

## **A Legal Assessment of the Penal Law for Terrorism and its Financing**

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1. The purpose of this memorandum is to provide my expert comparative reassessment of the Penal Law for Terrorism and its Financing (“the anti-terror law”) that was enacted by Saudi Arabia in November of 2017, presumably replacing the version of the law enacted in February 2014. In June 2015, I provided my original expert assessment of that law. It is my understanding that the anti-terror law has continued to be used on occasion to target minority leaders and human rights advocates in Saudi Arabia, thus my reassessment focused on the gaps between the English text which I have reviewed in light of the best practices for the prevention and punishment of terrorism offenses. There may well be wrinkles in the official Arabic text that obviate some of the concerns raised herein. This opinion focuses on a comparative analysis, fully acknowledging the reality that each nation may well have distinctive features of its own struggle against terrorist acts. In short, despite amendments that indicate positive development toward a more complete encapsulation of the connected aims of effective anti-terrorism law and protection of human rights, the November 2017 law as assessed from a purely textual perspective falls short of fully respecting important human rights principles in several areas. Paragraphs 5 to 19 describe my conclusions in this regard. The changes recommended herein would bolster the Kingdom’s compliance with human rights norms, while simultaneously serving to deprive terrorist groups of ability to twist the Statute for propagandistic and recruiting purposes.
2. At the outset, I wish to briefly describe my qualifications for rendering such an expert assessment. My name is Michael A. Newton. I am currently serving as Professor of the Practice of Law at Vanderbilt University Law School. Prior to my service on the faculty at Vanderbilt, I taught at the United States Military Academy at West Point and at the U.S. Army Judge Advocate General's School and Center, Charlottesville Virginia. I am a 1984 graduate of the U.S. Military Academy who served more than 21 years on active duty, both as a combat arms officer and as an operational lawyer to include more than 500 cases as a military prosecutor.
3. I am an elected member of the International Institute of Humanitarian Law in San Remo Italy, and active in the International Bar Association, as well as current service on the Advisory Board of the American Bar Association International Criminal Court Project. I have published more than 90 works of varying lengths, to include a number of books, law

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review articles, and book chapters addressing the law of international terrorism. I was the senior editor of the Terrorism International Case Law Reporter published annually by Oxford University Press since 2007, which necessarily required me to closely follow terrorism related litigation across a wide variety of jurisdictions.

4. I am an internationally recognized expert in the substance of the field of International Humanitarian Law particularly as it relates to the field of terrorism. I helped to negotiate the Elements of Crimes for the United States delegation to the International Criminal Court negotiations in the aftermath of the 1998 Rome Statute negotiations and have served as an expert witness in federal terrorism litigation on three occasions. Though the United States remains opposed to full accession as a State Party to the International Criminal Court, we successfully negotiated the details of the *actus reus* (criminal acts) and *mens rea* (criminal intent) for each of the many crimes of genocide, crimes against humanity, and war crimes delineated in the Rome Statute to the point that the U.S. delegation could join consensus with all of the other national delegations on both the Elements and the Rules of Procedure and Evidence for the Court. I have also argued before the International Criminal Court, and advised on other matters. The law is clear that any act designed to instill terror in the civilian population violates both the laws of warfare when conducted in the context of hostilities as well as the relevant body of peacetime terrorism law. Subsequent to those negotiations, I served in the Office of the U.S. Ambassador-at-Large for War Crimes during both the Clinton and George W. Bush Administrations. In that capacity helping to craft the concept for the hybrid tribunals, and serving as the U.S. representative on the United Nations Planning Mission for the Sierra Leone Special Court. The model of a specialized tribunal that we implemented in Sierra Leone provided the comparative template for internationalized and local tribunals in Cambodia, the Balkans, Bangladesh, East Timor, Uganda, Peru, Kenya, and the Lebanon Tribunal currently working in The Hague. Lastly, I served as the International Advisor to the Iraqi High Criminal Court and advised the attorneys working with the Central Criminal Court in Baghdad on terrorism related offenses under Iraqi domestic law.
  
5. At the outset, international practice is clear that there should be no latitude for states to disregard human rights standards or international best practices based on a subjective condemnation of terrorist activities. The Global Counter-Terrorism Strategy condemns all forms and manifestations of terrorism, but the document [unanimously adopted in the General Assembly] specifically states that “measures to ensure the respect for human rights for all and the rule of law [are] the fundamental basis for the fight against terrorism.”<sup>2</sup> United Nations Security Council Resolution 2178 emphatically notes that “Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, underscoring that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort.”<sup>3</sup> The unanimously adopted Security Council Resolution requires in its

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<sup>2</sup> UN General Assembly resolution A/60/288, Annex, Plan of Action, part IV.

<sup>3</sup> S/RES/2178 (2178), see [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2178%20\(2014\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178%20(2014))

operative paragraphs, *inter alia*, that “Member States shall, consistent with international human rights law, international refugee law, and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities.”<sup>4</sup>

6. Human rights represent more than an inconvenient corollary to successful state counter-terrorism. In my view, states should absolutely take prompt action within the relevant legal standards to protect the lives and property of their citizens, thereby protecting their fundamental human right to life and property and the sanctity of their family. To that end, I find the key aspects of the jurisdictional scope of Article 3<sup>5</sup> if applied in good faith to be commendable and completely consistent with international best practices insofar as Saudi courts can extend authority over individuals who attempt to force Saudi Arabia to “do or abstain from doing any act” [quoting the formulation drawn from the Terrorist Bombing Convention, to which Saudi Arabia acceded on October 31, 2007]. The domestic statute is also perfectly consistent with international standards and the most current best practices in purporting to cover persons who attempt to attack Saudi citizens anywhere in the world [based on my reading of the phrase in English “with exception to the principle of territoriality”], or who seek to damage the nation’s public properties abroad including embassies, other diplomatic locations, or consulates or to commit any prohibited terrorist act aboard any vessel, aircraft, or other method of transportation registered with the Kingdom or carrying its flag. On the other hand, language extending the authority of the Chamber over anyone who supports changing the ruling system of the State comes dangerously close to infringing on the freedom of thought and speech that is at the core of human rights.
7. The extension of jurisdiction in Article 3 with regard to persons who commit, seek to commit, or assist in committing acts designed to harm the “Kingdom’s interests, economy, or national security” is a broad formulation that is not precisely replicated in other domestic statutes or international treaties, but falls well within the Kingdom’s sovereign duties, provided that such prosecutions comport with Saudi Arabia’s treaty obligations regarding

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<sup>4</sup> *Ibid.* para. 5.

<sup>5</sup> Saudi Arabia Law of Terrorism Crimes and its Financing, Article (3) (unofficial translation):

With exception to the principle of territoriality, the Law applies to every Saudi or foreign person who commits a crime as stipulated in the Law, outside the Kingdom, assists in committing the crime, instigates, incites, contributes to, or participates in the crime, and was not tried for it. If it is intended to achieve any of the following:

1. Change the system of government in the Kingdom.
2. Disrupt of the Basic Law of the Government or some of its provisions.
3. Induce the state to carry out an act or abstain from doing so.
4. Assault Saudis abroad.
5. Damage to the public property of the state and its missions abroad, including its embassies, and its other diplomatic or consular places.
6. Carry out a terrorist act on board a transportation vehicle registered to the Kingdom or carries its flag.
7. Harm the Kingdom's interests, economy, or national security.

the protection of fundamental human rights.

8. **Inadequate Protection Against Discriminatory Enforcement Measures** – My review of the Saudi statute reveals that it still does not preclude discriminatory application by expressly providing for equal application of the law,<sup>6</sup> and thus falls well short of established and widely recognized minimum standards thereby creating the potential for prosecutorial targeting based solely on impermissible proxy criteria such as religious or political affiliation.<sup>7</sup>
9. The goal of fighting terrorism expediently and effectively should not come at the expense of human rights. In 2008, the then-UN High Commissioner for Human Rights, Louise Arbour, noted in her final report that “It has now become clear that upholding human rights is not at odds with confronting terrorism; on the contrary, the moral vision of human rights coupled with the nature of legal obligations to uphold these rights foster deep respect for the dignity of each person. National counter- terrorism strategies and international cooperation must include measures to prevent the spread of terrorism, and must also include measures to prevent ethnic, national or religious discrimination, political exclusion, and socio-economic marginalization, as well as measures to address impunity for human rights violations.”<sup>8</sup> The group of more than 30 international experts from a variety of legal systems assembled by the Netherlands to refine the best practices also reached a similar conclusion. Paragraph 9 of the Leiden Policy Recommendations for Counter-Terrorism and International Law noted in this regard that effective international efforts require respect for human rights norms: “Criminal justice response to terrorism (which includes the investigation, prosecution, and adjudication of terrorist crimes) forms the cornerstone of any sustainable counter-terrorism effort that respects the principles of the rule of law, human rights, and due process. Effective international cooperation requires respect for human rights. ... The disregard for fundamental human rights norms also has the demonstrable effect of undermining international cooperation in the struggle against suspected terrorists, as well as eroding the available channels for assisting investigations and prosecutions related to transnational

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<sup>6</sup> Saudi Arabia Law of Terrorism Crimes and its Financing, Article (1)(3) (unofficial translation):

“Terrorist crime: Any act carried out by the perpetrator to commit a criminal activity either as an individual or as part of a group, whether directly or indirectly, towards the purpose of disrupting public order; harming the security of the community and the stability of the state; risking national unity; disabling the Basic Law or any of its articles; harming the reputation or status of the country; damaging public facilities and natural resources; or trying to coerce a branch of the authority into undertaking a certain course action or obstructing justice; or to harm or cause death of any person when the purpose- by its nature and context- to intimidate people or force the government or an intentional organization to act or refrain from doing any act; or threatening or inciting the commission of any of the aforementioned acts.

As well as carrying out any conduct constituting a crime under the Kingdom's obligations in any of the international conventions or protocols related to terrorism or its financing -- to which the Kingdom is a party -- or carrying out any of the acts listed in the annex to the International Convention for the Suppression of the Financing of Terrorism.”

<sup>7</sup> See, e.g., Jean-Marc Ferré, *UN Experts Decry Saudi Arabia's Use of Anti-terror Laws Against Peaceful Activists*, UN NEWS (Jan. 2, 2018), <https://news.un.org/en/story/2018/01/640852-un-experts-decry-saudi-arabias-use-anti-terror-laws-against-peaceful-activists>.

<sup>8</sup> Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (UN Doc. A/HRC/8/13, para.4).

terrorist acts, particularly those that cross regional boundaries. The absence of an effective and efficient regime for international cooperation can result in frustration among law enforcement and security officials that in turn leads to human rights violations.”<sup>9</sup> In other words, respect for human rights and fundamental freedoms in the investigation and enforcement of domestic offenses provides a necessary precondition for lasting international cooperative efforts.

9. The Terrorist Bombing Convention, which binds the Kingdom as a matter of international law effective October 31, 2007, is clear on this point. Article 5 of the Convention specifically notes that the substantive terrorist offenses must be criminalized and that defendants cannot under any circumstances justify their conduct by recourse to “considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.” Thus, the state is free to punish all terrorists using severe sanctions, but must do so with full respect for that defendant’s basic rights to non-arbitrary enforcement of the law. In a perfect symmetry, because the Kingdom must apply the law equally across all groups and citizens without specifically targeting any single group or entity, Article 12 of the Convention logically requires denial of any extradition request or request for mutual legal assistance from another state based on a good faith belief that such request “has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons.” Article 15 of the International Convention for the Suppression of the Financing of Terrorism [to which Saudi Arabia acceded on August 23, 2007] contains identical proscriptions. Thus, the implication is unmistakable that states cannot use their own domestic laws as a pretext for the persecution of any person on grounds of their race, religion, nationality, ethnic origin or political opinion and they must affirmatively protect those personal characteristics from unwarranted interference at the hands of other state officials.
10. To be clear, the Saudi statute is defective on its face in that it textually fails to provide for equal protection of the law and equal application to all covered citizens or non-nationals regardless of their political views, racial identification, religious views, or their ideological perspectives. It may well be true in practice that some higher percentage of defendants share some common trait, but the law itself cannot serve as a pretext for targeting any group based on such prohibited criteria. The failure to provide for such protections on the face of the Penal Law leaves it short of the mark in terms of relevant international standards.
11. **Overly Broad Criminal Formulations** – The 2017 anti-terror law that I reviewed falls short of the best practices across other states because the criminal formulations in Article 1 remain overly broad in several ways. The key definitional text of Article 1 is now more specific, in better accordance with the relative specificity found in the Terrorist Bombing Convention as well as the Convention for the Suppression of Terrorist Financing. However, Article 1 is still imprecise in ways that can permit the criminal statute to deviate from its

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<sup>9</sup> See COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER, 68 (Larissa van den Herik & Nico Schrijver, eds., Cambridge University Press 2013). The Leiden Principles are at <http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf>.

laudable and necessary purposes and be used as a pretext to prevent parts of the population from enjoying the appropriate range of freedom of expression, freedom of thought and belief, and free exercise of religion, especially when read with Article 30 of the anti-terror law. Key defects in the scope of Article 1 are as follows:

- a. The 2014 anti-terror law broadly prohibited acts that threatened ‘national security’ or ‘national unity,’ or that ‘disrupted public order.’ These statutory constructions have been condemned in other contexts as providing a subterfuge for states to undermine protected fundamental rights.<sup>10</sup> My 2015 legal analysis specified that these phrases could not warrant criminal sanction as part of the terrorism statute absent a linkage to acts designed to provoke terror in the civilian population. The 2017 anti-terror law does provide such a linkage, limiting a ‘terrorist crime’ to commission of any of a list of acts “when the purpose—by its nature and context—is to terrorize the people or to compel a government or an international organization to carry out an act or abstain from doing it...”<sup>11</sup> This new language is similar to provisions in the Terrorist Financing Convention<sup>12</sup> and aligns with state practice.
- b. Despite the increased specificity of the 2017 anti-terror law and its further alignment with international statutory practice, the character of many of the criminal acts in Article 1 makes them liable to potential inappropriate use. Acts such as those intended to ‘destabilize the state’ or ‘jeopardize [the state’s] national unity’ could—and reportedly have been<sup>13</sup>—used to punish political opponents and rights advocates. The anti-terror law can be improved in ways that do more to prevent mis-use of the law. For the sake of comparison, the analogue South African statute that uses the phrase “unity or territorial integrity of the Republic” does so with significantly higher and specific thresholds, *inter alia*, “the systematic, repeated or arbitrary use of violence by any means or method”; “causes the destruction of or substantial damage to any property, natural resource, or the environment or cultural heritage, whether public or private”; “intimidate, or to induce or cause feelings of insecurity within, the public...with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public.” Notably, the South African statute that does make reference to “unity or territorial integrity” as being within the

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<sup>10</sup> See UN Doc. A/61/267, 16 August 2006, paras.17-19, 23.

<sup>11</sup> Article 1(3) (unofficial translation).

<sup>12</sup> Terrorist Financing Convention, Article 2(1)(b); *see also* UNSC Resolution 2566 ¶ 3 (“[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act...”).

<sup>13</sup> *See, e.g.,* Ferré, *supra* note 7 (“United Nations human rights experts deplored Saudi Arabia’s continued use of counter-terrorism and security-related laws against human rights defenders and urged the release of all those detained for peacefully exercising their rights.”); Amnesty Int’l, *Saudi Arabia Must Take Immediate Steps to Address Concerns of UN Special Rapporteur on Counter-Terrorism* (2018), <https://www.amnesty.org/download/Documents/MDE2377602018ENGLISH.pdf> (“The 2014 counter-terror law has been used to prosecute human rights defenders and activists on vague and overly broad charges for their peaceful activism.”).

criminal scope of its domestic statute specifically states that though the criminal prohibition encompasses acts “committed, directly or indirectly, in whole or in part, for the purpose of advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking” the crime does **not** consist of “any act which is committed in pursuance of any advocacy, protest, dissent or industrial action and which does not intend the harm contemplated.” The Saudi Arabian statute contains no glimmer of this particularity nor does it protect the exercise of basic human rights in a similar manner. This omission is especially significant in light of Article 30 of the 2017 anti-terror law, which assigns a five- to ten-year punishment to “describ[ing], directly or indirectly, the King or the Crown Prince by any description against religion or justice.”<sup>14</sup> The 2017 anti-terror law’s explicit call for use of the law to punish peaceful religious and political dissidents presents a marked contradiction to both international standards of human rights and the purposes of anti-terrorism legislation.

- c. Apart from these defects, other crimes within the scope of Article 1 can be reconciled under established precedents as warranting prosecution under domestic terrorism legislation, in particular the language aimed at punishing acts designed to coerce public officials or to compel state policy decisions.
- d. The 2017 anti-terror law, although more specific, still does not require that prohibited acts be committed with the intent to “cause death or serious bodily injury” or “with the intent to cause extensive destruction” that could result “or is likely to result in major economic loss.” The quoted language comports with international practice as reflected in the Terrorist Bombing Convention. The requirement that prohibited acts or attempts be tied to such concrete results is the most appropriate way to prevent the application of overly broad crimes when used as a tool for state suppression of protected human rights.
- e. Lastly, the prohibitions on Funding Terrorism contained in Article 1(4)<sup>15</sup> are still impermissibly broad in that there is no specific reference to a raised *mens rea* requirement. The 2017 anti-terror law merely describes the prohibited conduct as “providing funds” for the specified purpose of “commit[ing] an act of terrorism or for the interest of a terrorist entity or a terrorist in any form mentioned in the Law.” This language remedies some of the ambiguity of the 2014 anti-terror law, which prohibited conduct either ‘directly or indirectly’ aimed at the listed purposes. The text of the statute, however, still falls short of giving the specificity required to meet due process standards. Article 47—the provision that prescribes sentencing for funding terrorism—duplicates the ambiguous *mens rea* language of the 2014 anti-terror law. The language of the Terrorist Financing Convention addresses precisely the problem of the 2014 language by specifying in Article 2 that the crimes can be committed by anyone that:

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4

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<sup>14</sup> Article 30 (unofficial translation).

<sup>15</sup> See Article 1(4): “Providing funds to commit an act of terrorism or for the interest of a terrorist entity or a terrorist in any form mentioned in the Law, including the financing of the travel of a terrorist and training him.””

of this article; (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article; or (c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) *Be made with the aim of furthering the criminal activity or criminal purpose of the group*, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or (ii) *Be made in the knowledge of the intention of the group* to commit an offence as set forth in paragraph 1 of this article. [my emphasis added].

In my expert opinion, the raised *mens rea* thresholds for the terrorist funding provisions are a necessary predicate for punishing these offenses while complying with relevant human rights principles.

12. In marked contrast to the silence of the Saudi statute, the Supreme Court of Canada addressed precisely the same issue in connection with upholding the life sentence adjudged against Momin Khawaja<sup>16</sup> for violating the Canadian Anti-Terrorism Act of 2001. The Chief Justice wrote that overbreadth “occurs when the means selected by the legislator are broader than necessary to achieve the state objective, and gross disproportionality occurs when state actions or legislative responses to a problem are “so extreme as to be disproportionate to any legitimate government interest.”<sup>17</sup> Chief Justice McLachlin authored the majority opinion based on the logic that the foundational purpose of the Canadian statute is “to provide means by which terrorism may be prosecuted and prevented” rather than imputing a broader purpose to “punish individuals for innocent, socially useful or casual acts which, absent any intent, indirectly contribute to a terrorist activity.” Thus, in her conclusion, the statute accords with human rights norms and the Canadian constitution because to be convicted under the Canadian domestic terrorism statute, a perpetrator must knowingly participate in or contribute to such criminal activity but the *actus reus* must also be undertaken for the higher purpose of enhancing the ability of a terrorist group or to facilitate an act of terrorism. In effect, the higher *mens rea* requirement narrowed the band of prohibited conduct sufficiently to make the law itself sustainable, and the punishment flowing from its enforcement suitable. The Chief Justice explained that the statute was sufficiently protective of human rights norms even as it regulated a broad swath of prohibited conduct:

I return to the central question: is s. 83.18 broader than necessary or does it have a grossly disproportionate impact, considering that the state objective is the prevention and prosecution of terrorism? It is true that s. 83.18 captures a wide range of conduct.

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<sup>16</sup> See Her Majesty the Queen v. Mohammed Momin Khawaja [2008] Ontario Superior Court of Justice, Court File 04-G30282, *reprinted in* , I Terrorism International Case Law Reporter 319 ( Michael Newton,ed. 2008) ( assessing a sentence of 10.5 years for support to terrorism, which was subsequently extended to life imprisonment upon the cross appeal of the Prosecutor).

<sup>17</sup> R. v. Khawaja, 2012 SCC 69, ¶ 40 (decided Dec. 14, 2012) (*citing* Canada (Attorney General) v. PHS Services, at para, 133).

However, as we have seen, the scope of that conduct is reduced by the requirement of specific intent and the exclusion of conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. On the other side of the scale lies the objective of preventing the devastating harm that may result from terrorist activity. When the tailored reach of the section is weighed against the objective, it cannot be said that the selected means are broader than necessary or that the impact of the section is disproportionate.<sup>18</sup>

13. **Due Process Standards** – The 2017 statute maintains the Specialized Criminal Court as the judicial body with jurisdiction over crimes prosecutable under the statute.<sup>19</sup> There is no *per se* prohibition on the use of designated chambers or designated procedures to conduct terrorism trials in domestic systems. Though some nations, such as Algeria and India, have abolished the practice of trying terrorist suspects at special courts and have transferred jurisdiction over terrorism cases back to ordinary courts,<sup>20</sup> I believe that the relevant distinction is between “specialized courts” and special courts. While there is no definition of what constitutes a “special court,” this term often refers to courts constituted ad hoc and in response to particularized political pressure, or with a different composition of regular courts, or with lesser procedural safeguards. Some aspects of the Saudi system could be attacked for lacking sufficient procedural protections. However, some countries have decided to centralize all terrorism prosecutions and/or trials in one or a few courts, which may be staffed with particularly experienced prosecutors and judges specializing in terrorism cases, and may be equipped with heightened security for the facilities and the prosecutors, judges and other officials working there. Such specialized courts, or specialized sections of ordinary courts, do not generally raise the same concerns as do special courts as long as there is no limitation of fair trial guarantees.
  
14. As a State Party to the Arab Charter on Human Rights<sup>21</sup> the Kingdom of Saudi Arabia is obliged to implement the anti-terror law in a manner that comports with the prohibition on arbitrary detention in Article 14 and fundamental fair trial rights included in Article 16 of the Charter. For any offenses committed in the context of conflict, the anti-terror law must be implemented in a manner consistent with provisions of Article 75, Additional Protocol I to the 1949 Geneva Conventions, which is binding on Saudi officials as of August 21, 1987.
  
15. The Saudi statute may well violate these norms in several key aspects. Article 5 of the 2014 anti-terror law authorized detention for up to one year without the need to obtain permission from a judicial authority, in violation of Article 14(5) of the Arab Charter which requires that “[a]nyone arrested or detained on a criminal charge shall be brought promptly

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<sup>18</sup> R. v. Khawaja, 2012 SCC 69, ¶ 44 (decided Dec. 14, 2012) ( *citing* Canada (Attorney General) v. PHS Services, at para. 133), *citing* Application under s. 83.28 of the Criminal Code (Re), at para. 39.

<sup>19</sup> Article 1(6): “Competent Court: The Specialized Criminal Court.”

<sup>20</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/63/223), para. 27.

<sup>21</sup> See Saudi embassy website at, [http://saudiembassy.net/latest\\_news/news04150902.aspx](http://saudiembassy.net/latest_news/news04150902.aspx)

before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. His release may be subject to guarantees to appear for trial. Pre-trial detention shall in no case be the general rule.” The 2017 anti-terror law reduces the timeframe of detention to “not. . . more than seven days, except by a written order.”<sup>22</sup> While seven days better aligns with international standards of due process, the written order exception creates the potential for longer detentions. Article 19 provides somewhat of a limitation by mandating periodic reissuance of arrest warrants every 30 days, not to exceed a year in total. For an arrest longer than a year, the case must be “referred to the competent court for a determination as to its extension.”<sup>23</sup> Article 5 and Article 19 thus both allow for judicial discretion over the ultimate length of detention. Both articles, however, fail to provide any form of statutory procedure that would limit unfettered judicial discretion.

16. At a minimum, the anti-terror law should (1) permit pre-trial detention only to prevent flight, interference with evidence or the recurrence of crime and where alternative guarantees, such as bail, would not be sufficient;<sup>24</sup> (2) provide the specific standard—ideally something more than mere suspicion—by which to assess the quantum of evidence; and (3) explicitly state that the detention will be subject to mandatory *and* adversarial periodic review. The seriousness of the crime alone is not enough to justify continued detention of the accused.<sup>25</sup>
17. Article 20 allows authorities to detain the defendant for up to 90 days without contacting anyone,<sup>26</sup> in violation of Articles 14(3) and 14(6) of the Arab Charter, which ensure that anyone who is arrested shall be entitled “to contact his family members” and “to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.” Incommunicado detention is commonly linked with abusive interrogation techniques that would conflict with the Kingdom of Saudi Arabia’s obligations under the Convention Against Torture. In the UN Report against Torture of June 12, 2002, the Kingdom of Saudi Arabia stated that it

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<sup>22</sup> Article 5 (unofficial translation): “The Public Prosecution shall be competent to issue a subpoena or to arrest and to bring to justice any person suspected of committing any of the crimes as stipulated in the Law.

In all cases, the arrested person may not be remanded in custody for more than seven days, except by a written order, in accordance with the regulations and procedures prescribed by the Regulations.”

<sup>23</sup> Art. 19 (unofficial translation): “The Public Prosecution shall issue a warrant for the arrest of any accused of any of the crimes set forth in the Law for a period or successive periods, none of which shall exceed 30 days, and not exceed in the aggregate of twelve months. In cases where the arrest is required for a longer period, the matter shall be referred to the competent court for a determination as to its extension.”

<sup>24</sup> ICCPR, art. 9(3); *see also* Van Alphen v. Netherlands, H.R. Comm. No. 305/1988, para. 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (July 23, 1990) (“[R]emand in custody must not only be lawful but necessary in all circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.”); United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), Rule 5.1, G.A. Res. 45/110, U.N. Doc. A/45/49 (1990).

<sup>25</sup> *Schweizer v. Uruguay*, H.R. Comm. No. 66/1980, para. 18.1, U.N. Doc. CCPR/C/OP/2 (1990).

<sup>26</sup> Article 20 (unofficial translation): “Without prejudice to the right to inform the family of the accused of his arrest, the Public Prosecution may order that the contact with the accused be prohibited or visit him for a period not exceeding 90 days if the interest of the investigation so requires. If the investigation requires a longer period of detention, the matter shall be referred to the competent court for a determination of what it deems fit.”

would ensure that all of its laws, including those pertaining to arrest and detention, would ensure compliance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

18. Article 21 deprives the defendant from having legal representation during the different stages of investigation,<sup>27</sup> in violation of Article 16(3) of the Arab Charter. Article 27(1) prevents the accused or his attorney from examining the experts or the witnesses in violation of Article 16(5) of the Arab Charter.<sup>28</sup>
19. Articles 6, 8, and 23 must be implemented in a manner that preserves the full rights of the defense.<sup>29</sup> Specifically, defense attorneys should be able to access the authority in the statute to use banking experts and to compel the transfer of relevant information. Provisions that provide these rights only to the Ministry of Interior would be deficient under any normal human rights standards. Articles 17 and 87 must also be implemented in a manner that benefits all sides to litigation as well. It is conceptually possible that judges and

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<sup>27</sup> Article 21 (unofficial translation): “Without prejudice to the right of the accused to seek the assistance of a lawyer or an agent to defend him, the Public Prosecutor, at the investigative stage, may restrict this right whenever the interest of the investigation so requires.”

<sup>28</sup> Article 27(1) (unofficial translation): “The competent court may, when necessary, discuss with experts and hear witnesses in isolation from the accused and his counsel, and inform the accused or his counsel of the testimony and the report of the expert without disclosing the identity of the defendant. Necessary protection needed for the condition of the witness or the expert must be provided, considering the circumstances of the case in question, and the types of risks anticipated.”

<sup>29</sup> Article 6 (unofficial translation):

1. The Public Prosecution -- on its own initiative or at the request of the arresting officer, may request from any person, financial institutions, non-financial businesses, and professions, or non-profit organizations, to provide records, documents, or information. The party receiving this request shall urgently respond to it properly and accurately as specified in the request. In the case where the request is directed to a financial institution, it should be addressed by the supervisory body responsible for the financial institution's control. The Regulations shall specify the mechanisms for addressing such requests.
2. The State Security Service Headquarters may, in the inference process, request any person, financial institutions, designated non-financial businesses, professions, or non-profit organizations to provide records, documents, or information, and the requested party is required to do so correctly and accurately, as specified in the request as a matter of urgency. In case the request is directed to a financial institution, it should be executed by the supervisory body responsible for its control. The Regulations shall specify the mechanisms for addressing such requests.
3. A person who is notified in accordance with paragraph one or paragraph two of this Article shall not disclose, to any person, the existence or concern of such a request except for a person concerned with its implementation, or another employee or member of the administration for advice or the necessary steps to address the request.

Article 8 (unofficial translation): “The Public Prosecutor may issue an order to monitor and access evidence, records, and communications -- including letters, publications, parcels, other means of communication, information, and documents stored in electronic systems relevant to any of the crimes as stipulated in the Law.”

Article 23 (unofficial translation): “The investigation or prosecution proceedings in the crimes set forth in the Law or the crimes related to it shall not cease upon the complaint filed by the victim, who represents him, or his heirs. The plaintiff of the personal right has the right to file his case before the competent court after the investigation of the public right has ended.”

Ministry of Interior authorities exercise their duties to protect the procedural rights of perpetrators.<sup>30</sup> However, the Statute on its face does not offer any basis for assuming adequate due process protections.

20. Article 7(3) allows the Public Prosecutor to, in times of necessity and upon preparation of a record, conduct searches, seizures, and arrests without obtaining a warrant.<sup>31</sup> Despite the requirement to provide a report within 24 hours, the anti-terror law fails to specify the scope of necessity, the process of implementation, or any mechanism for judicial review.
21. **Recommendations** –
22. The overly broad criminal formulations of Article 1 should be amended to cover only those crimes that “cause death or serious bodily injury” or “with the intent to cause extensive destruction” that could result “or is likely to result in major economic loss,” and should explicitly disavow use of the anti-terrorism law as a mechanism for punishing peaceful dissidents or for restricting freedom of speech and freedom of the press.
23. Articles 5 and 19 should be amended to ensure prompt judicial review of all detentions by providing statutory standards that would procedurally limit judicial discretion.
24. Article 20 should be amended to provide detainees access to counsel and their family.
25. Articles 21 and 27(1) should be amended to provide access to counsel at all stages of the proceedings and the ability to cross-examine witnesses.
26. All provisions pertaining to searches and seizures, such as Article 7, should be subject to judicial review and implemented in full equality.

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<sup>30</sup> Article 17 (unofficial translation): “Without prejudice to the relevant provisions of the Saudi Customs of the Anti-Money Laundering Law, the Saudi Customs shall, upon suspicion of a case of financing of terrorism, seize suspected currencies, negotiable instruments, gold bullion, precious metals, precious stones or processed jewelry, regardless of its value, and transfer them along with the person holding them, if found, immediately to the competent authority to take the formal procedures, after giving a notice to Saudi Arabia Financial Investigation. The Regulations shall specify the provisions relating to the application of this Article.” Article 87 (unofficial translation): “Any person who is responsible for the application of the provisions of the Law shall be responsible for the confidentiality of the information that he has read, and shall not disclose its confidentiality except for the necessity of using it for the purposes of the competent authorities. He shall not disclose, to any person, any of the procedures, reasoning, investigation, or trial procedures in respect of any of the crimes set forth In the Law, or disclosure of data relating thereto without the need to do so.”

<sup>31</sup> Article 7(3) (unofficial translation):

There is no need to obtain a warrant to perform any of the procedures referred to in paragraph one of this Article, provided that a record indicating reasons and needs for urgency shall be prepared. The Public Prosecution shall report this procedure and the result thereof within a period not exceeding 24 hours, and the Regulations shall specify the conditions of necessity.;

*Cf.* Arab Charter on Human Rights, Article 14(1): “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.”

The whole respectfully submitted,



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