



AMERICAN BAR ASSOCIATION  
CENTER FOR HUMAN RIGHTS  
WASHINGTON, DC

## MEMORANDUM

DATE: June 2014  
TO: Iraq National Commission on Human Rights  
FROM: American Bar Association (ABA) Center for Human Rights<sup>1</sup>  
RE: Compliance of Iraq's Anti-Terrorism Law (2005) with international human rights standards

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Our responses to terrorism, as well as our efforts to thwart it and prevent it, should uphold the human rights that the terrorists aim to destroy. **Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism – not privileges to be sacrificed at a time of tension.**

- Ban Ki Moon, Secretary General of the United Nations, Remarks to the Special Meeting of the Security Council's Counter-Terrorism Committee with Regional Organizations, New York (March 6, 2003)

### I. Introduction

The Republic of Iraq (Iraq) has committed itself to the preservation of human rights within its jurisdiction, including rights to a fair trial and due process of law, the right to be free from arbitrary detention, and the right to freedom of expression, and association, among others. In addition to constitutional protections for these fundamental rights, Iraq has entered into international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR)<sup>2</sup> and the Arab Charter on Human Rights (Arab Charter),<sup>3</sup> which require it to ensure the realization

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<sup>1</sup> This report was commissioned by the American Bar Association (ABA) Center for Human Rights to determine the compatibility of Iraq's Anti-Terrorism Law of 2005 with its obligations under international human rights law. The preliminary research, analysis, and working draft of this report were completed by Toby Collis, an international human rights attorney. The views expressed in this memorandum have not been approved by the ABA House of Delegates or Board of Governors and should not be construed as representing ABA policy.

<sup>2</sup> 999 U.N.T.S. 171, *entered into force* March 23, 1976, ratified Jan. 25, 1971.

<sup>3</sup> League of Arab States, Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005), *entered into force* March 15, 2008.

of universal human rights within its borders. At the same time, Iraq is faced with a significant terrorist threat and is among the many nations that have adopted laws and policies whose purpose is to deter, investigate, and penalize acts of terrorism. At the request of the Iraq National Commission on Human Rights, the American Bar Association (ABA) Center for Human Rights reviewed Iraq's primary counter-terror law for compliance with international standards and best practices. The review determined that the law is vague and overly broad and thereby criminalizes otherwise lawful activities that are unrelated to deterring or punishing terrorism.<sup>4</sup> The law should be revised to prevent misapplication and applied carefully by the courts to avoid arbitrarily detaining and punishing individuals engaged in lawful activity, including those exercising their basic rights to freedom of expression and opinion and freedom of association and assembly.

## II. Analysis

The Anti-Terrorism Law, No. 13 of 2005 (Iraq) has only six articles. **Article 1** defines the term terrorism while **Article 2** defines specific acts of terrorism, which include violence or threats which aim to cause fear or endanger the lives of others; work with violence to damage property; organizing a terrorist gang; stirring up sectarian strife; using explosives designed to kill, among others. **Article 3** defines "crimes against state security," which include "any act" that threatens the national unity and safety of society, the attempt or use of force to overthrow government, coups or takeovers, incitement of armed rebellion, or impeding the orders of government. **Article 4** describes the penalties for those convicted of the crimes defined in the statute: the death penalty for the main perpetrator or participant of any of the offenses defined in Articles 2 or 3 and life imprisonment for a person convicted of intentionally covering up a terrorist act or of harbouring a perpetrator of a terrorist act as defined in Article 2 and 3. **Article 5** allows for "mitigation" of these sentences in the event that an accused provides information leading to the prevention of a terrorist act or the arrest of further suspects.<sup>5</sup> **Article 6** provides for the confiscation of funds and incidental items used in the commission or preparation of a terrorist act, among other final provisions.

### A. The law violates the requirement under the ICCPR and the Arab Charter that criminal laws be precise and free of ambiguity.

Article 15 of the ICCPR and Article 15 of the Arab Charter each guarantee that no one shall be convicted of a crime that was not a criminal offense prior to their alleged conduct and prohibit definitions of criminal offences that are vague, ambiguous, or imprecise.<sup>6</sup> These treaties codify the principle of the legality of the offense, which "requires that the criminalized conduct be described in precise and unambiguous language that narrowly defines the punishable offense and distinguishes it from

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<sup>4</sup> The ABA Center for Human Rights has reviewed the publicly available English-language translation of the law, available on the Legal Database of the University of Utah, College of Law, Global Justice Project: Iraq at <http://gjpi.org/central-activities/criminal-law/>.

<sup>5</sup> This is not mitigation as commonly understood (being factors that reduce a sentence for circumstances of the crime or the criminal), but incentives for cooperation.

<sup>6</sup> ICCPR art. 15 and Arab Charter art. 15; *see, e.g., David Michael Nicholas v. Australia*, Communication No. 1080/2002, ¶ 7.5 U.N. Doc. CCPR/C/80/D/1080/2002 (2004).

conduct that is either not punishable or is punishable by other penalties.”<sup>7</sup> Laws that do not clearly define terrorism and terrorist offenses violate these treaties and risk criminalizing the lawful exercise of other fundamental rights, such as freedom of expression, association, and assembly, among others.

### **Article 1: Defining Terrorism**

The 1999 International Convention for the Suppression of the Financing of Terrorism, which Iraq ratified in 2012, defines terrorism as any “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do or abstain from doing any act.”<sup>8</sup> This definition defines terrorism as an intentional violent act where the actor’s purpose is to intimidate or to compel State or international action.

In contrast, Article 1 of Iraq’s anti-terrorism law defines “terrorism” as “every criminal act committed by an individual or an organized group that targeted an individual or a group of individuals or groups or official or unofficial institutions and caused damage to public or private properties, with the aim to disturb the peace, stability, and national unity or to bring about horror and fear among people and to create chaos to achieve terrorist goals.”

This provision is both overbroad and ambiguous. *It encompasses serious and petty crimes, ranging from mass killings to vandalism. Many of the lesser crimes are likely punishable under separate provisions of Iraqi law and should not be included in a provision intended to combat serious, violent crimes that carry the penalty of death or a life sentence.* Rather than precisely defining the necessary criminal intent, the provision refers in a circular manner to acts committed to achieve “terrorist goals.”

### **Articles 2 and 3: The Offenses**

The ambiguity in the law is not lessened by the list of criminal offenses outlined in Articles 2 and 3 of the Act. Article 2(1) prohibits “violence or threats which aim to bring about fear among people or expose their lives, freedoms and security to danger and their money and properties to damage regardless of its motives and purposes which takes place in the execution of a terrorist act, individually or collectively organized.” This appears to cover all violence or threats, to persons or property, committed during the execution of a terrorist act. However, the section also states that this applies regardless of motive. *As a result, an individual could be subject to the death penalty for a simple act of vandalism perpetrated without any intent to terrorize the population or compel government action or knowledge of such activities.*

Similarly, Article 2(3)’s criminalization of organizing, chairing or participating in an armed terrorist gang could potentially sweep within its broad ambit legitimate

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<sup>7</sup> Report on the protection of fundamental human rights while countering terrorism, UN Doc. E/CN.4/2005/103, para. 33.

<sup>8</sup> International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I) (1999), S. Treaty Doc. No. 106-49 (2000), 39 I.L.M. 270 (2000), *adopted* 9 Dec. 1999, *entered into force* 10 Apr. 2002.

activities or activities conducted without criminal intent due to the vague definition of terrorism.<sup>9</sup> References to acts committed with “terrorist motives” (Article 2(5), (6), and (7) and Article 3(1)) are ambiguous because there is no clear definition of “terrorism” anywhere in the statute. *Absent a clear definition of “terrorism” and “terrorist motives”, there is no way to distinguish the acts proscribed by this law from less serious crimes.*

**Article 3(1): An example of ambiguity**

Article 3(1) criminalizes “any act with terrorist motives that threatens the national unity and the safety of society and affects the State security and its stability or weakens the capacity of security services ... either through armed confrontation with State forces or any other act that deviates from the freedom of expression which the law guarantees.” The term “national unity”, like the term “terrorist goals,” is not defined in the statute, leaving the government unfettered discretion to prosecute anyone it dislikes. In addition, the provision defines the crime in the negative as anything that is not protected by the right of freedom of expression. As such, *it violates the principle of legality because it fails to put the public on notice as to what conduct is considered criminal.*

**B. The law appears to criminalize freedom of expression, association, and assembly without narrowly tailoring such restriction to the State’s legitimate interest in the prevention of terrorism.**

Articles 19, 20, and 22 of the ICCPR guarantee the right to freedom of expression, association, and assembly, respectively. Articles 24(5), 24(6), and 32 of the Arab Charter guarantee the right to freedom of association, assembly, and expression, respectively. These rights are not absolute and can be restricted when prescribed by law, and when necessary for the respect of the rights or reputations of others, the protection of the rights and freedoms of others, the protection of national security or of public order (*ordre public*), or of public health or morals, or public safety.<sup>10</sup> Restrictions must be proportionate to the purported goal of the State.

The purported goal of counter-terrorism legislation is national security and public safety, legitimate aims for State restriction of freedom of expression and association. However, the Anti-Terrorism Law includes numerous provisions that are not clearly defined, including offenses related to “threats,” incitement, and association with others in “terrorist gangs.” This ambiguity, discussed in more detail above, potentially criminalizes acts of expression, association, and assembly that have little to do with preventing a terrorist act and sweep up conduct that is critical of the government or that is interpreted as harmful to “national unity.” Such restrictions go well beyond internationally accepted restrictions on such rights for the purposes of national security and countering terrorism. *By granting the government unfettered discretion to penalize conduct it considers “threatening”, the law could be used to*

<sup>9</sup> Article 2(3) does appear to avoid criminalizing mere membership in an armed terrorist gang by including a requirement that the offender not only participate in the gang but that the defendant have also contributed and participated in the planning and practicing for the planned terrorist act.

<sup>10</sup> ICCPR arts. 19(2), 21, and 22(2); Arab Charter arts. 24(7), 32(2).

*target political opponents or sectarian minorities. In other countries, such misuse of counterterrorism laws has led to cycles of violence between rivalling political and/or sectarian groups.*

**Example: Article 4(2)'s ambiguity violates the right to freedom of expression**

Article 2(4)'s prohibits the "use of violence or threat to stir up sectarian strife or civil war or sectarian infighting by arming citizens or by encouraging them to arm themselves and by incitement and funding."<sup>1</sup> This section does not define sectarian infighting or strife. *Any statement that is controversial could be considered incitement of "strife" even if such statements presented no real danger of causing violence.* The U.N. Special Rapporteur on freedom of expression has made clear that restrictions on acts of expression should only be enacted where the statements rise to the level of inciting violence,<sup>1</sup> which requires that the statements were:

- 1) public;
- 2) made with the intent to incite violence; and
- 3) spoken in a context where there is a risk that they could, in fact, cause violence.

This vaguely worded prohibition on threats and incitement could include a wide variety of statements that are not related to imminent violence and therefore is overly restrictive.

**C. The breadth and ambiguity of the law create a serious risk of arbitrary detention in violation of international law**

Article 9(1) of the ICCPR and Article 14 of the Arab Charter prohibit arbitrary detention. Where, as here, a criminal law fails to comply with these treaties' requirement that it be free from ambiguity, detention pursuant to its provisions is prone to arbitrary application. As discussed above, the Anti-Terrorism Law's definition of terrorism and list of offenses considered acts of terrorism contain ambiguity and appear to include otherwise lawful activity. Under the Act, an accused may be detained for exercising his or her basic rights, such as criticizing the government, when the State decides that the criticism arose to the level of threatening "national unity," an undefined term in the Act. In addition, an accused may face life imprisonment for otherwise minor offenses, such as property damage, which would subject an offender to significantly less lengthy detention absent a determination that the offender acted with "terrorist motives," another term that is not defined clearly in the Act. As a result, there is a serious risk that detention pursuant to this law is arbitrary under international standards.

**D. The imposition of the death penalty for all offenses deemed terrorist acts under the law, without regard to the severity of the act or the differing**

**levels of participation required of offenders, constitutes an arbitrary deprivation of life.**

Despite a trend towards abolition, capital punishment does not, *per se*, violate international human rights law.<sup>11</sup> However, Article 6 of the ICCPR and Article 10 of the Arab Charter both recognize a right to life and prohibit the arbitrary deprivation of life. In addition, both treaties state that the *death penalty shall be reserved only to the most serious of crimes, which has been read to limit its imposition to intentional crimes with lethal or other extremely grave consequences.*<sup>12</sup>

The acts defined as terrorism under Iraq's Anti-Terrorism Law, each of which carries a death sentence, vary in severity and scope. None necessarily require a lethal act, and several refer to damage to property or "threats" that may or may not lead to any physical injury to others. As a result, the law imposes the death penalty on individuals who have not been convicted of an intentional crime with lethal or extremely grave consequences. It therefore constitutes a grave threat to the right to life and the prohibition on the arbitrary deprivation of life.

**III. Conclusion and recommendations**

Iraq's Anti-Terrorism Law of 2005 contains broad and ambiguous terms and, as a result, is conducive to arbitrary application and abuse. The breadth of the offenses and the ambiguity of key terms appear to criminalize otherwise lawful activities, including the exercise of the fundamental rights of freedom of expression and opinion, association, and peaceful assembly. The law should be amended and greater detail and clarifying language added to remedy these problems. In particular, the Center has the following three overarching recommendations regarding the law:

**RECOMMENDATION 1:** The definition of terrorism should be amended to narrowly focus on serious violent acts intended to intimidate the population or compel government action. Absent such amendment, it should be construed narrowly by the courts to only criminalize violent acts meeting the internationally-accepted definition of terrorism.

**RECOMMENDATION 2:** The law should be amended to make clear that membership in, association with, or expressions of support for unpopular groups or groups that are critical of the government alone are not acts of terrorism. The government must at all times prove intent to, at a minimum, aid and abet an organization engaged in acts of violence or imminently threatening violence.

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<sup>11</sup> See, e.g., Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. res. 44/128, annex, 44 UN GAOR Supp. (No. 49) at 207, UN Doc A/44/49 (1989), entered into force 11 July, 1991.

<sup>12</sup> Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, art. 1, U.N. Doc. E/1984/84 (1984) ("In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.").

**RECOMMENDATION 3:** The Iraqi parliament should consider revising the law to eliminate the death penalty altogether or, at a minimum, to permit the death penalty only for intentional acts causing the death of others or widespread casualties.