

## **PROPOSAL TO DESIGNATE AL SHABAAB AS A TERRORIST ENTITY**

### **PURPOSE**

1. The purpose of this paper is to set out the case for designating Al Shabaab as a terrorist entity within New Zealand pursuant to the Terrorism Suppression Act 2002 (“TSA”).
2. Al Shabaab is also known as All-Shabaab al-Islamiya, Harakat al-Shabaab al-Mujahideen, Mujahidin Youth Movement, Shabaab al-Mujahideen Movement, Young Mujahideen Movement, and Young Mujahideen Movement in Somalia.
3. The paper concludes that Al Shabaab meets the criteria for designation as a terrorist entity under the TSA and recommends that it should be so designated.

### **TERRORIST DESIGNATIONS WORKING GROUP**

4. The process for advancing the designation of non-United Nations listed terrorist entities is managed by a Terrorist Designations Working Group, coordinated by the Department of the Prime Minister and Cabinet, and including officials from Police, the New Zealand Defence Force, Crown Law, the Ministry of Foreign Affairs and Trade, the Ministry of Justice, the New Zealand Security Intelligence Service and the External Assessments Bureau.
5. This paper has been jointly prepared by the agencies represented on the Terrorist Designations Working Group.

### **LEGAL FRAMEWORK FOR DESIGNATION**

#### **Terrorism Suppression Act 2002**

6. In October 2002, New Zealand enacted the TSA. The TSA establishes a legal framework for the suppression of terrorism. In particular, it is the mechanism by which New Zealand gives effect to the United Nations Security Council (“UNSC”) mandatory resolutions requiring UN member states to take certain steps to suppress terrorism. An important feature of this framework is the Prime Minister’s power under the TSA to designate individuals or groups as terrorist or associated entities. Designation can be on an “interim” (s 20 TSA) or “final” (s 22 TSA) basis.<sup>1</sup>
7. The TSA criminalises various forms of interaction with designated entities. It is an offence under the TSA to deal with a designated entity’s property or provide such an entity with property, financial or related services. It is also an offence to knowingly recruit for a group which is a designated entity, or participate in a group for the purpose of enhancing its ability to carry out a terrorist act, knowing, or being reckless as to whether the group is a designated entity. Simple membership of a designated entity, however, is not an offence.
8. The TSA also enables action to be taken against designated entities’ property. For example, the TSA empowers Customs officials to seize and detain goods or cash they have good cause to suspect are owned or controlled by designated entities. In certain specified circumstances, the TSA also permits an application by the Attorney-General to the High Court for orders that property owned or controlled by designated entities be forfeited to the Crown.

9. There are two broad categories of entities that are affected by the TSA – entities listed by the UN as terrorist entities (by the UNSC’s 1267 Committee) and non-UN listed entities designated under the TSA.
10. UN listed entities are defined as designated terrorist entities in the TSA and so engage the criminal provisions of the TSA without the need for further designation under s 22. The UNSC listing process involves only Al-Qaida and the Taliban and associated individuals and organisations.
11. The legal consequences that flow from designation under the TSA are primarily a response to international legal obligations. The two categories of entities described above reflect two different obligations:
  - 11.1 First, New Zealand is specifically obliged to take action against those terrorist entities listed by the UNSC 1267 Committee.
  - 11.2 Secondly, and by contrast, while UNSC Resolution 1373 obliges New Zealand (inter alia) to outlaw the financing of, participation in and recruitment to, terrorist entities, it does not specifically identify those entities. The Resolution effectively leaves it to Member States to identify the entities against which they should act.

## NON-UN ENTITY DESIGNATION PROCESS

### Satisfying the s 22 legal requirements

*Discretion to designate if reasonable grounds to believe*

12. The Prime Minister has the power under the TSA to designate individuals or groups as terrorist entities. Section 22 provides that the Prime Minister may designate an entity as a terrorist entity if the Prime Minister believes on reasonable grounds that the entity has knowingly carried out, or has knowingly participated in the carrying out of, one or more terrorist acts.
13. It does not follow, however, that every entity that meets the legal test in s 22 must be designated. Section 22 confers a discretion on the Prime Minister (“the Prime Minister may designate ...”) as to whether to designate an entity that meets the legal test for designation. No specific factors are identified for the Prime Minister’s consideration when exercising his discretion. However, it would be reasonable to suggest that both the TSA’s purpose (as stated in s 3 of the TSA) and the matrix of obligations in UNSCR 1373 that the TSA was enacted, in part, to implement, point to the guiding consideration being whether designation of the relevant entity would effectively assist the suppression of terrorism.

*Defining terrorist acts*

14. A terrorist act is defined in s 5 of the TSA. A number of different acts fall within this definition. The s 5 criteria relevant to this paper are those which deem an act to be a terrorist act if that act:
  - 14.1 Is intended to cause the death of, or serious bodily injury to, one or more persons; and

- 14.2 Is carried out for the purpose of advancing an ideological, political, or religious cause; and
- 14.3 Is intended to either:
  - 14.3.1 Induce terror in a civilian population; or
  - 14.3.2 Unduly compel or force a government or an international organisation to do or abstain from doing any act; and
- 14.4 Is not an act that occurs in a situation of armed conflict and which is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.

### **The legal threshold and reliance on non-classified information**

- 15. In deciding whether reasonable grounds exist to support a belief that an entity has knowingly carried out, or has knowingly participated in the carrying out of, one or more terrorist acts, s 30 of the TSA provides that the Prime Minister may consider any relevant information, including classified security information.
- 16. This paper relies only on unclassified open source information. Open source information may include newspaper reports, literature, and public statements by the entity itself. It may include unclassified information supplied to New Zealand by foreign governments and material from domestic agencies. The case describing an entity's involvement in terrorism need not be constructed from evidence that would ordinarily be admissible in court proceedings.

### **The formal process**

- 17. In 2003 Cabinet agreed to a process for advancing requests to designate non-UN listed terrorist entities. This is set out in the Cabinet Minute CAB (03) 34/15A.
- 18. Cabinet agreed that the following factors may be relevant in deciding whether to recommend the designation of a non-UN listed terrorist entity that meets the s 22 TSA criteria:<sup>2</sup>
  - 18.1 New Zealand presence;
  - 18.2 Regional presence;
  - 18.3 The nature and scale of involvement in terrorist acts or support activity;
  - 18.4 Links with New Zealand citizens but no known New Zealand presence;
  - 18.5 Risk to New Zealand citizens; and
  - 18.6 The rationale for going beyond the UN listing.
- 19. Cabinet also agreed that a further factor in deciding whether to make the request may be the need for New Zealand to contribute to the international security environment by preventing activities such as recruiting, harbouring, participating in or financing terrorist entities that fall outside the scope of the UN listing process.

20. The process formally agreed to by Cabinet requires the Working Group to refer recommendations relating to non-UN listed entity requests to ODESC. ODESC is to make the final determination on whether to proceed with presenting the request to the Prime Minister. In making this determination, the Working Group and ODESC consider those factors identified by Cabinet that are relevant. They are examined specifically at paragraphs 81 to 90 below.
21. Upon presentation of the recommendation for designation to the Prime Minister, the Prime Minister must then be satisfied that Al Shabaab falls within the scope of the designation power in s 22 of the TSA. If on that material the Prime Minister considers that Al Shabaab meets the legal criteria for designation as a terrorist entity, the Prime Minister must then consult the Attorney-General about the designation and may then exercise his discretion under s 22 as to whether to designate, bearing in mind New Zealand's international obligations under UNSCR 1373 and the guiding consideration of whether designation would effectively assist the suppression of terrorism.
22. The TSA requires that the designation be publicly notified in the Gazette and also that a notice indicating the designation has been made is given with all reasonable speed to the designated entity, if practicable and where the entity or a representative of it is in New Zealand.
23. The designated entity can apply in writing to the Prime Minister for the designation to be revoked on the grounds that the entity does not satisfy the s 22 TSA test or that the entity is no longer involved in any way in acts of the kind that made, or that would make, the entity eligible for designation. Judicial review proceedings are also possible in respect of a designation under the TSA.

### **Consideration of designation of Al Shabaab**

24. Al Shabaab was identified by the Working Group as an entity that was consistent with the relevant factors agreed by Cabinet, and ODESC endorsed consideration of designation of Al Shabaab in July 2009. Al Shabaab is listed as a terrorist entity by the United States<sup>3</sup> and Australia.<sup>4</sup>

### **STRUCTURE OF THIS PAPER**

25. This paper sets out background information about Al Shabaab and also discusses various other aspects of the organisation including its objectives, tactics, weapons and structure, before detailing three case studies of recent attacks which meet the definition of a terrorist act under the TSA.
26. The discussion preceding the case studies provides background about Al Shabaab which helps inform the analysis of the specific attacks in the case studies below. The attacks detailed in the three case studies represent recent and serious attacks attributed to and/or claimed by Al Shabaab. It is these three attacks that have been analysed as meeting the definition of a "terrorist act" under s 5 of the TSA, and which provide the basis for the paper's conclusion that Al Shabaab meets the legal criteria for designation as a terrorist entity under the TSA.

### **CREDIBILITY OF SOURCES**

27. A large number of sources have been used in the preparation of this paper. They are: the International Crisis Group, Jane's (Intelligence Review plus Terrorism and

Intelligence Centre), the United States Council on Foreign Relations, Human Rights Watch, The United Nations High Commissioner for Human Rights, the Centre for Social Cohesion, Hudson Institute of New York, Centre for Security Studies in Zurich, Associated Press, Reuters, Voice of America News, Jamestown Foundation, New York Times, Agence France-Presse (AFP), BBC, World Analysis, United States Department of State, the United States Director of National Intelligence, the Federal Bureau of Investigation (FBI), ISN (ETH Zurich), Global Geopolitics News, the Economist and Al Jazeera. These sources have been consulted because, in sum, their reporting is considered to be reliable and they provide a good factual basis for the events described in this paper.

## **BACKGROUND**

### **Recent history of Somalia**

28. Somalia has lacked central government since the dictator Mohamed Siad Barre was ousted from power in 1991. What governance there has been has tended to be generated at the local level by those able to wield coercive power and/or those who lead the traditional Somali social structures known as "clans" or sub-clans".
29. In 2006, the Union of the Islamic Courts ("UIC") took power from the "warlords" in Mogadishu and established some order in the city. In December 2006 the Ethiopian Army invaded Somalia, defeated the UIC's militia and occupied Mogadishu.<sup>5</sup> The Ethiopian military remained in Somalia at the invitation of the Transitional Federal Government ("TFG") until it withdrew in January 2009. The TFG, formed in 2004 as the product of two years of international mediation, remains in government and is supported by the United Nations Security Council-backed African Union Mission in Somalia ("AMISOM").<sup>6</sup>
30. The internationally recognised but largely powerless<sup>7</sup> TFG is attempting to ward off an insurgency in Somalia that is made up of a number of different groups, including Al Shabaab. There is a high level of violence in Mogadishu city and fighting is also spread throughout the country. The security situation is unstable and unpredictable.<sup>8</sup>

### **Establishment of Al Shabaab**

31. Al Shabaab means "the youth" in Arabic.<sup>9</sup> There are conflicting reports on when the organisation was founded,<sup>10</sup> however there is general agreement that it is relatively young. It gained influence and some power because it was "one of the more powerful factions encompassed by the UIC" which controlled Mogadishu until late 2006.<sup>11</sup> It is described by the International Crisis Group as one of three distinct groups in the Somali insurgency, and as "the most militant, well-organised, well-financed and active of the three".<sup>12</sup> The other two are, first, a clan-based militia and, the second, another UIC splinter group.<sup>13</sup>
32. Al Shabaab split from the UIC after it was ousted from power. As the Council on Foreign Relations reports, Al Shabaab has waged a violent insurgency against the TFG since 2006 and now controls much of southern Somalia.<sup>14</sup>

### **Al Shabaab's objectives**

33. Al Shabaab's objective in waging its violent insurgency is achieving a total revolution in Somalia, similar to that achieved by the Taliban in Afghanistan before 2001. It seeks the abolition of the TFG and the creation in Somalia of an Islamic State governed by a

strictly defined and enforced Sharia law, based on its own Salafi and Wahhabi influenced form of Islam.<sup>15</sup>

34. Al Shabaab espouses a highly militant version of Islam and sees its struggle with its opponents in ideological terms.<sup>16</sup> It views the TFG as an apostate government and is therefore contemptuous of the current Somali President, a moderate Muslim, Sharif Ahmed. The Economist has quoted an Al Shabaab commander as saying to its correspondent, about Ahmed, that "[e]ven you [an unbeliever] are closer to us than he is ...[h]e is far, far from us because he has sold out his religion".<sup>17</sup> Al Shabaab remains hostile to an Ethiopian presence, and most other international involvement in Somalia as being undesirable intervention in the country.<sup>18</sup> It was Al Shabaab's uncompromising and militant views that drove its split with the UIC. As the International Crisis Group has written,<sup>19</sup> the split was between the "moderate Islamists, who favoured political engagement with other anti-Ethiopian groups, and militant Islamists, who detested such a compromise". For Al Shabaab, to compromise its goals by cooperating with others is to risk the dilution of the purity of its faith. Al Shabaab also wished to pursue a global jihad, but the UIC did not.<sup>20</sup>
35. The group's own commentary on the split with its former partners in the "deviant Courts"<sup>21</sup> also shows the centrality of their religious/ideological motivations and their militancy. An Al Shabaab spokesperson has said that compromising with "apostates" and "unbelievers" should not be undertaken because "jihad" is the only way to achieve its fundamental goals.<sup>22</sup> It is "seeking to establish an Islamic state along the lines of the Taliban ruled by Allah in the land of Somalia" and "driv[e] the infidels out of the Horn of Africa".<sup>23</sup> Al Shabaab has said that it will "cooperate with any group from the Muslims (as long as they are truly Muslims)".<sup>24</sup>
36. Al Shabaab have also stated that they are happy to have been listed as a terrorist organisation by the United States because "it would help recruiting and further internationalise its cause"<sup>25</sup> and also because it is "a name given to pure Muslims who are strong and clear in their religious position."<sup>26</sup>

### **Organisation and structure**

37. Al Shabaab has three roughly geographical or regional groupings.<sup>27</sup> The International Crisis Group notes one operating in Mogadishu and the central regions of Galgudund and Hiiraan; a second in the Bay and Bakool and Shabeelle regions; and a third in the Juba Valley. These regional units "appear to operate independently of one another, and there is often evidence of friction between them".<sup>28</sup>
38. Al Shabaab has a relatively flat leadership structure. Jane's suggested in 2008 that the group had a "relatively unified, albeit decentralised administration" and that Al Shabaab's "commanders almost certainly operate with considerable autonomy".<sup>29</sup> The Council on Foreign Relations reported in February 2009<sup>30</sup> that Sheik Mohamed Muktar Abdirahman (Abu Zubeyr) is the group's nominal leader. There does not appear to be an overall leader to which all others are subordinated. The Council on Foreign Relations reports rather that a core group of senior leaders guide its actions.<sup>31</sup>
39. Estimates of Al Shabaab's size vary, but there is a consensus among observers that its fighting forces are in the thousands rather than tens of thousands.<sup>32</sup> However, it is not so much the numbers at Al-Shabaab's disposal that give it a military edge in Somalia but

the "hardcore ideological believers, which could range between three hundred and eight hundred individuals".<sup>33</sup>

40. Among these hardcore believers are reported to be some foreign born fighters from a range of countries including the United States and the United Kingdom.<sup>34</sup> Some of these see Somalia as the next battleground for holy war.<sup>35</sup> An ethnic Somali from the United States was one of the suicide bombers in an Al Shabaab attack in October 2008.<sup>36</sup>

### **Al Shabaab links with Al-Qaida**

41. On the information available, it would be difficult to conclude that there is a formal organisational link between Al Qaida and Al Shabaab. There is, however, evidence supporting strong informal and ideological/rhetorical links between the two groups. As the Council on Foreign Relations reports, the strongest tie between Al Shabaab and Al-Qaida is ideological,<sup>37</sup> and although weak organisational links may exist between the two groups, reports support the proposition that Al Shabaab appears to be an Al-Qaida inspired group. Al Shabaab leaders have stated their support for Al-Qaida.<sup>38</sup>
42. Al-Qaida has recently and in the past provided Al Shabaab members and new recruits with explosives and jihadist training,<sup>39</sup> lending substance to the argument that there are informal links. These links are further demonstrated by the killing in Somalia of Saleh Ali Saleh Nabhan by United States forces on 14 September 2009.<sup>40</sup> Nabhan, reported to be running training camps in Somalia for Al Shabaab members,<sup>41</sup> was a known Al-Qaida member.

### **Weapons and tactics**

43. When it began its insurgency in late December 2006, Al Shabaab used guerrilla tactics<sup>42</sup> (ie 'hit and run' attacks based on mobility and surprise) giving its forces a temporary local advantage. The weapons used in these attacks were usually small arms.
44. As the insurgency has continued, Al Shabaab's military capacity has grown. Attacks on the Ethiopian forces' bases became more frequent and more skilful in 2007. Al Shabaab also overran some TFG bases and held them for some hours before withdrawing.<sup>43</sup> From 2007/8, Al Shabaab added improvised explosive devices ("IEDs"), especially roadside devices, suicide bombs, mines and mortars to its list of weapons.<sup>44</sup> The International Crisis Group reports that, in late 2008, Al Shabaab and the other insurgent groups "waged a campaign of targeted assassinations against TFG administrators and security officials" and that the "fear of assassination, coupled with difficulties in recruitment ... is now severely hampering TFG ability to gather information on the insurgency".<sup>45</sup>
45. Although the Ethiopian military withdrew from Somalia in January 2009, Al Shabaab has continued to take the fight to the TFG. International Crisis Group staff, writing in the Canadian press in June 2009, said that the "scale and ferocity of the latest fighting between the transitional government and the hard-line Islamist factions opposed to it is unprecedented, even by Somalia's grim and bloody standards".<sup>46</sup>
46. As the fighting has intensified, its impact on civilians has grown. The UN High Commissioner for Human Rights reported in July 2009 that witnesses had told its investigators that Al Shabaab had carried out "extrajudicial executions, planted mines, bombs and other explosive devices in civilian areas and used civilians as human

shields". They are reported "to have used torture and fired mortars indiscriminately into areas populated or frequented by civilians".<sup>47</sup>

47. The International Crisis Group<sup>48</sup> agrees that "civilians are often the main victims" of the insurgents' actions and that indiscriminate methods have been used, including suicide bombs, land mines and roadside bombs. Human Rights Watch<sup>49</sup> says that "insurgent forces [of whom it notes that Al Shabaab is one] have repeatedly and indiscriminately attacked civilians with mortars, small arms and remote explosive devices; killed TFG officials and threatened civilians, including journalists and aid workers; and jeopardised civilians through their deployment in densely populated areas".
48. In addition to using violence, Al Shabaab has also used pragmatic "political and public outreach" tactics when capturing towns. The International Crisis Group describes this strategy as "remarkably sophisticated" and "well choreographed". It involves clerics addressing public rallies and holding talks with local clan elders as well and the use of 'mobile Sharia courts' to attempt to settle disputes.<sup>50</sup>

## CASE STUDIES

### Public beheading of seven people, Baidoa, Somalia, 10 July 2009

#### *The facts*

49. On 10 July 2009, Al Shabaab publicly beheaded seven people in the south-western Somali city of Baidoa.<sup>51</sup> The seven were accused by Al Shabaab of abandoning the Muslim faith and spying for the government.<sup>52</sup> This was believed to be the largest mass execution by Al-Shabaab since 2006.<sup>53</sup> Reports indicate that none of those beheaded were tried prior to their executions.<sup>54</sup>
50. Al Shabaab took control of the city of Baidoa in January 2009 after Ethiopian troops, who had been supporting the TFG, withdrew.<sup>55</sup> Following its takeover, Al Shabaab called locals to a football stadium, telling them that they would now rule the city by Islamic law.<sup>56</sup>
51. Al Shabaab is known to carry out public executions and public punishments as part of their strict enforcement of Sharia law. In June 2009, Al Shabaab also publicly beheaded three people in the same region<sup>57</sup> and ordered four men to have an opposite hand and foot amputated in Mogadishu, after they were accused of theft.<sup>58</sup>
52. The beheadings on 10 July 2009 were attributed to Al-Shabaab by Reuters,<sup>59</sup> Al Jazeera,<sup>60</sup> the Associated Press,<sup>61</sup> and Jane's Terrorism and Insurgency.<sup>62</sup>

#### *The act meets TSA criteria for designation*

53. This mass public beheading is consistent with the definition of a terrorist act under s 5 of the TSA.
54. The beheading of the seven people shows a clear intention on the part of Al Shabaab to cause their death (s 5(3)(a) TSA). Carrying out the execution of these people in public, without trial, also shows an intention to terrorise the civilian population (s 5(2)(a) TSA). The public executions send a message to those living in Baidoa that the Al Shabaab militants have control of the city and will exercise that control by enforcing their own strict interpretation of Islamic law, seemingly arbitrarily.



55. Al Shabaab's accusations that those killed had spied for the Somali government and abandoned the Muslim faith demonstrate that the beheadings were carried out for the purpose of advancing their political/religious cause of overthrowing the TFG and installing a strict Islamic regime in Somalia (s 5(2) TSA).

### **Suicide bomb, Beled Weyne, Somalia, 18 June 2009**

#### *The facts*

56. On 18 June 2009, an Al Shabaab suicide bomber drove up to the entrance of a hotel in the Somali town of Beled Weyne,<sup>63</sup> detonating explosives that killed at least 20 people.<sup>64</sup> Among those killed were Somalia's Security Minister, the former ambassador to Ethiopia, Somali government officials, local security men and several other civilians.<sup>65</sup> At least 30 people were also injured in the attack.<sup>66</sup>
57. Somalia's Security Minister was reported as being a key player in the government's offensive against Al Shabaab.<sup>67</sup> According to the Jamestown Foundation, the attack was carefully timed, occurring just as the Minister was leaving the hotel with the Ethiopian Army officers he had been meeting with to discuss "means of reversing the progress of the Islamist opposition coalition and preserving the diminishing government of President Shaykh Sharif Shaykh Ahmad."<sup>68</sup>
58. An Al Shabaab spokesman later claimed responsibility for the attack<sup>69</sup> stating that "[o]ne of our Mujahideen went with his car laden with explosives to a building where the apostate and other members from his group had been meeting... The apostates have been eliminated; they all died in the suicide attack."<sup>70</sup> The Jamestown Foundation notes that the attack was carried out by the Mujahideen Youth Movement which is one of the names Al Shabaab is known by (see paragraph 2 above).<sup>71</sup> Al Shabaab is the only group known to use suicide bombs in Somalia.<sup>72</sup>

#### *The attack meets TSA criteria for designation*

59. The suicide bombing is consistent with the definition of a terrorist act in s 5 of the TSA.
60. The nature of this suicide attack shows a clear intention to cause the death or serious injury of the individuals targeted (s 5(3)(a) TSA): the explosives were detonated at a precise time and location, were aimed at a particular group of people, and were clearly sufficient to cause a large amount of damage.
61. The targets of the attack (the Somali Security Minister, other Somali government officials, and Ethiopian Army Officers) and the fact the attack targeted a meeting where they were discussing Ethiopian military support to the TFG, shows an intention to unduly compel the government to abstain from doing an act, namely allowing the Ethiopian Army to return to Somalia (s 5(2)(b) TSA). The attack was reported at the time as a clear warning from Al Shabaab to the TFG that it will strike at anyone thought to be negotiating a return of the Ethiopian military to Somalia.<sup>73</sup>
62. The target and timing of the attack, along with their statement claiming responsibility, demonstrate that the attack was carried out for the purpose of advancing Al Shabaab's political/religious cause of overthrowing the TFG and installing a strict Islamic regime in Somalia (s 5(2) TSA). It directly attacked the civilian government which Al Shabaab views as being an apostate government that must be replaced.

**Coordinated suicide bombings in Hargeisa (Somaliland region) and Boosaaso (Puntland region), 29 October 2008.**

*The facts*

63. On 29 October 2008, between 1000 and 1030hrs,<sup>74</sup> three suicide car bombs were set off within seven minutes of each other in Hargeisa (the capital of the Somaliland region<sup>75</sup>).<sup>76</sup> The bombs targeted the Presidential palace, the Ethiopian consulate and the UN Development Programme building.<sup>77</sup> At approximately the same time, another two suicide car bombs<sup>78</sup> targeted two anti-terrorism offices of the United States-supported<sup>79</sup> Puntland Intelligence Service (PIS) in Boosaaso (located in the neighbouring semi-autonomous Puntland region).<sup>80</sup> The attacks, which were reported to be co-ordinated,<sup>81</sup> killed more than 20 people<sup>82</sup> and injured 28.<sup>83</sup>
64. The bombings occurred as Somali government officials met with other regional leaders in Nairobi, Kenya to discuss the ongoing crisis in Somalia and the performance of the TFG.<sup>84</sup> Al Shabaab has previously launched attacks while regional mediation efforts were underway. In August 2008, Al Shabaab seized the port city of Kismayu in Djibouti when the TFG and some opposition figures signed a peace pact at United Nations-led negotiations in Djibouti.<sup>85</sup>
65. The day after the Hargeisa and Boosaaso bombings, Al-Shabaab posted a video on Jihadi websites showing the last testament of one of the suicide bombers, though they did not explicitly claim responsibility.<sup>86</sup> Jane's<sup>87</sup> and the FBI<sup>88</sup> report that a United States national was identified as one of the suicide bombers responsible for these attacks. The attacks were attributed to Al Shabaab by the Jamestown Foundation<sup>89</sup> and Jane's Terrorism and Insurgency.<sup>90</sup>

*The attack meets TSA criteria for designation*

66. These coordinated bomb attacks meet the definition of a terrorist act under s 5 of the TSA.
67. The use of explosives, detonated by suicide bombers, accurately targeted at buildings, at a time of day where people would be present and the size of the bombs (clearly sufficient to cause significant harm) shows a clear intention to cause the death or serious injury of those targeted (s 5(3)(a) TSA).
68. The selected targets (Somali government and intelligence agencies and Ethiopian and UN buildings), and the timing of the bombings (during regional talks on the situation in Somalia) demonstrate Al Shabaab's intention to unduly compel the Somali government to do or abstain from doing any act (s 5(2)(b)), namely, continuing to resist Al Shabaab and seeking international assistance to do so and maintain power. The coordinated nature of the bombings also demonstrates to the government Al Shabaab's capabilities/strength.
69. As noted at paragraph 34 above, Al Shabaab views the TFG as an apostate government which it is fighting to overthrow and international organisations such as the United Nations as unwanted international intervention. The targets for these coordinated bomb attacks and their timing show they were carried out for the purpose of advancing Al Shabaab's political/religious cause of overthrowing the TFG and installing a strict Islamic regime in Somalia (s 5(2) TSA).

## LAW OF ARMED CONFLICT

### The law of armed conflict exemption

70. Section 5(4) of the TSA states that an act is not a terrorist act if “it occurs in a situation of armed conflict and which is, at the time and in the place that it occurs, in accordance with the rules of international law applicable to the conflict.”
71. For the s 5(4) exemption to apply, two conditions must be satisfied. First, there must be a state of armed conflict in Somalia. Secondly, the attack must accord with the law of armed conflict (“LOAC”). If one of these conditions is not met, the exemption does not apply.
72. In this case, there is an internal armed conflict in Somalia and so the first condition is met. However, the attacks in the case studies breach LOAC principles and so the s 5(4) exemption does not apply.

### Is there an armed conflict in Somalia and do members of Al Shabaab conduct themselves as combatants?

73. There are two kinds of armed conflict. An international armed conflict exists where there is a conflict between the armed forces of two states, where there is a military occupation of one state by the armed forces of another, or where peoples are fighting against colonial domination, alien occupation or a racist regime in the exercise of their self-determination. An internal armed conflict exists where the conflict is fought between government forces and opposing non-state forces, or amongst armed groups, none of whom qualify as a legitimate government.
74. LOAC makes a key distinction between armed conflict and other internal disturbances or tensions such as riots and isolated and sporadic acts of violence.<sup>91</sup> Neither Al Shabaab’s nor the TFG’s actions against each other are isolated or sporadic acts of violence. Rather, as detailed in this paper, each side is engaged in an insurgency/military campaign against the other of such intensity that amounts to an internal armed conflict.<sup>92</sup> This is clear from the impact on the civilian population.<sup>93</sup>
75. In situations of armed conflict, only combatants have the right to conduct attacks. Although combatant status does not strictly exist in internal armed conflicts,<sup>94</sup> non-state armed forces such as Al Shabaab, in order to be carrying out their operations in accordance with LOAC, have to distinguish themselves from the civilian population, at least while engaged in an attack or in operations preparatory to an attack.
76. Al Shabaab arguably meets the criteria for distinguishing itself from the civilian population:<sup>95</sup> it has a responsible command structure (albeit a relatively flat one)<sup>96</sup> and its fighters often wear similar clothing (red and white shemaghs/keffiyehs and green fatigues), carry arms openly,<sup>97</sup> and certainly seek to distinguish themselves when they take over a town/territory.<sup>98</sup> It is not known, however, whether members of Al Shabaab distinguish themselves during individual attacks and the material reviewed for the writing of this paper does not suggest there is an internal disciplinary system that enforces compliance with LOAC.

### The case studies

77. As there is a non-international armed conflict in Somalia and arguably Al Shabaab fighters act as combatants so that LOAC can apply, the final question is whether the attacks detailed in the case studies are consistent with the applicable LOAC.
78. The LOAC that applies in Somalia is Common Article 3 of the Geneva Conventions 1949 (which Somalia became party to in 1962). The key principle in Common Article 3 is distinction: attacks on enemy combatants and military targets are lawful, whereas attacks on the civilian population, civilian objects and people rendered *hors de combat* are not.<sup>99</sup>
79. In the second and third case studies (both suicide bomb attacks), Al Shabaab has directly targeted civilians with an attack and so breached the LOAC principle of distinction. In the first case study (the public beheadings), Al Shabaab has breached a protection Common Article 3(1)(d) sets down for civilians. It prohibits “the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised people.”
80. Since each of the case studies involve violations of the LOAC applicable to the conflict, the exemption in s 5(4) TSA cannot apply, and they are properly characterised as terrorist acts under s 5 TSA.

### CABINET RELEVANT FACTORS

81. As discussed above at paragraphs 18 and 19, there are a number of Cabinet agreed relevant factors for deciding whether to recommend the designation of a non-UN listed terrorist entity. The factors that are specifically relevant in relation to the recommended designation of Al Shabaab are discussed below.

### Regional presence/links with New Zealand

82. Links are developing between members of Al Shabaab and people in developed countries (for example foreign fighters in Somalia).<sup>100</sup> Given the jihadist nature of Al Shabaab, these links are of potential security concern. So far, there has been a flow of people from various developed countries, probably small in absolute numbers, to participate in Al Shabaab's insurgency. There is further concern that some of these would-be mujahideen will return home, bringing with them radicalised attitudes and new and dangerous skills. Another risk is that some Somalis, residing in developed countries, might either be vulnerable to radicalisation because of some past trauma or be radicalised under the influence of people from Somalia. The Somali diaspora is one of Al Shabaab's sources of funds.<sup>101</sup>
83. Recently, Australian authorities charged a number of young men of Lebanese and Somali descent, some of whom reportedly had links with Al Shabaab, with terrorism offences relating to alleged plans to conduct a suicide attack against an Australian Army base. Australian authorities continue to investigate the extent to which security risks are posed by links between people resident in Australia and Al Shabaab.<sup>102</sup>
84. There is a sizeable population of Somalis currently residing in New Zealand, although there is a lack of accurate statistics and census data is ambiguous. Drawing on foreign

experience, some of these people may be sympathetic to Al Shabaab due to political, religious or familial affiliations.

### **The nature and scale of involvement in terrorist acts or support activity**

85. Although Al Shabaab has employed political strategies in its campaign to overthrow the TFG (see paragraph 48 above), it regularly uses terrorism against a range of targets to advance its cause and send a message to the civilian population (see paragraphs 41 to 45 and 49 to 55 above). Its use of terrorist methods and practices is ruthless and has been vital to its successes of the past 30 months. In effect, terror has been a 'force multiplier' for Al Shabaab, giving it a prominence in the Somali conflict it would probably otherwise have lacked.

### **Risks to New Zealand citizens**

86. Terrorist activity may pose a risk to the security of New Zealand citizens or interests. A risk to New Zealand citizens, albeit that this is most likely to be in an overseas jurisdiction rather than in New Zealand (recent arrest of Somali militants in Australia), will constitute an important factor in considering whether to request the designation of that entity.
87. There are three New Zealanders registered with the Ministry of Foreign Affairs and Trade as being in Somalia at October 2009. New Zealand does not have any diplomatic representation in Somalia. New Zealand's consular advice (as at September 2009) is that there is an 'extreme risk' to peoples' security in Somalia and New Zealanders are advised against all travel there and that New Zealanders in Somalia should leave. There is therefore a risk of New Zealanders living or travelling in Somalia being directly affected by Al Shabaab activities.
88. A New Zealand designation of Al Shabaab is unlikely to change this level of risk to New Zealanders in Somalia to any significant degree. Al Shabaab has targeted foreign and international interests however the focus has been on attacking the TFG and its supporters, primarily the Ethiopian military and the AMISOM peacekeepers.

### **The rationale for going beyond the UN listing**

89. As outlined at paragraph 10 above, pursuant to UNSCR 1267, the UN maintains one list of terrorist entities – individuals and entities belonging to or associated with Al-Qaida and the Taliban. Al Shabaab is not on this consolidated list and is unlikely to be listed by the UN in the short term. Therefore, any designation of Al Shabaab must be a New Zealand national decision.

### **Contribution to international security**

90. The designation of terrorist entities not already listed by the UN helps New Zealand implement its obligations under UNSCR 1373. As the threat of terrorism and terrorist activity in New Zealand is low, the primary purpose of New Zealand designating terrorist entities is usually to contribute to international efforts to constrain the operating space of terrorist entities as much as possible. By making New Zealand an unwelcome environment for terrorist entities, in particular regarding their financing, we make it more difficult for them to operate internationally.

## THE CASE TO DESIGNATE

91. This paper concludes that Al Shabaab meets the legal criteria for designation as a terrorist entity and also that it is in line with the Cabinet relevant factors for recommending designation to the Prime Minister.
92. Al Shabaab is a hardline Islamic insurgent group that often uses terrorism in its campaign to overthrow the Somali government and impose strict Islamic law over the country. The use of terrorist acts has been vital to the group's recent successes in the conflict.
93. There does not appear to be a formal organisational link between Al Shabaab and Al-Qaida or the Taliban and designation of Al Shabaab by the UN 1267 Committee is unlikely. Al Shabaab has been listed as a terrorist organisation by the United States and Australia.
94. Al Shabaab receives funds from Somalis and others outside of Somalia. The group may have a regional presence and/or links with people in our region. There is a risk that some Somalis in New Zealand may travel to Somalia to fight with or be trained by Al Shabaab (as some United States and United Kingdom nationals have done). There is a small risk to any New Zealanders in Somalia from Al Shabaab's actions.
95. A key purpose of designation would be to contribute to international security by assisting international efforts to constrain the operating space of terrorist entities as much as possible.
96. If the Prime Minister were to agree that Al Shabaab meets the legal criteria for designation under the TSA, he must consult with the Attorney-General on the case and may then exercise his discretion in s 22 of the Act whether to designate.

## RECOMMENDATION

97. It is recommended that you:
  - 97.1 Note that officials, acting in accordance with Cabinet mandated procedures, have concluded that Al Shabaab meets the legal criteria for designation as a terrorist entity under the TSA and recommend that Al Shabaab be so designated.
  - 97.2 Note that, should the Prime Minister be inclined to proceed to designation, he is required to consult the case with the Attorney-General.
  - 97.3 Note that the decision to designate otherwise falls within the statutory discretion of the Prime Minister.

**Howard Broad**  
Commissioner of Police

- 1 Final designations expire under the TSA after 3 years unless renewed by the Prime Minister (section 35 TSA).
- 2 See CAB (03) 34/15A.
- 3 See the statement issued by the US Secretary of State on 26 February 2008, available at <http://www.state.gov/s/ct/rls/other/des/102448.htm>, last accessed 14 September 2009.
- 4 See the joint statement issued by the Australian Attorney-General and the Minister for Foreign Affairs, 21 August 2009, available at <http://www.foreignminister.gov.au/releases/2009/fa-s090821.html>, last accessed 14 September 2009.
- 5 See International Crisis Group (ICG) report "Conflict history: Somalia" dated September 2008 and last accessed on 21 September 2009 ([http://www.crisisgroup.org/home/index.cfm?action=conflict\\_search&l=1&t=1&c\\_country=98](http://www.crisisgroup.org/home/index.cfm?action=conflict_search&l=1&t=1&c_country=98)).
- 6 See, for example, New York Times article dated 17 September 2009 "In Somalia, a leader is raising hopes for stability". Available at: [http://www.nytimes.com/2009/09/17/world/africa/17somalia.html?\\_r=1&scp=1&sq=%22In%20Somalia,%20a%20leader%20is%20raising%20hopes%20for%20stability%22&st=cse](http://www.nytimes.com/2009/09/17/world/africa/17somalia.html?_r=1&scp=1&sq=%22In%20Somalia,%20a%20leader%20is%20raising%20hopes%20for%20stability%22&st=cse). Date last accessed 17 September 2009.
- 7 See page 1 of an article in the Economist, "The next Jihad" and dated 2 July 2009. Last accessed 9 September 2009. See [http://www.economist.com/world/middleeast-africa/displaystory.cfm?story\\_id=13964251](http://www.economist.com/world/middleeast-africa/displaystory.cfm?story_id=13964251).
- 8 Foreign Commonwealth Office Travel Advisory for Somalia, current at 27 September 2009, at <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/sub-saharan-africa/somalia>, Foreign Affairs and International Trade Canada Travel Report valid at 27 September 2009, available at [http://www.voyage.gc.ca/countries\\_pays/report\\_rapport-eng.asp?id=269000](http://www.voyage.gc.ca/countries_pays/report_rapport-eng.asp?id=269000), Human Rights Watch 'So Much to Fear: War Crimes and the Devastation of Somalia' December 2008, pp 18-19, available at <http://www.hrw.org/node/76419> VOA News 'Heavy Fighting Resumes in Mogadishu' 11 May 2009, available at <http://www.voanews.com/english/archive/2009-05/2009-05-11-voa15.cfm?CFID=300009140&CFTOKEN=93058232&jsessionid=de301e477a72c915144b5532c425c146e561>, see also paragraph 45 below.
- 9 See The Economist, "A government under the cosh", [http://www.economist.com/world/middleeast-africa/displaystory.cfm?story\\_id=13927334](http://www.economist.com/world/middleeast-africa/displaystory.cfm?story_id=13927334), 25 June 2009, this article was last accessed on 25 August 2009. The BBC, renders the term as "the lads". See <http://news.bbc.co.uk/2/hi/africa/7307521.stm>. This article was published on 21 March 2008 and was last accessed on 14 September 2009.
- 10 See International Crisis Group "Somalia: To Move Beyond The Failed State", (footnote 71 on page 11), dated 23 December 2008, available at <http://www.crisisgroup.org/home/index.cfm?id=5836&l=1>. Last accessed 1 September 2009.
- 11 See page 3 of Jane's Intelligence Review item of 1 September, 2008 "Misspent Youth - Somalia's Shabab insurgents". Date last accessed 30 August 2009. Refer to [http://www8.janes.com/JDIC/JTIC/documentView.do?docId=/content1/janesdata/mags/jir/history/jir\\_2008/jir10472.htm@current&pageSelected=&keyword=&backPath=http://jtic.janes.com/JDIC/JTIC&Prod\\_Name=JIR&activeNav=http://www8.janes.com/JDIC/JTIC](http://www8.janes.com/JDIC/JTIC/documentView.do?docId=/content1/janesdata/mags/jir/history/jir_2008/jir10472.htm@current&pageSelected=&keyword=&backPath=http://jtic.janes.com/JDIC/JTIC&Prod_Name=JIR&activeNav=http://www8.janes.com/JDIC/JTIC).
- 12 See page 11 of note 10.
- 13 See page 11 of note 10.
- 14 US Council on Foreign Relations' article (page 1), dated 27 February 2009 and available at <http://www.cfr.org/publication/18650/>. Date last accessed 24 August 2009.
- 15 See page 2 of note 14.
- 16 See page 11 of note 10.
- 17 See page 1 of note 7.
- 18 See page 11 of note 10 for a description of the ideological background to Al Shabaab's attitude to foreign contacts.
- 19 See page 10 of note 10.
- 20 See page 2 of statement of Abu Mansoor al-Riki "To the beloved Mujaahideen (in specific) and the Muslims (in general)", available at <http://worldanalysis.net/postnuke/html/index.php?name=News&file=article&sid=785> last accessed 1 September 2009.

- 21 For a statement of how the members of Al Shabaab see themselves as differing from their former colleagues see, especially pages 4 to 8 of the statement by Abu Mansoor al-Riki "To the beloved Mujaahideen (in specific) and the Muslims(in general)" above note 20.
- 22 See page 2 of an article, by Alexander Meleagrou-Hitchens "Somalia and the two faces of Islamism". This article, available at <http://www.hudsonny.org/2009/08/somalia-and-the-two-faces-of-islamism.php> , was published on 21 August 2009. Last accessed 25 August 2008.
- 23 See page 2 of note 22.
- 24 See page 8 of note 21.
- 25 See page 26 of note.
- 26 New York Times, "Somalia: Militants glad to be on US list",20 March 2008, available at <http://query.nytimes.com/gst/fullpage.html?res=9C02E6D7143CF933A15750C0A96E9C8B63&sec=&sp=on=&pagewanted=print> . Last accessed 15 September 2009.
- 27 On page 11 of note 10 , the ICG says that Al Shabaab has "roughly (of) three units". The Council of Foreign Relations says, on page 1 of note 14 , that there are three plus there is a fourth unit which is closely aligned with Al-Shabaab but not a member of it.
- 28 See page 1 of note 14.
- 29 See page 6 of Jane's, note 11.
- 30 See page 1 of note 14.
- 31 See note 14.
- 32 The Council on Foreign Relations (page 1,note 14 ) notes that analysts "generally agree that the group contains several thousand members".
- 33 See page 1 of note 14.
- 34 See page 1 of note 14.
- 35 See page 15 of note 10.
- 36 See page 2 of note 14.
- 37 Council on Foreign Relations, note 14 .
- 38 United States National Counter-terrorism Centre note on Al Shabaab at [http://www.nctc.gov/site/groups/al\\_shabaab.html](http://www.nctc.gov/site/groups/al_shabaab.html), last accessed on 8 October 2009. Also see statement of Abu Mansoor al-Riki "To the beloved Mujaahideen (in specific) and the Muslims(in general)", above, note 20.
- 39 BBC "Profile: Saleh Alui Saleh Nabhan" dated 15 September 2009, last accessed 17 September 2009. Article can be found at <http://news.bbc.co.uk/2/hi/africa/8256024.stm>
- 40 Time "Somalia: U.S. Kills Al-Qaeda's Nabhan in Terrorism Raid" dated 15 September 2009, last accessed 17 September 2009. Article can be found at [http://news.yahoo.com/s/time/20090916/wl\\_time/08599192316900/print](http://news.yahoo.com/s/time/20090916/wl_time/08599192316900/print)
- 41 BBC "Profile: Saleh Alui Saleh Nabhan" dated 15 September 2009, last accessed 17 September 2009. Article can be found at <http://news.bbc.co.uk/2/hi/africa/8256024.stm>
- 42 See pages 12 and 13 of note 10.
- 43 See page 4 of note 14 .
- 44 See page 13 of note 10.
- 45 See page 13 of note 10.
- 46 See "When it comes to Somalia, Inaction is not an Option", carried in the 'Globe and Mail' on 15 June 2009. This is available on the ICG website at [www.crisisgroup.org/home/index.cfm?id=6157&l=1](http://www.crisisgroup.org/home/index.cfm?id=6157&l=1) .
- 47 See UNHCR report "United Nations Human Rights Chief Says Reports Suggests Possible War Crimes In Somalia". This report, dated 10 July 2009, is available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/AF10F0DBFC1A694DC12575EF00343797?opendocument>, last accessed 7 September 2009.
- 48 See page 13 of note 10.
- 49 See page 2 of an article, dated 30 March 30, 2008, "The Human Rights Crisis in Somalia". This is available from <http://www.hrw.org/en/news/2008/03/30/human-rights-crisis-Somalia>. Date last accessed 24 August 2009.
- 50 See page 12 of note 10.
- 51 See item by Reuters dated 10 July 2009 "Somali Islamist hardliners behead 7 people. This is available at <http://reuters.com/articlePrint?articleId=USLA469466>. Date last accessed 31 August 2009.
- 52 See:
- Associated Press "Somali Islamist insurgents behead 7 people" dated 10 July 2009, last accessed 31 August 2009. Article can be found at <http://www.msnbc.msn.com/id/31853423>
  - Reuters "Somali Islamist hardliners behead 7 people" dated 10 July 2009, last accessed 31 August 2009. Article can be found at <http://www.reuters.com/articlePrint?articleId=USLA469466>



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- 53 See:
- VOA News "Al-Shabaab Militants in Somalia Behead 7 in mass execution" dated 10 July 2009, last accessed 31 August 2009. Article can be found at <http://www.voanews.com/english/2009-07-10-voa26.cfm>
  - VOA News "Al-Shabaab Militants in Somalia Behead 7 in mass execution" dated 10 July 2009, last accessed 31 August 2009. Article can be found at <http://www.voanews.com/english/2009-07-10-voa26.cfm>
  - Associated Press "Militants behead seven in spy, apostasy cases" dated 11 July 2009, last accessed 31 August 2009. Article can be found at <http://www.washingtontimes.com/news/2009/jul/11/militants-behead-seven-in-spy-apostasy-cases/>
- 54 VOA News "Al-Shabaab Militants in Somalia Behead 7 in mass execution" dated 10 July 2009, last accessed 31 August 2009. Article can be found at <http://www.voanews.com/english/2009-07-10-voa26.cfm>
- 55 Reuters "Somali Islamists to rule by sharia law in Baidoa" dated 27 January 2009, last accessed 7 September 2009. Article can be found at <http://www.reuters.com/articlePrint?articleId=USLR224194.CH.2400>
- 56 See , note 55
- 57 Reuters, note 51 .
- 58 See:
- New York Times "Islamists amputate limbs of 4 Somalis accused of theft" dated 26 June 2009, last accessed 8 September 2009. Article can be found at <http://www.nytimes.com/2009/06/26/world/africa/26somalia.html>; and
  - Reuters "Somali Islamists order teenagers' hands, legs amputated" dated 22 June 2009, last accessed 8 September 2009. Article can be found at: <http://www.reuters.com/articlePrint?articleId=USLM261120.CH.2400>
- 59 See, note 57.
- 60 Al Jazeera "Somalia's al-Shabab beheads 'spies'" dated 10 July 2009, last accessed 31 August 2009. Article can be found at <http://english.aljazeera.net/news/africa/2009/07/200971017742924625.html>
- 61 Associated Press "Islamist Insurgents Behead 7 People in Somalia" dated 10 July 2009, last accessed 31 August 2009. Article can be found at [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,531405,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,531405,00.html)
- 62 See, note 51.
- 63 See:
- Jamestown "Suicide bombing kills Somali Security Minister as Islamist mount assault on Mogadishu" dated 25 June 2009, last accessed 19 August 2009. Article can be found at [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=35181&tx\\_ttnews%5BbackPid%5D=13&cHash=6df0716f51](http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=35181&tx_ttnews%5BbackPid%5D=13&cHash=6df0716f51)  
**Note:** Beled Weyne is the provincial capital of Hiraaan province in Somalia; and
  - NY Times "Somali Minister Killed in Bombing" dated 19 June 2009, last accessed 1 September 2009. Article can be found at <http://www.nytimes.com/2009/06/19/world/africa/19somalia.html>
- 64 AFP "Somalia government regroupes after suicide attack" dated 19 June 2009, last accessed 8 October 2009. Article can be found by accessing Google <http://www.google.com/hostednews/afp/article/ALeqM5hie7lGi-DvZ51S1JCKFd5Uey9wyQ>
- 65 NY Times, note 63.
- 66 AFP "Somalia government regroupes after suicide attack" dated 19 June 2009, last accessed 22 June 2009. Article can be found at
- 67 Reuters "Suicide bomber kills Somali security minister" dated 18 June 2009, last accessed 19 June 2009. Article can be found at <http://www.reuters.com/article/topNews/idUSTRE55H1PN20090618>
- 68 See, note 63 and 67
- 69 See:
- 70 Reuters, note 67 . NY Times, note 63 .
- 71 See: note 63, note 64
- Jamestown Foundation, "Suicide bombing kills Somali Security Minister as Islamist mount assault on Mogadishu" dated 25 June 2009, last accessed 19 August 2009. Article can be found at [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=35181&tx\\_ttnews%5BbackPid%5D=13&cHash=6df0716f51](http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=35181&tx_ttnews%5BbackPid%5D=13&cHash=6df0716f51)
- 72 See, note 63.
- 73 See, note 63.

- See NY Times "5 Suicide bomb attacks hit Somalia" dated 29 October 2008, last accessed 15 September 2009. Available at: <http://www.nytimes.com/2008/10/30/world/africa/30somalia.html>.
- Somaliland attempted to split from Somalia in 1991, following the fall of the Siad Barre regime. It had created a stable governing entity with democratic elections, but failed in gaining international recognition.
- BBC "Deadly car bombs hit Somaliland" dated 29 October 2009, last accessed 28 August 2009. Article can be found at <http://news.bbc.co.uk/2/hi/africa/7696986.stm>
- Jane's "US and UK nationals acted as suicide bombers for Somali Shabab" dated 9 March 2009, last accessed 5 August 2009. Article is available on subscription only. [http://search.janes.com/Search/documentView.do?docId=/content1/janesdata/mags/jtsm/history/jtsm2009/jtsm5236.htm@current&pageSelected=allJanes&keyword=%22US%20and%20UK%20nationals%20acted%20as%20suicide%20bombers%20for%20Somali%20Shabab%22&backPath=http://search.janes.com/Search&Prod\\_Name=JTSM&](http://search.janes.com/Search/documentView.do?docId=/content1/janesdata/mags/jtsm/history/jtsm2009/jtsm5236.htm@current&pageSelected=allJanes&keyword=%22US%20and%20UK%20nationals%20acted%20as%20suicide%20bombers%20for%20Somali%20Shabab%22&backPath=http://search.janes.com/Search&Prod_Name=JTSM&)
- See, note 61
- See International Crisis Group policy briefing "Somalia: The Trouble with Puntland" 12 August 2009, p 7, available at <http://www.crisisgroup.org/home/index.cfm?id=6264>, last accessed 15 September 2009.
- See:
- Reuters "Suicide bombers kill at least 28 in Somalia" dated 29 October 2008, last accessed 28 August 2009. Article can be found at <http://www.reuters.com/article/homepageCrisis/idUSL0534420.CH.2400> and;
  - Jamestown Foundation "Somaliland charges al-Shabaab extremists with suicide bombings" dated 8 December 2008, last accessed 24 August 2009. Article can be found at [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=34239](http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=34239)
- See, note 76
- See:
- Jamestown Foundation, note 80; and,
  - BBC, note 76.
- Human Rights Watch "Hostages to peace, threats to Human Rights and Democracy in Somaliland" dated July 2009, last accessed 7 September 2009, report can be found at <http://www.hrw.org/sites/default/files/reports/somaliland0709web.pdf>
- See, note 76
- Reuters, note 80.
- Jamestown Foundation, note 80.
- Jane's "Somalia's foreign fighters" dated 4 June 2009, last accessed 25 August 2009. Article is available on subscription only at [http://search.janes.com/Search/documentView.do?docId=/content1/janesdata/mags/jtsm/history/jtsm2009/jtsm5267.htm@current&pageSelected=allJanes&keyword=somalia's%20foreign%20fighters&backPath=http://search.janes.com/Search&Prod\\_Name=JTSM&](http://search.janes.com/Search/documentView.do?docId=/content1/janesdata/mags/jtsm/history/jtsm2009/jtsm5267.htm@current&pageSelected=allJanes&keyword=somalia's%20foreign%20fighters&backPath=http://search.janes.com/Search&Prod_Name=JTSM&)
- FBI Executive Speech by Robert S. Mueller, III Director FBI. Dated 23 February 2009, last accessed 14 September 2009. Speech can be found at <http://www.fbi.gov/pressrel/speeches/mueller022309.htm>
- Jamestown Foundation, note 80.
- Jane's "Shabab militants behead civilians in Somalia's Bay" dated 10 July 2009, last accessed 5 August 2009. Article available on subscription only. A hardcopy of the article is held by the Working Group.
- Article 2 of Additional Protocol II 1977 states "this protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."
- See specifically paragraphs 30 and 45.
- Human Rights Watch 'So Much to Fear: War Crimes and the Devastation of Somalia' December 2008, pp 18-19, available at <http://www.hrw.org/node/76419>. See also paragraphs 45 to 47.
- Members of non-state armed forces party to an internal armed conflict may still be prosecuted under the ordinary criminal law for their actions (Common Article 3 to the Geneva Conventions 1949).
- These criteria are based on the Hague Regulations 1907 that set out the requirements for forces/individuals to qualify as combatants. Under the Regulations, the group must: be commanded by a person responsible for his/her subordinates; wear a distinctive emblem recognisable at a distance; carry arms openly; and conduct their operations in accordance with LOAC. Occasional breaches of LOAC should not be used to disqualify an otherwise qualifying force. That element requires, at least, a chain of command that enforces respect for LOAC.
- See paragraph 38.
- Many photos show Al Shabaab fighters in the green fatigue 'uniform', such as those hose at BBC News 'Somalia's text message insurgency' 16 March 2009 (<http://news.bbc.co.uk/2/hi/africa/7932316.stm>) and

Global Geopolitics News 'Somalia: Al Shabab's pyrrhic victory?', 19 May 2009 (<http://globalgeopolitics.net/wordpress/2009/05/20/somalia-al-shababs-pyrrhic-victory/>). Others however show Al Shabaab fighters in other dress, for example, BBC News 'Profile: Somalia's Islamic 'lads'', 21 March 2008 (<http://news.bbc.co.uk/2/hi/africa/7307521.stm>) or ISN 'Somalia: Al-Shabaab Defiant, Determined', 4 June 2009 (<http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?lng=en&id=101131>).

For example, see ICG report, note 10, p 12.

This principle is found in Common Article 3 to the Geneva Conventions 1949, art 13 of Additional Protocol II 1977 and is also customary international humanitarian law. A person is *bors de combat* if he or she is wounded, sick or shipwrecked or captured by the opposing force.

See paragraphs 40 and 65.

See page 3 of note 14.

See three items in the Melbourne newspaper, The Age:

- "Extremists recruiting Aussie Somalis, dated 13 April 2009. This is available at <http://news.theage.com.au/national/extremists-recruiting-aussie-somalis-20070413-7a9.html>.
- "Victoria's top cop meets Somali leaders", dated 7 August, 2009. This is available at <http://news.theage.com.au/breaking-news-national/victorias-top-cop-meets-somali-leaders-20090807-ecup.html>, and.
- "Al Shabaab radicalises youth, funded by piracy: experts" dated 4 August, 2009. This is available at <http://www.theage.com.au/national/alshabaab-radicalises-youth-funded-by-piracy-experts-20090804-e7zm.html>