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HUMAN RIGHTS WATCH

THE COURTS OF "ABSOLUTE POWER"

Fair Trial Violations by Somalia's Military Court

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Fair Trial Violations by Somalia's Military Court

Summary

> These military tribunal guys think they have absolute power, and you can't talk to them, you can't ask them anything, and they don't respect the human rights of people.
> —Defense lawyer, telephone interview, October 2013

Since 2011 the government of Somalia has relied heavily on the military court of the armed forces to try a broad range of crimes and defendants. The court has brought to trial, in addition to members of the armed forces, alleged members of the main Islamist armed group Al-Shabaab, police and intelligence agents, and ordinary civilians. Hundreds of defendants have been tried in the capital, Mogadishu, and in other towns in Somalia's south-central region that are nominally under the government's authority. The military court has filled a vacuum left by barely functioning civilian trial courts, operated without judicial review from the Supreme Court, and conducted proceedings that fall far short of international fair trial standards.

The military court, consisting of serving military officers, does not meet the fundamental requirement under international law of being a competent, independent, and impartial court. Trials have violated the basic fair trial rights of defendants to obtain counsel of their choice, prepare and present a defense, receive a public hearing, not incriminate themselves, and appeal a conviction to a higher court. More than a dozen of those convicted over the last year have been sentenced to death and executed, magnifying the harm to basic rights.

This report is based on over 30 interviews conducted in Somalia and Kenya between April 2013 and March 2014 with defendants and defendants' relatives, as well as military court officials, lawyers, and legal experts. It documents a range of human rights violations that require urgent attention by the Somali government and its international donor partners as part of the broader justice reform effort in Somalia.

While Somalia's criminal justice sector has received some attention from international donors, the military court has yet to receive significant attention or scrutiny. Given the

military court's broad powers, particularly its assertion of jurisdiction over civilians in violation of international human rights law, significant changes are urgently needed to ensure that all criminal defendants receive a fair trial.

In August 2011, following intensive fighting in Mogadishu and the withdrawal of Al-Shabaab from the city's center, then-President Sheikh Sharif Sheikh Ahmed of the former Transitional Federal Government (TFG), declared a state of emergency in areas of Mogadishu recently vacated by Al-Shabaab. The emergency decree granted the military court jurisdiction over all crimes committed in areas under the state of emergency—giving the military court jurisdiction over civilians by default. Although the state of emergency expired after three months, the military court since then has continued to try a range of defendants beyond that envisioned under the Code of Military Criminal Procedure.

Somali authorities and military court officials have defended the jurisdictional breadth and in particular the trial of all Al-Shabaab-related cases on the grounds that the ordinary courts are unprotected, vulnerable to attacks, and that the country faces pressing security needs. The military court has also tried cases traditionally difficult for civilian courts, such as prosecuting members of the police and intelligence agencies. But while security and other concerns facing the civilian courts and its officials are genuine, they cannot justify the violation of defendants' rights to a fair trial.

Many of those brought before the military court have been arrested during mass security sweeps by Somalia's intelligence agency, the National Intelligence and Security Agency (NISA). On occasion NISA detains people for prolonged periods without judicial review. It is unclear whether NISA has a legal mandate to carry out law enforcement activities.

Since 2011, military court judges have made efforts to ensure that defendants are provided access to legal counsel, including in more remote areas where the court operates on a mobile court basis. However, as was evident during several days of mass trials in the city of Baidoa in July 2013, defendants only had fleeting access to a lawyer who was representing dozens of defendants and not in a position to provide any of them an adequate defense. The impact of a supreme military court, established in late 2012, remains unclear.

Human rights violations by the military court require attention of both the Somali government and its international partners who have committed to supporting the rebuilding of the country's justice system. In late 2012, shortly after taking office, President Hassan Sheikh Mohamud made justice reform a priority. The international community has responded by placing justice on its agenda, including in the New Deal compact, which seeks to establish a development framework that will govern assistance to Somalia over the next three years.

Improving Somalia's justice system will take time, but significant steps can be taken now. President Mohamud should direct the Ministry of Justice, with Ministry of Defense support, to transfer cases involving civilian defendants from the military to the ordinary courts, and parliament should enact legislation clarifying that. The president should impose a moratorium on the death penalty until it can be abolished. And, consistent with Somalia's provisional constitution, parliament should enact a law ensuring that military personnel who are implicated in abuses against civilians are tried in ordinary courts. It should also enact laws that will help protect the rights of defendants before all jurisdictions, notably a legal aid law and a rights-respecting national security law. These measures will need to go hand-in-hand with donor-supported efforts to bolster the capacity, accountability, and security of the ordinary courts. Appropriate training for all judges, prosecutors, and defense lawyers should be expanded, and ensuring free legal assistance for the indigent should be a priority.

Somalia's rebuilding will be a long and arduous task. A well-functioning criminal justice system is essential for ensuring that this process will benefit the human rights of all Somalis. Decisions made now are likely to have an impact for a long time to come.

Recommendations

To the President

- Transfer existing cases of civilians being tried in military courts to the civilian criminal justice system;
- Direct the military attorney general to transfer future cases of civilians under military court jurisdiction to the attorney general for civilian court prosecution;
- Immediately commute pending death penalty sentences as a first step towards placing a moratorium on all death sentences; urge the parliament to ban all use of the death penalty;
- Proactively support legislative reforms regarding legal aid and role of security agencies, outlined below.

To the Somali Parliament

- Promptly enact legislation that would provide supreme court appellate review of military court decisions and would specifically prohibit the trial of civilians in military courts;
- Consistent with the Somali provisional constitution, enact legislation to ensure that human rights abuses alleged to have been committed by members of the armed forces against civilians are brought before a civilian court;
- Enact a legal aid law, as stipulated in the provisional constitution, to establish a legal aid system that provides free legal assistance to defendants if they cannot afford a lawyer and helps to ensure that legal assistance is available throughout the country;
- Enact a rights-respecting national security law, as stipulated in the provisional constitution, that defines the different roles of national security agencies and clarifies that the National Intelligence and Security Agency has no powers to arrest and detain;
- Consider enacting legislation to restrict the military court to trying offenses by members of the armed forces only of a military nature.

To the Chief Justice

- Take all necessary measures to ensure that the judiciary is capable of conducting independent, impartial, and competent trials in accordance with international standards;
- Direct judges to ensure that all detainees have access to a court to seek a review of the legality of their detention.

To the Minister of Justice

- Provide appropriate training to civilian court personnel, including judges and prosecutors, on Somali criminal law and procedure and international human rights standards for fair trials;
- Assist the minister of defense in providing appropriate training to military court personnel, including judges and prosecutors, on Somali criminal law and procedure and international human rights standards for fair trials;
- Ensure, with the assistance of relevant government agencies, that ordinary courts and personnel are accorded adequate security and protection;
- Expedite the drafting of a legal aid law, as stipulated in the provisional constitution, to establish a legal aid system that provides free legal assistance to defendants if they cannot afford a lawyer and helps to ensure that legal assistance is available throughout the country.

To the Chairman of the Military Court

- Direct military judges to implement Somali law, including Sharia, in conformity with international law for fair trials;
- Direct military judges to ensure that all detainees have access to a court to seek a review of the legality of their detention.

To the Ministers of Security and Interior

- Ensure that personnel of NISA do not conduct arrests or detention unless they have specific legal authority to do so;

- Provide to the attorney general the names and full information on all persons in custody, including those held by NISA;
- Expedite the drafting of a rights-respecting national security law, as stipulated in the provisional constitution, that defines the different roles of national security agencies, and clarifies the legal authority of NISA to arrest and detain;
- Ensure, with the assistance of relevant government agencies, that ordinary courts and personnel are accorded adequate security and protection;
- Ensure that all detained individuals have access to a court to seek a review of the legality of their detention.

To the Minister of Defense

- Direct military prosecutors to transfer cases involving civilian defendants to prosecutors in the civilian criminal justice system;
- Ensure that military authorities fully cooperate with investigations carried out by civilian prosecutors.

To the Military Prosecutors and Judges

- Ensure that all detained individuals have prompt access to a court to contest the lawfulness of their detention;
- Ensure that defense lawyers are granted full access to their clients, all necessary information and files, and adequate time to prepare a defense;
- Allow independent oversight of military court proceedings by providing access to independent human rights monitors. In addition, ensure greater access to court proceedings by members of the public, security permitting.

To International Donors and Agencies Engaged in Justice and Security Sectors

- Publicly support measures outlined above to end the trial of civilians before military courts;
- Call on the Somali president to immediately impose a moratorium on the death penalty and urge the parliament to abolish capital punishment;

- Support efforts to ensure that military courts act in accordance with international fair trial standards;
- Support efforts to train criminal defense lawyers and programs to provide legal counsel for the indigent in criminal cases;
- Encourage national legislation that would provide civilian judicial review of military court decisions.

United Nations Assistance Mission in Somalia (UNSOM) Rule of Law and Human Rights Sections

- Conduct frequent monitoring of military court proceedings as well as detention facility monitoring, including facilities run by NISA.

Methodology

This report is based on research carried out between April 2013 and March 2014, including two trips to Somalia's capital, Mogadishu, in December 2013 and in February 2014. Interviews were conducted in person in Mogadishu and in Nairobi, Kenya, and by phone.

Human Rights Watch interviewed over 30 former defendants and relatives of defendants who had been tried before Somalia's military court between late 2012 and early 2014. We also interviewed the former chairman of the military court, the military attorney general, the chief justice of the Supreme Court, and five civilian criminal defense lawyers who have represented individuals before the military court. We also consulted with Somali and international legal experts and United Nations staff working on rule of law issues.

All former defendants and their relatives were informed of the purpose of the interview and its voluntary nature and their right to end the interview at any point. Many voiced considerable concern about reprisals—either against family members or themselves—from military court officials and others if they were known to be speaking about the administration of military justice in Somalia. Initials have been used to protect the identities and other identifying information of interviewees. Interviews were conducted in Somali, Afmay, a local dialect, and English. Those interviewed were not remunerated.

The limited access to military court documents and proceedings, security concerns making trial monitoring throughout Somalia difficult, and fear of reprisals kept this report from being a full assessment of military court practices and policies. Rather it offers an overview of some of the most pressing due process concerns.

We also provide our recommendations to the government and international donor community for better protecting the rights of individuals facing trial before the military court.

I. Background

The Code of Military Criminal Law in Peace and War (1963)[1] and the Code of Military Criminal Procedure in Peace and War (1964)[2] established military courts that are separate from the civilian criminal justice system.[3] These codes apply to members of the armed forces during peacetime and more broadly after a state of war or a state of emergency is declared. Now 50-years-old, these codes reflect an outdated system of military justice that does not conform to international standards of due process.

The Somali military justice system has trial courts, with appeals being heard by the Supreme Military Court.[4] In times of war, mobile sessions of the military tribunal can be established following a decree by the president.[5] Courts of first instance can try all offenses defined in the code, including those that carry the death penalty. An appeal can be lodged with the Supreme Military Court on the basis of procedural flaws or errors of law in the sentencing.[6]

There is a lack of clarity on the military court's application of Somali laws. The military court is currently applying the three overlapping legal frameworks operating in Somalia: the formal system of general law based largely on the military and ordinary criminal codes; Sharia (Islamic law); and on occasion *xeer* law (Somali clan-based customary law).[7]

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[1] The Code of Military Criminal Law in Peace and War, No. 2 of 1963 ("MCC"); the code is divided into a first section on military law in peace time from article 1 to 208 and then a second section on military law in war time from article 209 to 414.

[2] The Code of Military Criminal Procedure in Peace and War, No. 1 of 1964 ("MCPC"); the code is divided into a first section covering procedures in peace time from article 1 to 52 and then a section on procedures in war time from article 53 to 70.

[3] Human Rights Watch email correspondence with Somali legal expert, August 18, 2013. Significant amendments were made to the codes during the 21-year rule of President Mohamed Siad Barre (1969-1991).

[4] MCPC, art. 1. In 1970, a year after the military coup in Somalia, a law was passed amending the code of military criminal procedure and granting the governing Supreme Revolutionary Council the power to overturn rulings by the Supreme Military Court. The amendment to article 44 of the code provides that decisions by the Supreme Military Court are final, but when deemed necessary, the Supreme Revolutionary Council can annul a decision by the Supreme Military Court ("Tutti i provvedimenti del Tribunale Supremo Militare sono inoppugnabili. Tuttavia il Consiglio Rivoluzionario Supremo, quan. do reputa neseccario, puo annullare la sentenza del Tribunale Supremo Militare"). The Code of Military Criminal Procedure in Peace and War, as amended by No. 20 of April 8, 1970.

[5] MCC, art. 54.

[6] MCPC, art. 43.

[7] For a more detailed description of Somalia's formal and informal legal systems, see Andre LeSage, "Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives," Centre for Humanitarian Dialogue, July 2005, http://www.ssrnetwork.net/uploaded_files/4397.pdf.

After a decade of internecine war, parts of Somalia in 2004 became nominally governed by the Transitional Federal Government (TFG).[8] In August 2011, then-TFG President S Sheikh Sharif Sheikh Ahmed signed a presidential decree declaring a state of emergency in areas of Mogadishu that had been recently vacated by the Islamist armed group Al-Shabaab, which included the city's Bakara market, along with internally displaced persons camps.[9] The emergency decree granted greater powers to the military court, notably jurisdiction over all criminal offenses in areas under the state of emergency, and by default including those committed by alleged Al-Shabaab members and civilians.[10] The decree granted the military court authority to apply the Military Criminal Code of War, which applies to individuals in the national armed forces, for just three months.[11] It was never renewed.

Military court officials told Human Rights Watch they have been applying the Military Criminal Code of Peace. This code only permits civilians to be tried by military courts for certain military crimes, such as unlawful communications with a foreign state, resistance, threats or insults to sentries or guards, and seditious activities.[12] However, there appears to be some confusion among lawyers as to which code—for peace or war—is being used and whether or not the emergency decree remains applicable.[13] Military court officials told Human Rights Watch that the criminal law was the main source of authority, but judgments

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[8] For a more detailed description see Human Rights Watch, *Shell-Shocked: Civilians Under Siege in Mogadishu*, vol. 19, no. 12(A), August 2007, http://www.hrw.org/node/10784.

[9] An English translation of the decree, Presidential Legislative Decree No.179 of 2011, on file with Human Rights Watch, refers to two legal documents as its basis. First, article 39, section 1(b) of Somalia's transitional constitution, the Transitional Federal Charter for the Somali Republic, February 2004, designates the president as commander in chief of the armed Forces. It also refers to article 70 of the 1963 Public Order Act, which stipulates that a state of emergency "shall be proclaimed by decree of the President of the Republic on the proposal of the Minister of Interior, having heard the Council of Ministers. The decree shall be forwarded to the National Assembly on the same date." This article gave the National Assembly the final decision on whether such a proclamation was approved. However, the August 2011 decree was not approved by parliament. In addition, article 57 of the Transitional Federal Charter states that military courts should have jurisdiction only over military offenses committed by members of the armed forces, whether during war or peacetime.

[10] See "Somalia: Stop Unfair Trials, Executions," Human Rights Watch news release, September 2, 2011, http://www.hrw.org/news/2011/09/02/somalia-stop-unfair-trials-executions.

[11] MCC, art. 216, "Persons unrelated to the Armed Forces of the State. Aside from the cases explicitly stated by the law, the Military Penal Law of War shall be applied to the persons unrelated to the Armed Forces of the State, who commit any of the acts as provided by articles 323, 324, 325, 326 and 327."

[12] MCC, art. 11, states: "Persons unrelated to the Armed Forces of the State. 1. The persons unrelated to the Armed Forces of the State who become involved in committing a military crime, are subject to the Military Penal Law. 2. Aside from the cases explicitly stated by the law, the persons unrelated to the Armed Forces of the State who commit any of offences referred to in article 78, 120, 124, 125, 129, 166 and 168, shall be liable to the penalties laid down for military personnel, ordinary penalties replacing military penalties in accordance with article 55. However, the court may reduce the penalty."

[13] Human Rights Watch interviews with defense lawyer A, Mogadishu, December 8, 2013; and defense lawyer B, Mogadishu, December 11, 2013.

cannot conflict with Sharia law.[14] This is in line with a law passed in 2009 by the Somali Transitional Federal Parliament requiring all court decisions to comply with Sharia.[15]

The Code of Military Criminal Law in Peace applies to "military personnel serving in the armed forces" along with civilians attached to the armed forces.[16] Military court officials have sought to prosecute Al-Shabaab-related cases on the basis that members of Al-Shabaab, as organized military fighters, fall within the jurisdiction of the military court. This would not appear to be the plain reading of the statute, which appears intended for members of the Somali armed forces.

The various channels and procedures by which defendants have appeared before the military court remain unclear. Military court officials and lawyers point to people arrested in large-scale security operations, notably by the country's National Intelligence and Security Agency, as representing a large number of those cases.[17] These operations happen on a regular basis in Mogadishu primarily following attacks and security incidents, and outside of Mogadishu including when towns come under the government's control following a military offensive.[18] Once in the hands of NISA, individuals accused of Al-Shabaab-related crimes are reportedly being categorized as top-level, high, or low risk. However, according to the United Nations, the criteria used to determine the category and the outcome of the process, including which cases to transfer to military courts, are unclear.[19]

[14] Human Rights Watch interview with Gen. Hassan Mohammed Hussein Mungab, Mogadishu, December 9, 2013.

[15] Human Rights Watch interviews with Somali lawyer, Nairobi, October 8, 2013; and Chief Justice Aidid Abdullahi Ilka Hanaf, December 11, 2013. The provisional constitution states in article 2(3) that: "No law which is not compliant with the general principles and objectives of Shari'ah can be enacted," The Provisional Constitution of the Federal Republic Somalia, 2012.

[16] MCC, arts. 1 and 7.

[17] Human Rights Watch interviews with Gen. Hassan Mohammed Hussein Mungab, Mogadishu, December 9, 2013; Col. Abdullahi Abdi Weheliye, Mogadishu, December 10, 2013; and Chief Justice Aidid Abdullahi Ilkahanaf, December 11, 2013.

[18] "Somalia: Pro-Government Militias Executing Civilians," Human Rights Watch news release, March 28, 2012, http://www.hrw.org/news/2012/03/28/somalia-pro-government-militias-executing-civilians.

[19] Human Rights Watch interviews with UNSOM Rule of Law and Security Group staff, October 14, 2013, and October 24, 2013.

Suspected insurgents rounded up during a security sweep in Mogadishu's Wardhigley district in May 2013. Those arrested during security operations have on occasion been tried in mass trials before the military court. Photo Courtesy of Tobin Jones

The violations of basic rights faced by individuals tried through the military courts are not therefore limited to the trial itself. Many people have been arbitrarily arrested by the police and the NISA during mass sweeps when dozens of people are taken into custody with often very limited evidence of wrongdoing. These are particularly likely to be charged with "membership" in Al-Shabaab.[20] As the chief justice told Human Rights Watch, "At present such an arrest could happen to anyone."[21]

In addition to arbitrary arrests, detainees held by NISA in particular are on occasion held for lengthy periods without access to a court. Human Rights Watch is unaware of any case in which bail was granted by the military court. One court lawyer told Human Rights Watch he has stopped asking for bail as the judges "just laugh at us when we request bail."[22]

In September 2012, Hassan Sheikh Mohamud, the newly selected president of the Federal Government of Somalia, which replaced the TFG, declared justice to be one of the six pillars of his reform agenda. International donors have responded to this call and made reforming the criminal justice system a priority. For instance, justice reform is among the five peace and state-building goals in the New Deal compact endorsed in Brussels in September 2013, which sets the framework for international development assistance for the Somali government over the next three years.[23] The New Deal compact focuses on reforming the civilian courts. International donors assisting in Somalia's justice system should not overlook the significant concerns with the functioning of the military courts outlined below nor neglect reform of the military courts.

[20] Human Rights Watch interviews with Gen. Hassan Mohammed Hussein Mungab, Mogadishu, December 9, 2013; Col. Abdullahi Abdi Weheliye, Mogadishu, December 10, 2013; Chief Justice Aidid Abdullahi Ilkahanaf, December 11, 2013; and defense lawyer B, Mogadishu, December 11, 2013.

[21] Human Rights Watch interview with Chief Justice Aidid Abdullahi Ilkahanaf, December 11, 2013.

[22] Human Rights Watch telephone interview with defense lawyer E, March 25, 2014; and interview with defense lawyer A, Mogadishu, December 8, 2013.

[23] See "Somalia Funding Should Focus on Rights Protections," Human Rights Watch dispatch, September 12, 2013, http://www.hrw.org/news/2013/09/12/dispatches-somalia-funding-should-focus-rights-protections.

II. Right to a Fair Trial

Individuals who appeared before or attended proceedings of Somalia's military court, including former defendants and their relatives, as well as lawyers and court staff, described various practices and procedures that undermine defendants' rights to a fair trial under international law. These rights, set out in the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (the Banjul Charter), among other instruments, include the rights to: legal counsel and to prepare a defense, a prompt and public trial by a competent, independent and impartial court, and an appeal to a higher court.[24] Many of these rights are also recognized in Somalia's provisional constitution.[25] Human Rights Watch also has grave concerns about the military court's use of the death penalty.

Rights to Legal Counsel and to Prepare a Defense

International law requires that defendants have access to a lawyer of their choice throughout criminal proceedings, including during pre-charge and pretrial detention, to help protect against mistreatment and to ensure their rights are defended in court.[26] Those who are unable to afford legal counsel are entitled to have counsel provided by the state without payment.[27] Defendants should have timely, private, and confidential access to their lawyers.[28]

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[24] International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force March. 23, 1976), article 14. Somalia ratified the ICCPR on January 24, 1990. African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (entered into force October 21, 1986), article 7. Somalia ratified the Banjul Charter on July 31, 1985.

[25] The Provisional Constitution, arts. 34 and 35.

[26] Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), principle 1.

[27] ICCPR, art. 14(3)(d).

[28] According to the UN Human Rights Committee, which monitors compliance with the ICCPR, in its General Comment No. 32 on the right to a fair trial, "The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications." UN Human Rights Committee, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trail, U.N. Doc. CCPR/C/GC/32 (2007), http://www.refworld.org/docid/478b2b2f2.html, para. 34.

Defendants should also have adequate time and facilities to prepare a defense. This means providing timely access to charges, appropriate files, and all evidence the prosecution plans to use in court or is exculpatory.[29]

The Code of Military Criminal Procedure in Peace provides for a defendant before the military court to have access to a military lawyer without payment.[30] While Somalia's military court has provided defendants who are in custody greater access to lawyers than in the past, the capacity of most persons tried before the military court to exercise their right to counsel of their choice and prepare a defense remains minimal. Civilian defense lawyers may be excluded from military court hearings in the procedural code, though we did not document any instances in which the court had excluded civilian lawyers from proceedings.[31]

Human Rights Watch is aware of at least four civilian lawyers who have regularly represented defendants, including military and security personnel and alleged Al-Shabaab members, before the court for fees.[32] However, free legal assistance has not been available for indigent defendants before the military court, although this is provided for under the provisional constitution.[33] There are no lawyers for the indigent paid for by the military or by the government.[34] It is not clear whether indigent defendants are able to obtain any representation.

Outside of Mogadishu the right to counsel is severely limited because the country's few dozen lawyers tend to be concentrated in the capital. In the cases examined by Human Rights Watch, lawyers traveling with the mobile court were appointed to serve as defense counsel at very short notice and with very little time to prepare a defense.

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[29] "'Adequate facilities' must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary)." UN Human Rights Committee, General Comment No. 32, para. 33.

[30] MCPC, art. 13.

[31] Ibid., art. 12.

[32] Several Somali lawyers, judicial staff and relatives of defendants tried before the court questioned the legal qualifications of lawyers representing defendants before the court. In particular they spoke of the lack of qualifications of two of the main lawyers, one of whom was a police commissioner in one of Mogadishu's districts until recently and the other who many said was not a trained lawyer.

[33] The Provisional Constitution, arts. 34(4) and 35(6).

[34] Human Rights Watch interviews with Gen. Hassan Mohammed Hussein Mungab, Mogadishu, December 9, 2013; and defense lawyer D, Mogadishu, February 11, 2014.

Defendants often have very limited opportunity to discuss their case with their lawyer. This could even be just a couple of minutes or up to a day in advance of their appearance in court, including for capital punishment offenses.[35] For instance, from July 16 to 20, 2013, the mobile court heard over 130 cases in the city of Baidoa. On the first day of hearings, the chairperson of the trial court, Col. Liban Ali Yarow, requested the presence of a lawyer, and one of the town's only lawyers was brought in. The lawyer was given only a few hours to prepare a defense for the 40 defendants being brought before the court that morning. Unsurprisingly, he was not able to meet with every defendant, let alone have the opportunity to prepare an adequate defense.[36] On the second day, the court gave the lawyer until 11 a.m. to prepare the defense of over 20 cases, including four murder cases and five cases relating to charges of Al-Shabaab-related activities.[37]

Lawyers representing cases before the military court told Human Rights Watch that they had only limited information on the cases, on their clients' case files, and the evidence.[38] In the July 2013 hearings in Baidoa, the defense counsel only had a list of the defendants' names and no charges or any other pertinent information.[39]

Defense lawyers in Mogadishu told Human Rights Watch that they do not receive a list of prosecution witnesses before appearing before court.[40] They are not even sure whether they have a right to access their client's case files under Somali law. One lawyer said he gets a list of the basic articles his clients are being charged with, but is not provided access to the full files.[41] Another lawyer blamed the judges for denying them access to their clients' files:

> The judges don't understand international standards or the constitution. They see our requests to access files as an interference in proceedings. We ask the court clerks and the officials in the prosecution office, but they tell

[35] Human Rights Watch telephone interview with A.B., January 16, 2014.

[36] Human Rights Watch telephone interviews with F.A.M., September 16, 2013; M.M.A., October 15, 2013; and I.M.N., October 9, 2013.

[37] Human Rights Watch telephone interview with F.A.M., September 16, 2013.

[38] Human Rights Watch interview with defense lawyer A, Mogadishu, December 8, 2013; and telephone interview with defense lawyer E, March 25, 2013.

[39] Human Rights Watch telephone interviews with F.A.M., September 16, 2013; and M.M.A., October 15, 2013.

[40] Human Rights Watch interview with court lawyer, Mogadishu, February 11, 2014.

[41] Ibid.

us to ask the judges for permission. The judges refer to an outdated law that denied access to prosecution files.[42]

Right to Be Tried before an Impartial and Independent Tribunal

A basic fair trial requirement is the right to be tried before an impartial and independent tribunal. Independence of judges refers to their appointment and security of tenure, conditions governing promotion and transfer, and freedom from outside interference, particularly from the executive branch.[43]

The composition and structure of Somalia's military court lacks the necessary independence and impartiality required under human rights law because the executive branch is in a position to control or direct the court. The court officials in Somalia's military courts remain under the military chain of command. Military judges and other court officials are thus subject to discipline or reprimand by their superior officers and ultimately the minister of defense. The judges are therefore at risk of external influences in their judicial decisions. The current judges were directly appointed by the then-minister of defense with the approval of then-president Sheikh Sharif, with no parliamentary approval.[44] The process whereby judges are dismissed is unclear.

Right to Be Tried before a Competent Tribunal

Somalia's military court asserts jurisdiction over civilians as well as military personnel. It not only brings to trial members of the Somali armed forces for offenses, but also alleged

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[42] Human Rights Watch telephone interview with defense lawyer A, March 24, 2014.

[43] ICCPR, art. 14(1); Banjul Charter, art. 7(1); see Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985); African Union, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa ("African Fair Trial Principles and Guidelines"), adopted October 24, 2011, http://www.achpr.org/instruments/fair-trial/, principle A(4) on an independent judiciary. The UN Human Rights Committee has stated that: "The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them." UN Human Rights Committee, General Comment No. 32, para. 19.

[44] Human Rights Watch interviews with Gen. Hassan Mohammed Hussein Mungab, Mogadishu, December 9, 2013; UNDP staff, April 17, 2013; civilian judicial staff, Nairobi, November 6, 2013; and court lawyer, Mogadishu, December 8, 2013.

members or fighters of Al-Shabaab, members of civilian state agencies such as the police and NISA, and on occasion ordinary civilians. This wide-ranging jurisdiction, conflicting with international and regional standards that sharply restrict and even prohibit military court trials of civilians, is particularly problematic because of the court's notable lack of independence from the defense command structure, as discussed above.

As a matter of Somali law, the military court's continuing claims of jurisdiction over civilians seems doubtful. The 2011 emergency decree granted the military court jurisdiction over all offenses committed in areas under the state of emergency. The former chairman of the military court and now the mayor of Mogadishu, Gen. Hassan Mohammed Hussein Mungab, said that the decree had expired three months after its promulgation and that the civilian cases were either dismissed or handed over to the ordinary courts.[45] Court officials also said that the 2011 decree was no longer in effect. However, defense lawyers and others dealing with the court expressed confusion as to whether or not the emergency decree was still in effect and the court has continued to bring to trial individuals who are not members of the Somali armed forces.[46] Whether permitted by law or not, the military court in south-central Somalia, including in Mogadishu, continues to exercise broad jurisdiction over civilians as well as military personnel.

International human rights law severely restricts, while African regional mechanisms completely prohibit, trials of civilians before military courts. The UN Human Rights Committee, the international expert body that monitors compliance with the ICCPR, states in its General Comment No. 32 on the right to a fair trial that while the ICCPR "does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of [a fair trial] and that its guarantees cannot be limited or modified because of the military or special character of the court concerned."[47] In practice, therefore, "[t]rials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such

[45] Human Rights Watch interview with General Hassan Mohammed Hussein Mungab, Mogadishu, December 9, 2013;

[46] Human Rights Watch telephone interview with defense lawyer A, November 14, 2013; and interview with defense lawyer D, Mogadishu, February 11, 2013.

[47] UN Human Rights Committee, General Comment No. 32, para. 22.

trials is necessary and justified by objective and serious reasons" and where "the regular civilian courts are unable to undertake the trials."[48]

Government and judicial officials said that the ordinary courts were unable to deal with Al-Shabaab-related cases as a result of security concerns.[49] A presidential advisor told Human Rights Watch that, "the military courts help us to expedite the Al-Shabaab cases and discourages other terrorist acts."[50] The security concerns of ordinary courts are very real. According to the United Nations, in 2013 at least four judicial personnel were killed in Mogadishu alone.[51] An April 2013 attack on a regional court complex killed a judge and three lawyers.[52] However ordinary courts are functioning in Mogadishu and other areas nominally under the central government control, although Human Rights Watch has not carried out an assessment of their work. According to the United Nations, the regional court complex was functioning once again as of late 2013 and most of the district level courts were working in Mogadishu. Human Rights Watch found that regional and district courts are also functioning in Baidoa and Beletweyne, although the effectiveness and the extent of their operations are unclear.[53]

Given the poor state and insecurity of the Somali criminal justice system, particularly in areas that had been under the control of Al-Shabaab before coming under government authority, there may be situations where the absence of ordinary courts made military courts trials of civilians temporarily justifiable. Yet, except when the 2011 emergency

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[48] UN Human Rights Committee, General Comment No. 32, para 22. The 2013 report of the UN special rapporteur on judges and lawyers states that where a government seeks to try civilians before military courts, it needs to demonstrate that a) the regular civilian courts are unable to undertake the trials; 2) other, alternative forms of special civilian courts are inadequate for the task; and c) the rights of the accused will be fully protected. UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, General Assembly A/68/285, http://www.law.yale.edu/documents/pdf/conference/UN_A68-285.pdf, (accessed March 19, 2014), para. 51. See also, UN Human Rights Committee, *Abbassi v. Algeria*, Comm. 1172/2003, U.N. Doc. A/62/40, Vol. II, at 105 (HRC 2007), para. 8.7; UN Commission on Human Rights, Draft Principles Governing the Administration of Justice Through Military Tribunals ("Decaux Principles"), January 13, 2006, U.N. Doc.E/CN.4/2006/58 at 4 (2006), no. 3: in emergency situations any derogation from the ordinary administration of justice, "strictly required by the exigencies of the situation," need to comply with the fundamental principles of fair trial.

[49] Human Rights Watch interview with Chief Justice Aidid Abdullahi Ilkahanaf, December 11, 2013.

[50] Human Rights Watch interview with Aweys Hagi, Mogadishu, December 9, 2013.

[51] Unpublished UN report, 2014, on file with Human Rights Watch.

[52] "Somalia: New Al-Shabaab Attacks are War Crimes," Human Rights Watch news release, April 16, 2013, http://www.hrw.org/news/2013/04/16/somalia-new-al-shabaab-attacks-are-war-crimes.

[53] Human Rights Watch telephone interviews, April 2014.

regulations were in effect, the military has not sought to justify its trials of civilians, nor have the use of military courts appeared temporary.[54]

The African regional prohibition on trials of civilians before military courts is absolute. The African Commission on Human and Peoples' Rights stated in its 2011 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa ("African Fair Trial Principles and Guidelines") that military courts could not meet the requirements of independence and impartiality required under international law and therefore, "[m]ilitary courts should not in any circumstances whatsoever have jurisdiction over civilians.[55] This position was adopted in the case law of the African Commission in *Law Office of Ghazi Suleiman v. Sudan*, which held that "civilians appearing before and being tried by a military court presided over by active military officers who are still under military regulations violates the fundamental principles of fair trial."[56]

Military court officials and defense lawyers working before the military court told Human Rights Watch that alleged members of Al-Shabaab made up the bulk of their caseload.[57] Al-Shabaab and other armed groups have been implicated in numerous serious violations of international humanitarian law, or the laws of war, and other crimes in violation of Somali law for which they should be appropriately tried and punished. The laws of war do not prohibit military trials of enemy combatants for war crimes and other criminal offenses during so-called non-international armed conflicts, such as in Somalia. However, the circumstances in which trials of alleged Al-Shabaab members are being conducted in Somalia raise serious concerns about their lawful use.

Common article 3 to the four Geneva Conventions of 1949, applicable during non-international armed conflicts, broadly permits trials "by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[58] Similarly, Protocol II of 1977 to the 1949 Geneva Conventions likewise applies

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[54] UN Human Rights Committee, General Comment 29, Article 4, Derogations during a State of Emergency, August 31, 2001, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 16.

[55] African Fair Trial Principles and Guidelines, principle L(c).

[56] African Commission on Human and Peoples' Rights, *Law Office of Ghazi Suleiman v. Sudan*, Comm. Nos. 222/98 and 229/99 (2003), para. 64.

[57] Human Rights Watch interviews in Mogadishu, December 8-12, 2013.

[58] Article 3 common to the four Geneva Conventions of 1949, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted August 12, 1949, 75 U.N.T.S. 31, entered into force October 21, 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at

to prosecutions of criminal offenses related to the armed conflict, and requires that trials be conducted by courts "offering the essential guarantees of independence and impartiality."[59]

Human Rights Watch learned of cases of alleged Al-Shabaab members who were tried for criminal offenses such as murder or Al-Shabaab membership unrelated to the armed conflict.[60] Members of Al-Shabaab who do not have an operational military role can only be considered as civilians under the laws of war and therefore should be tried by ordinary courts, consistent with the Banjul Charter. Bringing Al-Shabaab fighters before the military court would require that the court meet international standards of independence and impartiality, which, due to their chain of command and absence of appeal to a higher civilian court, they do not.

The military court has also tried defendants who are police officers, members of NISA, and employees of the custodial corps or prison service, all of whom are civilians and thus should be prosecuted in the civilian courts. Military court officials interviewed by Human Rights Watch saw these cases as firmly within their jurisdiction.[61] The military's attorney general told Human Rights Watch in December 2013 that he had recently received 30 files of crimes involving NISA officials for trial in the military court.[62] One of the 13 individuals executed following decisions by the military court in 2013 was a police officer. More recently, on March 11, 2014, three men were executed in Mogadishu following a verdict by the military court. According to Col. Liban Ali Yarow, two were soldiers and the third defendant was a member of the municipal police.[63]

Sea, adopted August 12, 1949, 75 U.N.T.S. 85, entered into force October 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, adopted August 12, 1949, 75 U.N.T.S. 135, entered into force October 21, 1950; and Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted August 12, 1949, 75 U.N.T.S. 287, entered into force October 21, 1950.

[59] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force December 7, 1978, art. 6(2).

[60] Individuals accused of Al-Shabaab membership are typically charged under article 221 of the 1964 penal code for "Armed Insurrection against the Power of the State," a crime that could be tried by the ordinary courts.

[61] Human Rights Watch interviews with Gen. Hassan Mohammed Hussein Mungab, Mogadishu, December 9, 2013; Col. Abdullahi Abdi Weheliye, Mogadishu, December 10, 2013; UNDP staff, Nairobi, April 10, 2013; and court lawyer, Mogadishu, February 11, 2014.

[62] Human Rights Watch interview with Col. Abdullahi Abdi Weheliye, Mogadishu, December 10, 2013.

[63] "Somalia-Firing Squad on the Football Field," Human Rights Watch dispatch, March 13, 2014. http://www.hrw.org/news/2014/03/13/dispatches-somalia-firing-squad-football-field.

Lastly, the military court has tried members of the Somali armed forces for offenses committed against civilians. The 2012 Somali Provisional Constitution, under the provision on "Abuse of Powers," provides that "Human rights abuses alleged to have been committed by members of the armed forces against civilians shall be brought before a civilian court."[64] Prosecuting military personnel for human rights violations against civilians in ordinary courts would also be consistent with the African Fair Trial Principles and Guidelines, which state: "The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel."[65]

In Baidoa on July 19, 2013, the military court heard three murder cases, two involving the killing of civilians, one during a personal dispute, and one at a government checkpoint.[66] According to UN figures, between January and November 2012, the military court opened 13 cases against members of the Somali security forces members accused of rape.[67] Similarly, one defense lawyer described a case in which a government soldier was sentenced to 15 years for raping an internally displaced woman.[68] One of the three men executed on March 11, noted above was a soldier who was found guilty of killing a civilian.[69]

Limited Legal Qualifications of Military Court Personnel

Concerns were raised with Human Rights Watch about the legal qualifications of military court personnel and judges.[70] The UN Basic Principles on the Independence of the Judiciary states that "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law."[71] The African Fair Trial Principles and Guidelines provide that "No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions."[72]

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[64] The Provisional Constitution, art. 128.

[65] African Fair Trial Principles and Guidelines, principle L(a).

[66] Human Rights Watch telephone interview with F.A.M., September 16, 2013.

[67] UN Human Rights Council, Report of the Independent Expert on the situation of human rights in Somalia, Shamsul Bari, August 16, 2013, A/HRC/24/40, para 54, http://reliefweb.int/sites/reliefweb.int/files/resources/A-HRC-24-40_en%20%281%29.pdf.

[68] Human Rights Watch interview with defense lawyer A, Mogadishu, December 8, 2013.

[69] "Somalia-Firing Squad on the Football Field," Human Rights Watch dispatch, March 13, 2014.

[70] Human Rights Watch interviews with Chief Justice Aidid Abdullahi Ilka Hanaf, Mogadishu, December 11, 2013; UNDP staff, Nairobi, April 17, 2013; defense lawyer A , Mogadishu, December 8, 2013; and email correspondence with defense lawyer E , March 14, 2014.

[71] Basic Principles on the Independence of the Judiciary, principle 10.

[72] African Fair Trial Principles and Guidelines, principle A(4)(k).

A significant number of military court officials, including judges and advisors, sitting at both the first instance level and the Supreme Military Court, are individuals whose only legal training is in Sharia law. The Supreme Court chief justice and several lawyers questioned both benches' understanding of ordinary criminal law.[73] This lack of legal qualification of military judicial officials is particularly troubling given the serious offenses they try under the military and regular penal code, including crimes that carry the death penalty.

Right to a Trial without Undue Delay

The ICCPR obligates governments to ensure that persons in custody are brought promptly before a judge or other judicial officer and are able to challenge the lawfulness of their detention.[74] Criminal suspects are to be "tried without undue delay."[75]

Military court officials and other judicial personnel identified lengthy pretrial detention resulting from poor investigations as the biggest challenges to their work.[76] The attorney general of the military court told Human Rights Watch that his office is informed when individuals who fall within the court's jurisdiction are arrested.[77] According to the Code of Military Criminal Procedure, persons can be held for up to 180 days in remand (pretrial) detention.[78] While the military code does not clarify procedures for judicial review, the Somalia criminal procedure code provides states that an individual in custody must be brought before court every seven days.[79]

Judicial review by the military court during pretrial detention was inconsistent in the cases Human Rights Watch examined. Under Somalia's provisional constitution, "[e]very person who is arrested has the right to be brought before a competent court within 48 hours of the

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73 Human Rights Watch interviews with court lawyer, Mogadishu, December 8, 2013; Chief Justice Aidid Abdullahi Ilka Hanaf, Mogadishu, December 11, 2013; and telephone interview with court lawyer, March 25, 2014.

74 ICCPR, art. 9(3)&(4).

75 Ibid., art. 14(3)(c); see also Banjul Charter, art. 7(d). According to the UN Human Rights Committee, "The right of the accused to be tried without undue delay, … is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice." UN Human Rights Committee, General Comment No. 32, para. 35.

76 Human Rights Watch interviews with Gen. Hassan Mohammed Hussein Mungab, Mogadishu, December 9, 2013; Col. Abdullahi Abdi Weheliye, Mogadishu, December 10, 2013; Chief Justice Aidid Abdullahi Ilka Hanaf, December 11, 2013.

77 Human Rights Watch interview with Col. Abdullahi Abdi Weheliye, Mogadishu, December 10, 2013.

78 MCPC, art. 34.

79 MCPC, art. 47(3). The MCPC in article 1 states that provisions of the criminal procedure code also apply to the military courts except as otherwise provided by law.

arrest."[80] The lack of judicial review heightens the risk that any mistreatment of detainees could be overlooked or ignored. Military court officials hold the NISA responsible for holding detainees without judicial oversight and appear not see it as their responsibility to follow-up. Gen. Hassan Mohammed Hussein Mungab, the mayor of Mogadishu and the former chairman of the military court, told Human Rights Watch:

> What is happening in that area [regarding prompt appearance before a court] and what the law says are different. A person should be brought to court within 48 hours but it takes time in Villa Somalia [where many NISA detainees are held] and witnesses are scared to come forward.
>
> The attorney general writes letters asking for the situation of detainees when relatives come forward and complain. NISA often goes to the president and asks for more time. They come to us saying, this is one of the individuals that the US is looking for [for alleged terrorist activities].[81]

In Mogadishu, Human Rights Watch identified some cases in which detainees were detained without charge for between two to six months by NISA with limited access to court.[82] The current legal status of NISA, including its powers to arrest and detain, are unclear.[83] Some Somali lawyers point to the 1970s laws on the National Security Service (NSS) as granting the intelligence agency powers of arrest and detention; however, the NSS was officially disbanded in 1990 and only later replaced by National Security Agency (NSA) and under the new government by NISA.[84] Other government and court officials told Human Rights Watch that NISA currently has no legal mandate to arrest and detain, and said that the government was planning to draft a law that would clarify NISA's

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[80] The Provisional Constitution, art. 35(5).

[81] Human Rights Watch interview with Gen. Hassan Mohammed Hussein Mungab, Mogadishu, December 9, 2013;

[82] Human Rights Watch telephone interviews with O.F.K., November 18, 2013; A.A.G., November 18, 2013; O.H.M., December 8, 2013.

[83] The ICCPR, art. 9(1), provides that "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

[84] One of the first decrees of the Siad Barre government gave the newly formed National Security Service (NSS), the government's secret service agency, the power to detain with limited constraints or opportunities for defendants to challenge their detention. National Security Law, No. 54 of 1970. The NSS was disbanded in 1990. For more details on the abuses committed by the NSS, see Human Rights Watch, *A Government at War with its Own People: Testimonies about the Killings and Conflict in the North in Somalia*, 1990, http://www.hrw.org/reports/1990/01/31/government-war-its-own-people. Human Rights Watch email communication with lawyer F, March 31, 2014; and telephone conversation with lawyer G, March 31, 2014.

mandate.[85] Government officials described NISA's broad current involvement in law enforcement activities as the result of significant security concerns and limited capacity of the police.[86] However, such heightened reliance on security services does not justify the failure of security officers to operate within the framework of international human rights standards.

In one case of eleven unrelated defendants, all reportedly accused of providing funding for Al-Shabaab and arrested over a period of several months beginning in April 2013,[87] at least two of the defendants were held for over two months in NISA detention before ever being brought before a judge.[88] When the trial started in October 2013, the defendants appeared on five occasions within the space of one month before the military court. An attendee at the trial said the prosecution failed to provide any evidence against the individuals and the court ordered their release.[89] Nevertheless, they were sent back to NISA facilities at Villa Somalia for further investigation. Between February and March 2014 the 11 individuals were finally released.[90]

Pretrial detention without judicial review is of particular concern in areas outside of Mogadishu. When the mobile court travelled to Baidoa in July 2013, it heard over 130 cases, including 69 cases in which the individuals were accused of being Al-Shabaab members. A significant number of the defendants had been held for over a year without appearing before a court, arrested in security sweeps in the months following the capture of Baidoa by government forces and the African Union Mission to Somalia (AMISOM) in February 2012.[91] The establishment of a branch of the military court in Baidoa as of January 2014 should speed judicial review, and help to ensure that civilian cases are transferred to the ordinary courts.[92]

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[85] Human Rights Watch interviews with Gen. Hassan Mohammed Hussein Mungab, Mogadishu, December 9, 2013; Aweys Hagi, Mogadishu, December 9, 2013; Chief Justice Aidid Abdullahi Ilka Hanaf, December 11, 2013; and the former senior advisor to the minister of interior, Mogadishu, December 2013.

[86] Human Rights Watch interview with Col. Abdullahi Abdi Weheliye, Mogadishu, December 10, 2013.

[87] Human Rights Watch telephone interview with O.F.K., November 18, 2013.

[88] Human Rights Watch telephone interviews with O.F.K., November 18, 2013; A.A.G, November 18, 2013; and interview with O.H.M., Mogadishu, December 8.2013.

[89] Human Rights Watch interview with defense lawyer A, Mogadishu, December 8, 2013.

[90] Human Rights Watch telephone interview with defense lawyer E, March 25, 2014.

[91] Human Rights Watch telephone interviews with N.A.A., a former defendant, September 17, 2013; and F.A.M., September 16, 2013.

[92] Human Rights Watch telephone interviews with F.A.M., January 22, 2014; and A.B., January 16, 2014.

Right to a Public Hearing

International fair trial standards call for hearings and judgments to be public, to ensure transparency of proceedings and serve as an important safeguard for defendants. Hearings can exceptionally be held in private before the judge, such as for specific and limited reasons of national security.[93] The UN Human Rights Committee has noted that under the ICCPR, "Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits."[94]

Most military court hearings in Mogadishu occur in the central prison main building. Prison and court officials restrict public access to the hearings, primarily due to limited space in the makeshift court room. Relatives of those tried before the court told Human Rights Watch that they could not attend hearings in cases in which more than one defendant was on trial.[95] The relative of a business man among the 11 accused of funding Al-Shabaab mentioned above said, "We asked several times to have access to the courtroom, but we were always told to sit in the hall."[96] On at least one occasion a judge denied a request by journalists to attend military court proceedings.[97]

There is currently no regular independent monitoring of the military court proceedings.[98] On several occasions court officials have cancelled visits by international monitors from the United Nations and donor governments.[99] In addition, information on the holding of hearings is rarely available. Relatives said that they were often only informed about a hearing taking place if they happened to be visiting defendants in prison prior to the hearings.[100]

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[93] UN Human Rights Committee, General Comment No. 32, para. 29, states that: "courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media."

[94] Ibid., para. 28.

[95] Human Rights Watch telephone interview with A.A.H., October 29, 2013.

[96] Human Rights Watch telephone interview with A.A.G., November 18, 2013.

[97] Human Rights Watch meeting with representative of a journalists' union, Mogadishu, December 10, 2013.

[98] One observation team sent by a diplomatic mission was twice able to observe court hearings as of late 2013. Human Rights Watch interview with Western diplomat, Nairobi, October 28, 2013.

[99] Human Rights Watch interview with donor, Nairobi, April 20, 2013.

[100] Human Rights Watch interview with M.S.A., Mogadishu, December 10, 2013.

Right Not to Be Compelled to Testify against Oneself

Under international human rights law as well as Somalia's provisional constitution,[101] no one can be compelled to testify against themselves, to confess guilt, or to testify against others.[102] The UN Human Rights Committee notes that "[t]his safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt."[103]

The cases examined by Human Rights Watch show that the military court is heavily reliant on testimonies and confessions from defendants, raising concerns of coerced confession.[104] Military court officials told Human Rights Watch that an individual cannot be convicted solely on the basis of a confession.[105] However, in July 2013 and January 2014 the military court in Baidoa heard eight cases of murders or killings involving government soldiers and a government official in which no witnesses testified in court and very limited other evidence was brought forward.[106] The court reportedly convicted seven of the defendants, sentencing five to the death penalty and two to make *diya* ("blood money") payments based solely on the defendants' confessions.[107]

A relative of a government official who was sentenced to death in July 2013 for allegedly murdering his wife said, "There was no evidence brought to the court against him. There was not a single witness, there was no gun…. The lawyer mentioned this, but the court did not listen."[108]

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that governments should "ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in

[101] The Provisional Constitution, art. 35(4).

[102] ICCPR, art. 14(g).

[103] UN Human Rights Committee, General Comment No. 32, para. 41.

[104] Human Rights Watch telephone interview with M.M.A., January 30, 2014.

[105] Human Rights Watch interview with Col. Abdullahi Abdi Weheliye, Mogadishu, December 10, 2013.

[106] Human Rights Watch telephone interviews with I.A., October 23, 2013; A.B., January 16, 2014; and M.M.A., January 30, 2014.

[107] Human Rights Watch telephone interview with M.M.A., January 30, 2014; and F.A.M., January 22, 2014.

[108] Human Rights Watch telephone interview with I.A., January 20, 2014.

any proceedings."[109] The UN Human Rights Committee has said that in cases of a claim that evidence was obtained through torture or other ill-treatment, "information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim."[110]

Human Rights Watch was not able to document the use of confessions gathered through torture or coercion as evidence in court. However, we received several credible reports of defendants being mistreated during the pretrial period, notably during detention in NISA facilities.[111] The uncle of a NISA official, who had been arrested for having beaten a civilian in late 2012, said that during his detention his nephew "was beaten—he still has a scar on his face—and beaten on his chest. This was at the 'PS' [a common name for NISA] in Villa Somalia…. They were taken to a room and beaten with sticks and wires."[112]

Right to an Appeal

The ICCPR ensures criminal defendants the right to appeal: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[113] The right to an appeal is prescribed in Somalia's military penal code;[114] in 2012, the Supreme Military Court was re-established.

However, the basis for an appeal under the military criminal procedure code is limited to procedural flaws or errors of law in the sentencing.[115] The UN Human Rights Committee has stated in its general comment on fair trial that "[t]he right to have one's conviction and sentence reviewed by a higher tribunal" imposes "a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case." A review

[109] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture), G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, art. 15. Somalia ratified the Convention against Torture on January 24, 1990.

[110] UN Human Rights Committee, General Comment No. 32, para. 33.

[111] Human Rights Watch telephone interview with A.A.G., November 18, 2013.

[112] Human Rights Watch telephone interview with A.A., October 29, 2013

[113] ICCPR, art. 14(5).

[114] Defendants have the right to appeal to the Supreme Military Court under article 43 of the MCPC.

[115] MCPC, art. 43.

"limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant."[116]

In practice, many convicted defendants seek to appeal but in practice are not afforded this right by a higher court. Human Rights Watch research found that only certain types of cases are more likely to end up in appeal, primarily capital punishment cases, although there does not appear to be a clear process for this. One lawyer complained that the Supreme Military Court "only sits for the big cases," mentioning capital punishment cases and other high-profile cases.[117] Many defendants may in practice be denied having their cases reviewed by a higher court.

In 2013 the Supreme Military Court only heard cases sporadically. However, according to a court lawyer, as of 2014, it is now sitting on a weekly basis in Mogadishu, which could improve administration of appeals.[118]

Lawyers and relatives of individuals sentenced by the court complained that obtaining the necessary documents to file an appeal was difficult, and on occasion expensive. The court did not always make the written judgments readily available.[119] One lawyer blamed the trial court judges: "If it was a civil court I could easily ask for a [written judgment], but these military tribunal guys think they have absolute power, and you can't talk to them, you can't ask them anything, and they don't respect the human rights of people."[120]

The relatives of four intelligence officials sentenced to two years' imprisonment for beating a civilian complained that it took them several months to lodge an appeal because they could not get all the required documents and the clerks were often unavailable.[121] They said they had to pay the court clerks $200 to file the appeal, a huge sum in Somalia.[122]

Those sentenced by the mobile military court face additional challenges when seeking to appeal decisions. Relatives of defendants convicted in Baidoa cited distance from

[116] UN Human Rights Committee, General Comment No. 32, para. 48.
[117] Human Rights Watch interview with court lawyer, Mogadishu, December 2013.
[118] Human Rights Watch telephone interview with court lawyer, March 25, 2014.
[119] Human Rights Watch telephone interview with A.B., January 16, 2014.
[120] Human Rights Watch telephone interview with M.M.A., October 15, 2013.
[121] Human Rights Watch telephone interview with A.A.H., October 29, 2013.
[122] Ibid.

Mogadishu, where appeals have to be filed, costs of transport, and legal assistance as well as not having judgments in writing as factors that undermined or obstructed their ability to lodge an appeal.[123]

Several relatives of convicted individuals told Human Rights Watch that when they deposited appeals with the clerks at the Supreme Military Court, they were told to negotiate with the relatives or clan of the victims rather than appeal. [124] The relative of the man sentenced to death for killing his wife in July 2013 deposited an appeal in Mogadishu and was told to negotiate the *diya* payment with the woman's family.[125] As of February his relative's appeal has not been heard by the Supreme Military Court and he is still struggling to collect the *diya* amount requested by the victim's family.[126]

A defense lawyer said that in most of the cases in 2013 in which members of the security services that he represented were convicted of killings, they had paid *diya* and been released.[127] In January 2013, a government soldier was convicted by the military court of killing a civilian in the town of Jowhar and his superior officer was also convicted for failing to comply with the arrest warrant to bring the soldier before the authorities. The military court reportedly later released the soldier following negotiations with the victim's family, while his superior, whose crime was less serious, is continuing serving his sentence.[128]

Imposition of the Death Penalty

Human Rights Watch opposes the death penalty in all circumstances as an inherently cruel and irreversible punishment. The notion of irreversibility is particularly relevant in the cases currently before the military court, given the due process concerns identified in hearings before the court described above as well as the broad jurisdiction exercised by the court.

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[123] Human Rights Watch telephone interview with M.M.A., October 15, 2013.

[124] Human Rights Watch telephone interview with I.A., October 23, 2013. Under Sharia law, family members of victims in cases for "retribution crimes" such as murder, can decide whether the defendant should be put to death, pardoned or should pay compensation in the form of blood money. Somali Xeer law also includes diya or "blood money."

[125] Human Rights Watch telephone interview with I.A., October 23, 2013.

[126] Ibid.

[127] Human Rights Watch interview with defense lawyer D, Mogadishu, February 11, 2013.

[128] Human Rights Watch interviews with defense lawyer B, December 11, 2013; and F.A.H., Mogadishu, December 9, 2013.

In cases where people face the death penalty, international human rights standards require fair trial safeguards that exceed those that must be afforded to individuals facing criminal charges generally. This includes the right to appeal and seek pardon or commutation of the sentence.[129] As the UN Human Rights Committee has noted, "The right of appeal is of particular importance in death penalty cases." The denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of the right to legal counsel, but also the right to appeal one's conviction. The "denial of legal aid for an appeal effectively precludes an effective review of the conviction and sentence by the higher instance court."[130]

According to public records, at least eleven people—eight government soldiers and three non-military personnel—were executed in 2013 following death sentences imposed by the military court. According to a credible source, three soldiers were executed on the same day in February 2013 after their final appeal was denied.[131] In at least two of the cases examined by Human Rights Watch, relatives were only informed of the final sentence through media reports. In the case of Aden Sheikh Abdi, who was sentenced to death in 2013, accused of being an Al-Shabaab fighter and of having murdered Somali journalist Hassan Yusuf Absuge,[132] the Supreme Military Court hearing his appeal reportedly closed before pronouncing the sentence, and Aden's relatives only heard about the final decision in the media after two weeks.[133] Aden was executed eight days later on August 17, 2013. The relatives were never given the final decision in writing, undermining their ability to seek a pardon or commutation.[134]

The United Nations General Assembly in December 2007 passed a resolution by a wide margin calling for a worldwide moratorium on executions. Globally, more than two-thirds of

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[129] While international law and the ICCPR do not prohibit the death penalty, its application and implementation are subject to stringent conditions. Article 6 of the ICCPR limits its imposition to the most serious crimes, and requires that it only be carried out "pursuant to a final judgment rendered by a competent court." Death sentences imposed in cases that did not meet the right to a fair trial, including those in which a military court improperly tried a civilian, would violate the right to life as protected under international law.

[130] UN Human Rights Committee, General Comment 32, para. 51.

[131] Human Rights Watch interview with donor, Nairobi, April 20, 2013.

[132] Human Rights Watch examined the trial of Aden Sheikh Abdi and interviewed both individuals involved in the prosecution, a defense lawyer, and relatives of the defendant, but did not identify any evidence presented in court by the prosecution of Aden's involvement or membership in Al-Shabaab. This raises questions as to why this case was heard in front of the military court and not in the ordinary court.

[133] Human Rights Watch telephone interview with M.S.A., September 17, 2013.

[134] Human Rights Watch interview with relative of defendant, Mogadishu, December 10, 2013.

UN member states—140 countries—have abolished the death penalty in law or in practice. This includes 37 of the 54 member countries of the African Union—more than two-thirds of all African countries.[135]

Somalia's President Mohamud should impose a moratorium on all executions in the country until the country's death penalty can be abolished by law.

[135] See Amnesty International, "Death Sentences and Executions, 2013," March 2014, http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2013, p. 6.

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THE COURTS OF "ABSOLUTE POWER"

Fair Trial Violations by Somalia's Military Court

Somalia's central government and its international partners have committed to rebuilding the country's justice system decimated by two decades of armed conflict. The government currently relies heavily on the military courts of the armed forces to try a broad range of crimes and defendants, including suspected members of the Al-Shabaab insurgents. Hundreds of individuals have been tried by the military courts, which have filled a vacuum left by barely functioning civilian courts.

The Courts of "Absolute Power": Fair Trial Violations by Somalia's Military Court, describes the ways in which Somalia's military courts routinely violate the fair trial rights of defendants. Based on over 30 interviews with defendants and their relatives, as well as military court officials, lawyers, and legal experts, the report highlights the restrictions on defendants' right to prepare and present a defense, receive a public hearing, not incriminate themselves, and appeal a conviction to a higher court. More than a dozen of those convicted over the last year have been sentenced to death and executed, magnifying the harm to basic rights.

Human Rights Watch calls on Somalia's president to immediately impose a moratorium on the death penalty and promote measures to restrict the role of the military court to military defendants. The government and donors should bolster the capacity, accountability, and security of the ordinary courts and support training for judges, prosecutors and defense lawyers. Finally, Somalia's parliament should enact laws that will help protect the rights of defendants before all jurisdictions, notably a legal aid law and a rights-respecting national security law.

Prisoners at Mogadishu Central Prison watch as a guard walks pass their cell in December 2013. Most of the military court's hearings in Mogadishu take place inside the prison, which limits access to hearings for relatives and independent monitors.

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