to avoid short-term basing of marines to Puntland given allegations of corrupt officials.

Somalia-led naval operations are unlikely to net many additional security gains at this point due to weak capabilities. Relinquish maritime anti-piracy responsibilities to the international community for the short term. Once security is firmly established and economic development grows, the root causes of piracy may be eliminated. In the long-term, anti-piracy operations should become the jurisdiction of the Somali Coast Guard.

Goal: Develop a plan for establishing a Somalia Coast Guard with law enforcement applications.

Recommendation: Organize a group of security experts to study the feasibility, affordability, and legality of implementing a Coast Guard with law enforcement, anti-piracy,²³² and environmental missions. Coast Guard forces should adhere to law enforcement roles and leave military maritime missions to the Navy.

²³² Pirates do not fall under the classic insurgency definition. Rather, they are technically criminals that should be addressed by law enforcement. However, a joint Navy and Coast Guard approach will likely be required in the short to medium term to deal with this problem. Naval (military) law enforcement duties may require legislative initiative to clarify the legal basis for these joint operations.

Consider using existing marine forces from Somaliland and Puntland marine forces as initial recruits for the Coast Guard. Begin training Coast Guard officers, and equip these forces with small patrol boats for rapid interdiction of pirates, illegal fishing, maritime border patrol, and environmental protection.

Goal: Improve the National Intelligence Agency

Recommendation: Continue training and equipping this government agency.

Adopt laws governing intelligence operations, including privacy issues and oversight.

Goal: Develop a plan for implementing a National Guard force at the state level.

Recommendation: Organize a group of security experts to study the feasibility, affordability, and legality of implementing a National Guard system with mission objectives for public service, emergency and disaster response and recovery, and reserve military duties. Consider recruiting unemployed youths for part-time service, and offering job/skill training. Funding and oversight coordinated at the state level.

Medium term strategy (3-7 years)

Goal: Expand the Somalia Police Force to 10,000 officers.

Recommendation: In line with budget affordability, security needs, and sustainability, expand recruitment, training, and equipping of the Somali Police Force based in Mogadishu to 10,000.

Police commanders should identify officers for special Gendarmerie training programs.

Goal: Begin transitioning trained SPF officer to a Gendarmerie Police Force service.

Recommendation: In small segments at appropriate intervals, begin to train and deploy Gendarmerie police units around Somalia. Start small, with units of 50-100 Gendarmerie officers deployed to each state or region. Equip officers with heavier weapons, better training, and rapid response vehicles. Mission objectives should be

counter-terrorism, inter-state federal law enforcement, riot control, and rapid emergency response. These units will be brought in for small-scale counter-terrorism operations in the future. Work towards a total gendarmerie force of between 500-1,000. Work to integrate their activities with the National Intelligence Agency.

Gendarmerie Force Model: Italian Carabinieri. The Italian Carabinieri could be engaged for training this force.

Continue to train and recruit Somalia Police Forces for regular duty in Mogadishu.

Goal: Reassess the efficacy of the counter-insurgency strategy against Al-Shabab and Al-Qaeda

Recommendation: Organize a study group and produce an updated security assessment. Adapt security strategy and force projections accordingly.

Goal: Rebalance the national budget as appropriate for the security sectors.

Recommendation: Full audit and reassessment of strategic security sectors. Develop a new financial budget, procurement strategy, and force projection plan accordingly.

Maintain 16,000 troop-level in the Army. Ensure higher pay and better training.

Goal: Equip and train the Somali Air Force.

Recommendation: Expand equipment inventory to cover light transport, surveillance, and reconnaissance missions. Maintain budget restrictions with emphasis on maintenance costs and sustainability.

Limit the personnel size of the Air Force to between 500-1,000. If possible, repair any existing inventory and infrastructure.

Long term strategy (8-10+ years)

Goal: Complete transition of AMISOM and international community forces out of Somalia.

Recommendation: Transition responsibility for security fully to Somalia's armed forces and police.

Goal: Deploy regional/state National Guard forces.

Recommendation: As appropriate, and with consideration for state and local budgets, implement a national guard system. Mission objectives are emergency response, community service, and reserve force status military duties.

Goal: Complete procurement and staffing allocations for the Somali Navy and Coast Guards.

Recommendation: Recruit, train, and equip 3,000-person Navy and fully staff the Coast Guard forces. Evaluate affordability and sustainability for expanding Naval fleet to 5,000 in line with previous NSSP and SSA visions. Long-term integration of the Somalia Navy with regional African navies should guide the selection of new equipment, the training of forces, and the expansion goals of the Somali Navy. It is more realistic to consider a limited Somali Navy with capabilities that interface with African naval forces. Avoid large, expensive naval acquisitions. Focus shorter term on Coast Guard development and a Navy with complementary attributes that can interface with African regional forces on joint missions.

Establish legal jurisdiction for Coast Guard operations, and ensure smooth transition of maritime policing duties from the Navy to the Coast Guard.

Goal: Reassess of size of Somali Army.

Recommendation: Evaluate effectiveness of 16,000 person Somali Army, with an in-depth strategic assessment for possible expansion to 20,000 troops.

Conclusion

This report has sought to outline and analyze the chapters of the Provisional Constitution concerning the justice and security in Somalia. The Provisional Constitution is the culmination of decades of peacebuilding

exercises and years of intensive debates regarding the constitutional document which will outline the future objectives, values and beliefs of the Somali people and will outline the duties of state organs in delivering services to its citizenry. The coming months and years will be crucial in determining whether the Provisional Constitution is to truly provide the bedrock of a period of peacebuilding and development or will remain a mere piece of 'parchment', irrelevant to the daily reality of the government of Somalia and its citizens.

The first part of this report detailed the judicial system currently in place in Somalia today and further outlined the judicial structure envisioned in the Provisional Constitution. The report has drawn on constitutions from around the world and has leveraged experience from IDLO's work in other constitutional design and implementation processes. The Judicial Authority established in the Provisional Constitution, and composition of it, will allow Somalia to develop a strong and effective government. The provisions laid therein ensure judicial independence and the courts, particularly the Constitutional Court, are offered a wide-ranging mandate that will enable them to challenge government actions, and uphold individual fundamental rights. The report attempts to address the function and use of Shari'ah, as outlined in the Provisional Constitution, and offers a number of solutions for Somalia's next steps in its utility in constitutional interpretation and enactment.

The next stages of the constitutional review and implementation process are a vital turning point for Somalia, and the Provisional Constitution establishes a broad roadmap for the process. The report analyzes the process and details legislation which should be implemented in the preliminary phases of Somalia's new constitutional era. Of note, the report re-emphasizes the role of the Constitutional Court in keeping legislators accountable to the Constitution. In addition, the report highlights other priority laws that legislators should focus on to support the peacebuilding process in Somalia.

While Somalia's security situation remains weak, the Provisional Constitution offers a number of options to build up Somalia's security forces to implement and secure the rule of law in Somalia. Reports of corruption and extortion by security officials are common. And the state of security forces is dire, with lack of appropriate equipment, training or funding. This report analyzes the constitutional provisions to scale up security forces, while highlighting areas of oversight in the Provisional Constitution and recommendations for reform. It also provides a three-step program for implementing constitutional provisions on Somalia's security forces. In the immediate term, Somalia's government should make tackling corruption a priority. Police forces should receive salary

adjustments to reduce the incentives of corruption and government should monitor and track salary payments. In the medium to long term government should increase spending on gendarmerie police forces and provide adequate equipment and training. Policy makers and legislators will need to give due regard to these recommendations and make plans considering national budgetary constraints and support of the international community.

APPENDIX

Somalia's Judicial System in the Constitutional Texts Prior to 2012

This section runs through a description of the Somali judicial system prior to the Provisional Constitution. It lays out the constitutional structures in the 1960 constitution, the 2004 Transitional Federal Charter, and the 2010 Consultation Draft Constitution.

Organizational and general provisions relevant to the judiciary

The 1960 Somali Constitution contains a clause common to constitutions in the region at the time, stating that Islam is the religion of the State.²³³ A relatively mild Islamization clause requires laws and other provisions having the force of law to conform both to the Constitution and “to the general principles of Islam.”²³⁴ There is no repugnancy clause as such in this text, while there is a mandate that the “[g]enerally accepted rules of international law” and international treaties concluded by Somalia have the force of law.²³⁵ The 1960 Constitution also mandates that Somali laws comply, insofar as is applicable, with the principles of the Universal Declaration of Human Rights.²³⁶

With time, however, and consistent with developments generally throughout much of the Islamic world, Islamization clauses become stronger with each successive text, culminating in the 2012 text. The Transitional Charter of 2004 declares that Islam is the religion of the State²³⁷ and adds that the Shari’ah shall be “*the* basic source for national legislation.”²³⁸ Nonetheless, the supremacy of the Charter itself was emphasized, requiring the supremacy of the law to be the basis of

²³³ Somalia Const. (1960) art. 1(3)

²³⁴ Somalia Const. (1960) art. 98(1). This article, interestingly, occurs in Title IV of the Constitution, dealing with the judiciary.

²³⁵ Somalia Const. (1960) art. 6(1). One cannot help but wonder if what the drafters meant were the general principles, rather than rules, of international law.

²³⁶ Somalia Const. (1960) art. 7.

²³⁷ Somalia Transitional Federal Charter (2004) art. 8(1)

²³⁸ Somalia Transitional Federal Charter (2004) art. 8(2) (emphasis added).

government activity, all done “in accordance with this Charter.”²³⁹ Any law inconsistent with the Charter is declared null,²⁴⁰ and the judiciary is required to interpret and implement the law in accordance with the Charter and the laws.²⁴¹ Finally, the validity, legality, or procedure of an enactment or promulgation of the Charter is not subject to challenge by or before any court or other state organ.²⁴²

The Charter contains several other nods to civil and international law. It is to be interpreted, for instance, in a manner that promotes national reconciliation, unity, and democratic values as well as the values of good governance and for the advancement of human dignity, integrity, rights, and fundamental freedoms, and the rule of law.²⁴³ Furthermore, it recognizes and requires the enforcement of “all international human rights conventions and treaties” to which Somalia is a party.²⁴⁴ For all matters not covered in the Charter, the 1960 Somalia Constitution and other national laws continue in effect, if they are not inconsistent with the Charter.²⁴⁵

The civil law lost ground to the Shari’ah in the Consultation Draft of 2010. It declares that the Constitution of Somalia is itself based on the foundations laid by the “Holy Quran and Sunna,” promoting the higher objectives (*maqāsid*) of the Shari’ah and social justice.²⁴⁶ It, too, declares Islam the religion of the Somali Republic, but adds a repugnancy clause: “No law which is not compliant with the general principles and with Shari’ah can be enacted.”²⁴⁷ Though the Consultation Draft asserts that it is the supreme law of the land, it seems that it is so only insofar as it is “based on the foundations laid by the Shari’ah.”²⁴⁸

Provisions directly related to the judiciary

Each of the three pre-2012 texts predictably vests the judicial authority in a judiciary,²⁴⁹ guaranteeing its independence from the other authorities.²⁵⁰

²³⁹ Somalia Transitional Federal Charter (2004) art. 3(1) and (2) (stating that the “Charter is the supreme law of the land, binding all authorities and persons”).

²⁴⁰ Somalia Transitional Federal Charter (2004) art. 3(2).

²⁴¹ Somalia Transitional Federal Charter (2004) art. 55(7).

²⁴² Somalia Transitional Federal Charter (2004) art. 3(3).

²⁴³ Somalia Transitional Federal Charter (2004) art. 4(1)(a-c).

²⁴⁴ Somalia Transitional Federal Charter (2004) art. 14(1).

²⁴⁵ Somalia Transitional Federal Charter (2004) art. 71(2).

²⁴⁶ Somalia Consultation Draft Const. (2010) art. 1(1).

²⁴⁷ Somalia Consultation Draft Const. (2010) art. 2.

²⁴⁸ Somalia Consultation Draft Const. (2010) art. 3(1).

²⁴⁹ Somalia Const. (1960) art. 92; Somalia Consultation Draft Const. (2010) art. 113; Somalia Transitional Federal Charter (2004) art. 54(1).

Significantly, the 1960 Constitution prohibits the existence of extraordinary and special courts,²⁵¹ as does the 2004 Charter.²⁵² The 1960 text, however, allows specialized dockets of the ordinary courts with the participation, where necessary, of citizens from outside the judiciary, who act as experts.²⁵³ Both the Constitution and the Charter expressly provide for military tribunals.²⁵⁴ The former distinguishes between war and peace, however, allowing the legislature to set the jurisdiction of military courts in times of war,²⁵⁵ but restricting such jurisdiction in times of peace to military offenses committed by members of the armed forces.²⁵⁶ The 2004 Charter, on the other hand, makes no such distinction, restricting the jurisdiction of military tribunals in all circumstances to military offenses “committed by members of the armed forces.”²⁵⁷ In a similar vein, the 2010 Consultation Draft requires that no court shall be established without conformity to the principles of justice as stipulated in the Constitution;²⁵⁸ however, it too provides for legislation establishing military courts with jurisdiction over military offenses committed by members of the armed forces.²⁵⁹

Under the 1960 Constitution and the 2004 Charter, judicial proceedings are public, though the court may decide for reasons of morals, hygiene, or public order, to hold proceedings *in camera*.²⁶⁰ The 2010 Consultation Draft adds national security, protection of witnesses, juveniles, or rape to the reasons for closing proceedings to the public.²⁶¹ All texts require that courts make no decision unless all parties have had an opportunity of presenting their case.²⁶² Further, they require all judicial decisions to state the grounds therefore.²⁶³ The 1960 Constitution makes the police and armed forces directly available to the judicial organs for the performance of acts pertaining to their functions.²⁶⁴ It also mandates that “[t]he people shall participate “directly in assize proceedings, in the

²⁵⁰ Somalia Const. (1960) art. 93; Somalia Consultation Draft Const. (2010) art. 114(1) (adding that judges are subject only to the law itself); 2004 arts. 55(1) and 55(6) (stating that the judiciary is not subject to the direction of any other organ or body).

²⁵¹ Somalia Const. (1960) art. 95(1)

²⁵² Somalia Transitional Federal Charter (2004) art. 57(1).

²⁵³ Somalia Const. (1960) art. 95(2)

²⁵⁴ Somalia Const. (1960) art. 95(3); Somalia Transitional Federal Charter (2004) art. 57(1).

²⁵⁵ Somalia Const. (1960) art. 95(3)

²⁵⁶ Somalia Const. (1960) art. 95(3)

²⁵⁷ Somalia Transitional Federal Charter (2004) art. 57(1).

²⁵⁸ Somalia Consultation Draft Const. (2010) art. 121(1)

²⁵⁹ Somalia Consultation Draft Const. (2010) art. 121(2)

²⁶⁰ Somalia Const. (1960) art. 97(1); Somalia Transitional Federal Charter (2004) art. 56(1).

²⁶¹ Somalia Consultation Draft Const. (2010) art. 115(1).

²⁶² Somalia Consultation Draft Const. (2010) art. 115(2); Somalia Transitional Federal Charter (2004) art. 56(2); Somalia Const. (1960) art. 97(2).

²⁶³ Somalia Consultation Draft Const. (2010) art. 115(3); Somalia Transitional Federal Charter (2004) art. 56(3); Somalia Const. (1960) art. 97(3).

²⁶⁴ Somalia Const. (1960) art. 97(4)

manner prescribed by law.”²⁶⁵ The 2004 Charter adds that the public, “both civilian and military[,] shall directly participate in judiciary proceedings in conformity with those laws defining such participation.”²⁶⁶

The 1960 text mandates legislation concerning the legal status and the appointment of members of the judiciary.²⁶⁷ Though the Constitution and the subsequent Charter bar judges from holding office, performing services, or engaging in activities incompatible with their judicial functions,²⁶⁸ they also protect them. Under the Constitution, members of the judiciary may not be removed or transferred except in cases specified by law.²⁶⁹ Administrative and disciplinary matters relating to members of judiciary are to be adopted by decree of the President of the Republic on the proposal of the Minister of Religious Affairs and Justice, “having heard the Higher Judicial Council.”²⁷⁰ The Charter expressly forbids the instigation of criminal proceedings against a sitting judge, further disallowing a judge from being interrogated as the object of a criminal investigation.²⁷¹ A sitting judge’s person or domicile may not be searched and he may not be arrested unless caught *in flagrante delicto* or unless the Judicial Service Council authorizes any of these activities against him.²⁷² Similarly, the Consultation Draft specifies that no civil or criminal proceeding may be instituted against a judge in respect to any act performed in the course of his judicial functions.²⁷³ Moreover, the person and homes of judges are inviolate without the authorization of the JSC.²⁷⁴

The 2004 Charter establishes the membership of the JSC as consisting of the president of the Supreme Court, the Attorney General, three judges elected from the Supreme Court, and four lawyers selected from the private law practitioners by the Law Society of Somalia.²⁷⁵ The Council is responsible for the appointment, transfer, conduct, discipline, and remuneration of judges.²⁷⁶ Members of the Council enjoy similar privileges and immunity as that of the judges.²⁷⁷ The term of each member of the Council is four years.²⁷⁸

²⁶⁵ Somalia Const. (1960) art. 95(4)

²⁶⁶ Somalia Transitional Federal Charter (2004) art. 57(2)

²⁶⁷ Somalia Constitution (1960) art. 96(2)

²⁶⁸ Somalia Constitution (1960) art. 96(4); Somalia Transitional Federal Charter (2004) art. 55(4).

²⁶⁹ Somalia Constitution (1960) art. 96(3)

²⁷⁰ Somalia Constitution (1960) art. 96(5). This is the only mention of the Council in the 1960 Somali Constitution, though, as shown below, each of the three subsequent texts elucidate (and rename) this Council in greater detail.

²⁷¹ Somalia Transitional Federal Charter (2004) art. 58.

²⁷² Somalia Transitional Federal Charter (2004) art. 58.

²⁷³ Somalia Consultation Draft Const. (2010) art. 114(2).

²⁷⁴ Somalia Consultation Draft Const. (2010) art. 114(3).

²⁷⁵ Somalia Transitional Federal Charter (2004) art. 63(1)(2).

²⁷⁶ Somalia Transitional Federal Charter (2004) art. 63(4).

²⁷⁷ Somalia Transitional Federal Charter (2004) art. 63(3).

²⁷⁸ Somalia Transitional Federal Charter (2004) art. 63(5).

The 2010 Consultation Draft also establishes a JSC, which is responsible for the administration, appointment, conditions of service, discipline, transfers, conduct, remuneration, and pensions of the judiciary, all to be determined in accordance to law.²⁷⁹ Its membership consists of the chief judge of the Federal Supreme Court, the chief judge of the Constitutional Court, the attorney general, two people nominated by the Law Society for a four-year term, the chair of the Human Rights Commission, one person nominated by the legislature of each regional state, and a person nominated by the president for a four-year term.²⁸⁰ Significantly, the Consultation Draft establishes the JSC a body independent of the executive and legislative branches, one which submits its budget directly to the Ministry of Finance.²⁸¹ The JSC nominates the judges of the Constitutional Courts and the Supreme Court to the House of the Regional States, and upon confirmation, the president appoints the nominees.²⁸² Judges for inferior courts are nominated directly by the JSC "and the president shall appoint the person or persons nominated."²⁸³

Judges are to be appointed by the President "acting in accordance with the advice of the Judicial Service Counsel."²⁸⁴ The appointment of a judge shall be based on legal qualifications and competence.²⁸⁵ To be appointed a judge of the Supreme Court, an individual must have been a judge of the Court of Appeal having unlimited jurisdiction in civil, commercial, and criminal matters or he must have been an advocate of the High Court of Somalia for not less than five (5) years.²⁸⁶

According to the Charter, a judge may only be removed from office for inability to perform the functions of his office, whether arising from infirmity of body or mind or any other cause, or for misbehavior.²⁸⁷ A judge may be removed from office by the president if the question of his removal has been referred to a tribunal appointed by Parliament and the tribunal has recommended removal.²⁸⁸ Administrative and disciplinary measures relating to the members of the judiciary are to be adopted, as provided by law, by decree of the President of the Republic on the proposal of the Minister of Justice and Religious Affairs and in conformity with the decisions of the JSC.²⁸⁹ Parliament is to make a law setting the

²⁷⁹Somalia Consultation Draft Const. (2010) art. 126(1).

²⁸⁰ Somalia Consultation Draft Const. (2010) art. 127(1)(a)-(g.)

²⁸¹ Somalia Consultation Draft Const. (2010) art. 126(2)(3).

²⁸² Somalia Consultation Draft Const. (2010) art. 124(2).

²⁸³ Somalia Consultation Draft Const. (2010) art. 124(3).

²⁸⁴ Somalia Transitional Federal Charter (2004) art. 59(1).

²⁸⁵ Somalia Transitional Federal Charter (2004) art. 59(2)

²⁸⁶ Somalia Transitional Federal Charter (2004) art. 59(3)(i)(ii)

²⁸⁷ Somalia Transitional Federal Charter (2004) art. 55(2)

²⁸⁸ Somalia Transitional Federal Charter (2004) art. 55(3)

²⁸⁹ Somalia Transitional Federal Charter (2004) art. 55(5)

time of service of the appointment, dismissal, discipline, and terms of service of judges.²⁹⁰

The Consultation Draft bars the removal of a judge except for “proven grave misconduct,” or for physical or mental incapacity.²⁹¹ Complaints against a judge for misconduct are to be made to the JSC, which may, if it is satisfied that there are reasonable grounds for proceeding, refer the matter either to the inspectorate of the judiciary,²⁹² or, in more serious cases, the appointment of an independent commission consisting of judges or former judges.²⁹³ If the commission concludes that grave misconduct has occurred, the judge “shall be dismissed.”²⁹⁴ The JSC must use a similar procedure in the case of physical or mental incapacity, except that such a commission must also include relevant medical experts and at least one former judge. In the event that the commission finds the judge unfit, the JSC shall retire the judge with pension and benefits.²⁹⁵

The Consultation Draft actively engages the issue of enforcement of rights. It mandates that laws be enacted with adequate procedures for redress of violations of human rights.²⁹⁶ Redress for such violations must be available in courts “that are readily accessible to the people.”²⁹⁷ A person or organization may file a proceeding in court to protect the rights of others who are unable to do so for themselves.²⁹⁸ The Consultation Draft allows the validity of a declaration of a state of emergency and the procedures involved in making the declaration to be challenged in court.²⁹⁹

The 2010 Draft instructs courts, in interpreting its rights provisions, to “seek to achieve the purpose of the rights and values that underlie them.”³⁰⁰ In doing so, the court may consider the Shari’ah, international law, and decisions of courts in other countries, (the latter being nonbinding).³⁰¹ Further, in interpreting and applying the law generally, every court must consider the relevance of the human rights provisions of the Consultation Draft, and insofar as is possible, to make its decision compatible with such provisions.³⁰² Rights conferred by the Shari’ah,

²⁹⁰ Somalia Transitional Federal Charter (2004) art. 55(8)

²⁹¹ Somalia Consultation Draft Const. (2010) art. 125(2)

²⁹² The inspectorate of judiciary is to be established by law. Somalia Consultation Draft Const. (2010) art. 125(6).

²⁹³ Somalia Consultation Draft Const. (2010) art. 125(3)

²⁹⁴ Somalia Consultation Draft Const. (2010) art. 125(4)

²⁹⁵ Somalia Consultation Draft Const. (2010) art. 125(5)

²⁹⁶ Somalia Consultation Draft Const. (2010) art. 44(1)

²⁹⁷ Somalia Consultation Draft Const. (2010) art. 44(2)

²⁹⁸ Somalia Consultation Draft Const. (2010) art. 44(3)

²⁹⁹ Somalia Consultation Draft Const. (2010) art. 169(7)

³⁰⁰ Somalia Consultation Draft Const. (2010) art. 41(1)

³⁰¹ Somalia Consultation Draft Const. (2010) art. 45(1)

³⁰² Somalia Consultation Draft Const. (2010) art. 45(2)

customary law, or legislation, otherwise consistent with the Shari’ah and the constitution, are also recognized even if not enumerated in therein.³⁰³

The Consultation Draft creates a four-tier system of courts. At the top of the pyramid is the Constitutional Court, followed by the Supreme Court, the Court of Appeal, and a “Unified System of First Instance Courts.”³⁰⁴ It also creates an Office of the Attorney General as a division of the judiciary.³⁰⁵ The JSC nominates a proposed attorney general to the House of the Regional States, and upon approval by the House, the president “shall appoint” the nominee.³⁰⁶ The attorney general may be dismissed only on the same grounds and by the same procedure as a judge.³⁰⁷ The functions of the attorney general include safeguarding the implementation of the laws in the republic and upholding the rule of law, as well as being responsible for public prosecutions.³⁰⁸

The Constitutional Court

The 1960 Somali Constitution creates the Supreme Court as the country’s highest judicial organ, with jurisdiction over the entire territory of the State in civil, criminal, administrative, and accounting matters, and in any other matters specified by the Constitution and by law.³⁰⁹ The Supreme Court, sitting as a constitutional court, has jurisdiction to pass upon the constitutionality of law.³¹⁰ Four additional members (additional to the members of the Supreme Court as otherwise constituted) must be appointed for when the Court sits as a Constitutional Court. The president of the Republic, on the recommendation of the cabinet, appoints two such members and the National Assembly, by an absolute majority, appoints two members, and the four additional members serve a co-terminus three-year term.³¹¹

A question concerning the constitutionality of a law or other provision having the force of law may be raised under the 1960 text by means of a petition of the party concerned or by the office of the Attorney General.³¹² Any court may, on its own motion, raise the constitutionality of such a

³⁰³ Somalia Consultation Draft Const. (2010) art. 45(3)

³⁰⁴ Somalia Consultation Draft Const. (2010) art. 116

³⁰⁵ Somalia Consultation Draft Const. (2010) art. 128(1)

³⁰⁶ Somalia Consultation Draft Const. (2010) art. 128(2)

³⁰⁷ Somalia Consultation Draft Const. (2010) art. 128(3)

³⁰⁸ Somalia Consultation Draft Const. (2010) art. 128(4)(5)

³⁰⁹ Somalia Const. (1960) art. 94(1)

³¹⁰ Somalia Const. (1960) art. 99(1)

³¹¹ Somalia Const. (1960) art. 99(1). See also *id.* art. 5(2) (stating that administrative acts and legislation contrary to the Constitution may be invalidated on the initiative of the interested party in accordance with the provisions of the Constitution).

³¹² *Id.*

provision, where its decision depends in whole or in part on the application of the law or provision being challenged.³¹³ Where a court finds that a petition respecting the constitutionality of a law is not “manifestly unfounded,” the court must suspend its judgment and refer the matter to the Supreme Court for a definitive ruling.³¹⁴ This same procedure may be employed even in the Supreme Court itself.³¹⁵

The 2004 Charter establishes a Transitional Supreme Court,³¹⁶ which has “unlimited original jurisdiction in the whole territory in civil, criminal, commercial and such other powers as may be conferred on it by this Charter.”³¹⁷ In addition, the Supreme Court has jurisdiction to sit as a constitutional court, in that it is authorized “to hear and determine judgment on any dispute about the Transitional Federal Charter and other laws.”³¹⁸ Any person may bring an action in the Supreme Court seeking review of any law for its consistency with the Charter, and the Supreme Court must determine such applications on a priority basis.³¹⁹ Judges of the Supreme Court “shall have the security of tenure while in office.”³²⁰ The president of the Republic appoints the president of the Supreme Court and other judicial officers on the proposal of the JSC.³²¹

The Consultation Draft establishes a Constitutional Court consisting of at least five justices.³²² Members of the Constitutional Court must have appropriate qualifications in law and Shari’ah and a particular competence in Constitutional law.³²³ The Constitutional Court has the following jurisdiction:

- a) to scrutinize draft legislation upon request to determine compatibility with the constitution;
- b) to make the final decision whether legislation or decisions of the executive are to be struck down for incompatibility with the constitution;
- c) the exclusive power to decide disputes between regional and central government and between regional governments, though this power shall be exercised only after attempts “pursued with reasonable diligence to

³¹³ Somalia Const. (1960) art. 98(2)

³¹⁴ Somalia Const. (1960) art. 98(3)

³¹⁵ Somalia Const. (1960) art. 98(4)

³¹⁶ Somalia Transitional Federal Charter (2004) art. 60

³¹⁷ Somalia Transitional Federal Charter (2004) art. 61(1)

³¹⁸ Somalia Transitional Federal Charter (2004) art. 61(2)

³¹⁹ Somalia Transitional Federal Charter (2004) art. 4(2)(3)

³²⁰ Somalia Transitional Federal Charter (2004) art. 61(4)

³²¹ Somalia Transitional Federal Charter (2004) art. 44(1)(d)

³²² Somalia Consultation Draft Const. (2010) art. 117(1)

³²³ Somalia Consultation Draft Const. (2010) art. 117(3)

resolve the dispute by mediation has been unsuccessful;”
and

- d) the exclusive power to ratify the result of national elections or referendum.³²⁴

Where the Constitutional Court holds legislation to be unconstitutional, it has the discretion to determine when the invalidity of the subject legislation is to begin, whether *ab initio*, or at a point subsequent, except that in the case of a criminal statute, the invalidity must be *ab initio*.³²⁵ Decisions of the Constitutional Court in matters relating to the constitution are final.³²⁶

A number of officials, as well as private individuals, have standing to bring a case before the Constitutional Court. These include: The president; the prime minister [assuming a parliamentary system]; the attorney general; any twenty-five members of either house of parliament; the government of any regional state; any independent commission; and any individual affected by a law or action allegedly in contravention to the constitution.³²⁷ Any of the preceding individuals or entities, except for private individuals, may institute litigation to seek an advisory opinion in the Constitutional Court.³²⁸ In addition, any court may refer matters which have come before it to the Constitutional Court for an opinion on a Constitutional matter.³²⁹ A court “shall do so [i.e., make the referral]” where a party to a case makes a request, assuming the court is satisfied that the resolution of the Constitutional issue is central to the case.³³⁰ The power to invalidate legislation as inconsistent with the constitution is not exclusive to the Constitutional Court.³³¹ Certain officials may also refer draft legislation passed by Parliament to the Constitutional Court for a ruling on the constitutionality of the substance of the draft law or of the procedures used to adopt it.³³²

Other courts

³²⁴ Somalia Consultation Draft Const. (2010) art. 117(4)(a), (b), (d), and (e)

³²⁵ Somalia Consultation Draft Const. (2010) art. 117(4)(c)

³²⁶ Somalia Consultation Draft Const. (2010) art. 117(5)

³²⁷ Somalia Consultation Draft Const. (2010) art. 118(1)(a)-(g)

³²⁸ Somalia Consultation Draft Const. (2010) art. 118(2)

³²⁹ Somalia Consultation Draft Const. (2010) art. 119

³³⁰ Somalia Consultation Draft Const. (2010) art. 119

³³¹ Somalia Consultation Draft Const. (2010) art. 3(2) (“In accordance with Chapter 10 of the Constitution [dealing with the judiciary], a court may invalidate any law, or administrative action, that is contrary to the Constitution.”) (Emphasis added).

³³² Somalia Consultation Draft Const. (2010) art. 88(4). The officials are the president, any ten members of the House of the People, any one or more delegations of the members of the House of the Regional States, or the cabinet. *Id.*

Under the 1960 Constitution, in cases of impeachment of the president and members of the government, the Supreme Court acts as a High Court of Justice.³³³ In this capacity, trials are conducted with six additional members. These individuals are drawn by lot by the president of the Court at a public hearing from a special list of twelve citizens otherwise qualified as election for Deputies in the National Assembly.³³⁴ These twelve citizens are to be elected by the Assembly at the beginning of each term from among persons who are not actual members of the Assembly.³³⁵ The Supreme Court also has jurisdiction over petitions challenging the qualifications of deputies of the National Parliament.³³⁶

The 1960 Constitution also guaranteed every person the right to institute legal proceedings under conditions of full equality before a lawfully constituted court.³³⁷ Judicial protections against acts of public administration are allowed in all cases.³³⁸ The right to obtain compensation from the state or other public bodies for suffering damages from acts or omissions in violation of an individual's rights by officials of the state is guaranteed.³³⁹ The penal, civil, and administrative liabilities of officials and government employees for acts or omissions regarding same are to be regulated by law.³⁴⁰ The 2004 Charter contains an identical provision.³⁴¹

The 1960 Constitution does not expressly establish any tribunal other than the Supreme Court. Rather, it is left the establishment of inferior courts to legislation.³⁴² Under the Transitional Federal Charter of 2004, on the other hand, the Somali court system is defined as the Transitional Supreme Court, the Transitional Appeal Court, and other courts established by law.³⁴³ Like the Constitution before it, the Charter guarantees that every person has the right to institute legal proceedings in a competent court.³⁴⁴

The 2010 Consultation Draft, aside from establishing the Constitutional Court, also establishes the Supreme Court, essentially a court of cassation. The nine judges of the Supreme Court³⁴⁵ are required to have

³³³ Somalia Const. (1960) art. 101(2)

³³⁴ Somalia Const. (1960) art. 102

³³⁵ Somalia Const. (1960) art. 102

³³⁶ Somalia Const. (1960) art. 59(1)

³³⁷ Somalia Const. (1960) art. 38

³³⁸ Somalia Const. (1960) art. 39

³³⁹ Somalia Const. (1960) art. 40(1)

³⁴⁰ Somalia Const. (1960) art. 40(2)

³⁴¹ Somalia Transitional Federal Charter (2004) art. 17(5)

³⁴² Somalia Const. (1960) art. 94(2).

³⁴³ Somalia Transitional Federal Charter (2004) art. 60

³⁴⁴ Somalia Transitional Federal Charter (2004) art. 17(1)

³⁴⁵ Somalia Consultation Draft Const. (2010) art. 120(1)

“appropriate qualifications in Shari’ah and law.”³⁴⁶ The Supreme Court has jurisdiction over all issues except matters which are within the exclusive jurisdiction of the Constitutional Court.³⁴⁷ In addition to the Supreme Court, the Consultation Draft provides for a Court of Appeal and Courts of First Instance, which are to be defined by a Judicial Organization Law.³⁴⁸ Significantly the Consultation Draft allows courts to recognize the decisions of customary dispute resolute mechanisms, subject to limitations to be set out by legislation as to the scope of such recognition.³⁴⁹

Rights provisions implicating the judiciary

Constitutional provisions regarding extradition have been remarkably consistent over the three pre-2012 constitutional documents. According to the 1960 Constitution, extradition may only be granted in the case and in the manner prescribed by law, and in any event, only pursuant to a *priori* international convention.³⁵⁰ The 2004 Charter also bars extradition except where a treaty exists between Somalia and a requesting country.³⁵¹ Similarly, the 2010 Consultation Draft states that extradition of an accused is only allowed in cases of an international treaty and subject to law.³⁵² Only the 1960 text, however, contains a prohibition on extraditions for political offenses.³⁵³

The 1960 Constitutions asserts the equality of rights and duties before the law of Somali citizens without distinction of race, national origin, birth, language, religion, sex, economic or social status, or opinion.³⁵⁴ The 2004 Charter is actually more restrictive in its declaration of equality, as it proscribes discrimination only on the basis of race, birth, language, religion, sex, or political affiliation.³⁵⁵ The Consultation draft is more all-encompassing. It proclaims equality before the law,³⁵⁶ barring discrimination against any person on any grounds, including but not limited to “race, color, clan, ethnic or social origin, culture, dialect or language, sex, birth, disability, religion, political or other opinion,

³⁴⁶ Somalia Consultation Draft Const. (2010) art. 120(3)

³⁴⁷ Somalia Consultation Draft Const. (2010) art. 120(4)

³⁴⁸ Somalia Consultation Draft Const. (2010) art. 122

³⁴⁹ Somalia Consultation Draft Const. (2010) art. 123

³⁵⁰ Somalia Const. (1960) art. 19(1)

³⁵¹ Somalia Transitional Federal Charter (2004) art. 23(1)

³⁵² Somalia Consultation Draft Const. (2010) art. 41(1)

³⁵³ Somalia Const. (1960) art. 19(2)

³⁵⁴ Somalia Const. (1960) art. 3

³⁵⁵ Somalia Transitional Federal Charter (2004) art. 15(1). Taking political affiliation to be a species of opinion, the Charter fails to protect for economic and social status and national origin.

³⁵⁶ Somalia Consultation Draft Const. (2010) art. 17(1)

occupation and property.”³⁵⁷ Measures designed to achieve full equality for individuals or groups who have suffered discrimination or disadvantage are not to be treated as discriminatory.³⁵⁸

The 1960 Constitution specifically allows for the death penalty, but “only for the most serious crimes against human life or the personality of the State.”³⁵⁹ Every person is otherwise guaranteed the right to life and to personal integrity, and arbitrary limitations to such rights are prohibited.³⁶⁰ The 2004 Charter, by contrast, declares that “everyone shall have the right to life and no person shall be deprived of his/her life.”³⁶¹ The absolutist terms of the declaration establish that the death penalty is not available in Somalia for crimes committed before or during the period in which the 2004 Charter was in effect.³⁶²

The 1960 Constitution bars personal restriction or detention except when an individual is apprehended in *flagrante delicto* or pursuant to an act of the competent judicial authority.³⁶³ An order of a competent judicial authority effecting arrest is required to state the grounds therefore.³⁶⁴ In case of urgent necessity, as expressly defined by law, the executive authority is allowed to adopt provisional measures which are to be communicated “without delay” to the competent judicial authority, and confirmed by it within the time and in the manner prescribed by law.³⁶⁵ In case of detention or other restriction of personal liberty, the reasons for such measures are to be communicated to the detainee without delay.³⁶⁶ No person is subject to security measures except in the case and in the manner prescribed by law.³⁶⁷

Physical and moral violence against a person is prohibited.³⁶⁸ No personal service or property levy may be imposed except in accordance to law.³⁶⁹ The inviolability of a person’s domicile is guaranteed.³⁷⁰ Inspection or

³⁵⁷ Somalia Consultation Draft Const. (2010) art. 17(2)

³⁵⁸ Somalia Consultation Draft Const. (2010) art. 17(4)

³⁵⁹ Somalia Const. (1960) art. 16(3)

³⁶⁰ Somalia Const. (1960) art. 16(1) and (2)

³⁶¹ Somalia Transitional Federal Charter (2004) art. 16(1)

³⁶² See International Covenant on Civil and Political Rights art. 15(1) (“Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.”). Somalia acceded to the ICCPR on 24 January 1990. See United Nations Treaty Collection website at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed Sept. 16, 2012).

³⁶³ Somalia Const. (1960) art. 17(3)

³⁶⁴ Somalia Const. (1960) art. 17(3)

³⁶⁵ Somalia Const. (1960) art. 17(4)

³⁶⁶ Somalia Const. (1960) art. 17(5)

³⁶⁷ Somalia Const. (1960) art. 17(6)

³⁶⁸ Somalia Const. (1960) art. 18

³⁶⁹ Somalia Const. (1960) art. 20

³⁷⁰ Somalia Const. (1960) art. 21(1)

search or seizure may only be carried out pursuant to the Constitution or in other cases prescribed by law for judicial purposes.³⁷¹

The 1960 Constitution also contains a standard (for the time) list of rights of the accused. It protects the right of defense at every stage of legal proceedings, along with a right to free legal aid to the poor.³⁷² There is a non-retroactivity provision for penal laws.³⁷³ Penal liability is personal and collective punishment forbidden.³⁷⁴ The accused is presumed innocent until a conviction has become final.³⁷⁵ The Constitution contains a prohibition of treatment contrary to “feelings of humanity” in the case of restrictions on personal liberty, and such punishment may not “obstruct the moral rehabilitation of the convicted person.”³⁷⁶ Supervision over the enforcement of punishment and security measures must be overseen by a competent court.³⁷⁷ There is also a provision requiring laws for the conditions and procedures necessary for the redress of judicial errors.³⁷⁸

The Transitional Federal Charter expands these rights. It confirms that those charged with a criminal offense are entitled to a presumption of innocence until proven guilty in a competent court of law; they are entitled to being informed as reasonably as practicable in a language they understand and in detail of the nature of the offense with which they are charged; and they shall be given adequate time and facilities for the preparation of a defense at any stage of the legal proceedings.³⁷⁹ Every person detained imprisoned or restricted is permitted the right to defend himself in person or to communicate with his relatives or a lawyer of his or her own choice as s/he requires.³⁸⁰ There is a guarantee of free legal services for the indigent.³⁸¹

The Charter also mandates that no person be subjected to inspection, personal search of his or her property or house without the permission of a competent judicial authority.³⁸² Physical and moral violence is prohibited and is to be punished as a crime.³⁸³ No person is liable to any form of detention in prison or other restrictions of personal liberty except

³⁷¹ Somalia Const. (1960) art. 21(2)

³⁷² Somalia Const. (1960) art. 41(1)(2)

³⁷³ Somalia Const. (1960) art. 42

³⁷⁴ Somalia Const. (1960) art. 43(1)

³⁷⁵ Somalia Const. (1960) art. 43(2)

³⁷⁶ Somalia Const. (1960) art. 44

³⁷⁷ Somalia Const. (1960) art. 45

³⁷⁸ Somalia Const. (1960) art. 46

³⁷⁹ Somalia Transitional Federal Charter (2004) art. 17(2)(a-c)

³⁸⁰ Somalia Transitional Federal Charter (2004) art. 17(3)

³⁸¹ Somalia Transitional Federal Charter (2004) art. 17(4)

³⁸² Somalia Transitional Federal Charter (2004) art. 16(3). The translation states that the competent judicial authority is one “related to health and tax.” One presumes that cannot be a correct translation.

³⁸³ Somalia Transitional Federal Charter (2004) art. 16(4)

in case of being found *in flagrante delicto* or pursuant to an order of a competent judicial authority.³⁸⁴ Any person who is arrested must have access to a competent judicial authority within forty-eight hours of that arrest.³⁸⁵

The 2010 Consultation Draft expands these rights yet further. It protects against the invasion of a person's home and privacy.³⁸⁶ It also protects against unlawful search, and protects property from interference, invasion, or unlawful search or seizure.³⁸⁷ There is a comprehensive list of the rights of those who are arrested, detained, and accused. First, a person may not be compelled to incriminate himself.³⁸⁸ Those arrested have the right to be brought before a court within no more than forty-eight hours after arrest.³⁸⁹ An individual arrested or detained has a right to be informed "promptly" of the reason of the arrest in a language which the individual understands.³⁹⁰ Those arrested or detained have the right to choose and to consult with "a legal practitioner."³⁹¹

There is a provision requiring a fair trial, which includes: the right to be presumed innocent until proven guilty; the right not to be convicted on the basis of a forced confession; the right to be represented by a lawyer chosen by the accused; the right to be present at trial; the right to challenge the evidence presented; and the right to an interpreter.³⁹² Criminal liability is personal, and a person can only be convicted of an offense if the act was a crime at the time that it was committed, "unless it is a crime against humanity under international law."³⁹³ The right to lawful, reasonable, and procedurally fair administrative action is enshrined.³⁹⁴ A right to a fair and public hearing within a reasonable time by an independent and impartial court is also affirmed with respect to any issue respecting civil rights and obligations or any criminal charge.³⁹⁵

The Consultation Draft also identifies the child entangled in the judicial system as needing particular attention. The child is defined as anyone under the age of 18.³⁹⁶ A child may only be detained as a last resort, then only for as short a time as possible, and he must be kept

³⁸⁴ Somalia Transitional Federal Charter (2004) art. 16(5)

³⁸⁵ Somalia Transitional Federal Charter (2004) art. 16(6)

³⁸⁶ Somalia Consultation Draft Const. (2010) art. 24(1)

³⁸⁷ Somalia Consultation Draft Const. (2010) art. 24(2)

³⁸⁸ Somalia Consultation Draft Const. (2010) art. 40(1)

³⁸⁹ Somalia Consultation Draft Const. (2010) art. 40(2)

³⁹⁰ Somalia Consultation Draft Const. (2010) art. 40(3)

³⁹¹ Somalia Consultation Draft Const. (2010) art. 40(4)

³⁹² 2010 Somalia Consultation Draft Const. (2010) art. 40(6)(a-f)

³⁹³ Somalia Consultation Draft Const. (2010) art. 40(g-h)

³⁹⁴ Somalia Consultation Draft Const. (2010) art. 38

³⁹⁵ Somalia Consultation Draft Const. (2010) art. 39(1)(2)

³⁹⁶ Somalia Consultation Draft Const. (2010) art. 34(8)

separate from adults other than the child's immediate family.³⁹⁷ These provisions represent a significant advance over prior constitutional texts.

³⁹⁷ Somalia Consultation Draft Const. (2010) art. 34(4)