

**Kuwait and Bahrain's Anti-terrorism Laws
in Comparative and International Perspective**

by

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University of Toronto

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Abstract

Counter terrorism is one of the contemporary issues that concerns both the international community and Arab states. A problematic issue in this regard is the lack of a definition, which allows states to criminalize “terrorism” based on the best interest of each individual state. This thesis examines the laws that deal with terrorism in Kuwait, which rely on Kuwait’s broad national security laws. Problems with these laws include the lack of the rule of law and violation of human rights. This thesis highlights Bahrain’s experience with counter terrorism and the human right violation during the February 2011 revolution. The thesis emphasises the importance of having an appropriate definition that coincides with the rule of law and human rights, by adhering to the international guidance provided by the 1999 ‘International Convention on Suppression of Terrorism Financing’ and the UN Security Council Resolution 1566 (2004) as a first serious step in combating terrorism.

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Introduction

Kuwait is located in a sensitive geographic location given its close proximity to Iraq, Saudi Arabia, and Iran. These three countries experience different types of terrorism and each, in different ways, could threaten the region of Kuwait. Despite this fact and the several terrorist actions that Kuwait has experienced, it has not codified terrorism. The Penal Code and the other relevant laws were adopted to criminalize offenses against state security and public order and these broad laws could include terrorist offences. However, without defining “terrorism,” many measures that are taken to counter terrorism or to ensure security, are not within the rule of law and, as a result, could affect human rights.

In Chapter I of this thesis, I will start with the Geopolitics of Kuwait, which shows the conflict between two parties; the ruling family and the Government represented by the Council of Ministers and the opposition groups or the National Assembly (the Parliament) depending on the situation. Oppositions demand more rights and freedoms, while the Government works to suppress human rights in order to maintain its status and its own interests. This conflict would explain the reason behind the existing laws that are repressive and broad in nature. I will then examine laws that deal with crimes related to terrorism, including the decrees. I will address various issues that are contrary to human rights and the rule of law, such as the limitation of freedom of expression and freedom of assembly; the use of secret intelligence; torture; and the withdrawal of citizenship. These issues are all related to the fact that “terrorism” lacks an appropriate definition. During my presentation of these laws, I will discuss some examples from the Bahraini law, as Bahrain’s internal geopolitics is similar to Kuwait’s

in some ways. Both countries are monarchies and the Royal family has governed for approximately 200 years. Discrimination against the Shiite community is another feature, except that Shiite represents a majority in Bahrain and a minority in Kuwait, and that discrimination is less in Kuwait. Also, both depend on state security laws which involve crimes that are very broad and criminalize dissent and protest. I will follow this by listing international and regional anti-terrorism treaties that Kuwait had signed or ratified. Although these treaties seem to be identified by their connection with “terrorism,” most of them did not define it and, those that do, have done so broadly, and the definition therefore, would not be within the framework of the law. I will then answer the question of whether or not Kuwait needs an anti-terrorism law, by emphasizing the importance of amending the existing laws so that they are in line with the rule of law and human rights and stressing the importance of defining “terrorism” as a first serious step in counter terrorism.

In Chapter II, I will present Bahrain’s anti-terrorism experience. I will start with the February 2011 crisis, its background, and the violation that government used against the protesters, enacting both the State Security Crimes under the Penal Code, and the 2006 Law on Protecting Society from Terrorist Acts. The latter law contains a broad definition of “terrorism,” which do not serve combating terrorism, but rather serving the government and the rulers’ interests. I will explain how the law fails to define terrorism and its negative impact on human rights.

This will lead us to two main points: first, the definition difficulty, especially with the absence of an international guidance; second, the importance of defining “terrorism”

under the penal code, in which it must be certain and specific. These two points will be examined further in Chapter III. In this Chapter, I will examine the international attempts that have been made to define “terrorism.” International guidance is provided by the 1999 ‘International Convention on the Suppression of Terrorism Financing’ and the 2004 ‘Security Council Resolution 1566.’ I will then present a regional definition under the 1998 ‘Arab Convention for the Suppression of Terrorism,’ which broadly defines “terrorism” and shows the failure of this attempt. Finally, I will emphasize that defining terrorism is a process that must stand on basic criminal law principles that can control the improper broad definitions.

Chapter I

Anti-terrorism in Kuwait

Geopolitics of Kuwait

Since the discovery of oil in Kuwait, there has been an up-rise of internal and external ambitions that have impacted legislative policy. The internal ambition, which is what matters in this research, is the desire of the ruling family, in particular, to dominate oil resources, which has resulted in fewer freedoms. It should be noted that the system of governance is hereditary in the descendants of Sheikh Mubarak Al-Sabah.¹

Kuwait has witnessed prosperity in terms of rights and freedoms in the era of Sheikh Abdullah Al-Salem, who worked to end the protection treaty with Britain in 1961; the establishment of the Constitution in 1962 that contains a chapter guarantees the public rights and freedoms; as well as the establishment of National Assembly (Parliament) in 1963. However, since his death in 1965,² the conflict continued over the rights and freedoms between the ruling authority and the people.

Political conflict exists between the two teams. The first being the Government, or the Council of Ministers, which is headed by the Prime Minister, who previously occupied a position now handled by the Crown Prince, but the crown prince and the premiership were separated as in 2003.³ The second team is represented by the people

¹ Article 4 of the Kuwaiti Constitution. Law (1) 1962, Gazette Kuwait Al Youm, 11 جريدة الكويت اليوم, November 1962, No. 402.

² Ahmad Alkhateab, *Kuwait: from the Emirate to the State*. الكويت: من الإمارة إلى الدولة, 2nd edn (Beirut; Casablanca: Almarkaz Athaqafi al Arabi, 2007) 297.

³ Ahmad Alkhateab, *Kuwait: from the State to the Emirate*. الكويت: من الدولة إلى الإمارة, (Beirut; Casablanca: Almarkaz Athaqafi al Arabi, 2009) 70.

and the Parliament, depending on the circumstances. The Parliament consists of 50 elected members in addition to appointed ministers, which constitute one third or less of the elected members, and both sit and vote in the Parliament.⁴ It is noteworthy to mention that the practice in Kuwait shows that the Ministry of Interior and the Ministry of Defense are tacitly excluded within the ruling family.

It is important to analyze how the conflict between the Government and the Parliament or people, impacts the issue of terrorism and anti-terrorism laws. The findings can be divided into two parts. First, the Government worked on passing laws that limit freedom of expression and freedom of publication, while providing overbroad protection for the Prince and the Crown Prince. The second is the Government control over Parliament resulting from the support of Islamic movements, which would weaken the liberal advocates of public freedoms. Also, the Islamic influence has been consolidated by establishing an Islamic bank, the Kuwait Finance House, which was exempted from the control of the Central Bank. Islamic charities were also exempt from the state's financial monitoring.⁵

In 1967, the Parliament elections have been rigged and patriotic candidates were excluded so that Government candidates obtain Parliamentary seats.⁶ It is noteworthy to recognize that this conflict was not only intended to weaken civil liberties but also to settle disagreements within the Royal Family.⁷ There are alliances designed to ensure that the Crown Prince not only rules the country, but also controls its oil resources and

⁴ Article 80 of the Kuwaiti Constitution.

⁵ Alkhateab, *Kuwait: from the State to the Emirate*. الكويت: من الدولة إلى الإمارة, *Supra*, 30-31.

⁶ Alkhateab, *Kuwait: from the Emirate to the State*. الكويت: من الإمارة إلى الدولة, *Supra*, 271.

⁷ Alkhateab, *Kuwait: from the State to the Emirate*. الكويت: من الدولة إلى الإمارة, 63.

the state lands,⁸ which are not the concern of this paper, but mentioning this helps to explain the reasons for issuing legislations over the state that result in the protection of the Prince and the Crown Prince. During the Parliamentary term in 1967, the Act of State Security Crimes and the State Security Court Law were issued, items which I will discuss in detail in Chapter II.

Another stage influenced the policy of legislation, that being the dissolution of Parliament between 1976 until 1981.⁹ During this period, Law regarding Public Meetings and Assemblages was issued by the Government alone, which I will discuss in Chapter II. Also, a committee was established to revise the Constitution, which was supposed to restrict the authority of Parliament and expand the authority of the Government. However, this revision was not successful due to extensive opposition.

In 1985, Parliament was elected and combined several national parties which incite Governmental fear. Thus, the Prince dissolved the Parliament after a year and a half,¹⁰ and Parliamentary life was suspended until 1992. During this stage, boards of directors for many associations and public societies, which demanded the return of democratic life, were disbanded. Several newspapers were suspended; gatherings and seminars were prohibited and a wide campaign of arrests and torture were made against members of the Parliament and Kuwait University professors, as well as other activators.¹¹

⁸ *Alkhateab, Kuwait: from the State to the Emirate. الكويت: من الدولة إلى الإمارة, Supra., 51.*

⁹ *Id.*, 76.

¹⁰ *Id.*, 67.

¹¹ *Id.*, 67.

In April 1990, to replace the Parliament, the “National Council” was established and held its first meeting in June of the same year. It was merely an advisory board, designed to come forth with a new constitution, devoid of the meanings of democracy. The Council did not last for more than a month due to the Iraqi invasion in August 1990. After the Gulf War, there were attempts by the Crown Prince, to convince the Prince in the failure of the democratic experience in Kuwait and to replace the Constitution, but the American intervention prevented it. The American Administration convinced the Congress that they fought for the liberation of a democratic state and not for a “Mashiakha” or “Tribal Chiefdom” as it was called by Saddam Husain. It was imperative to pursue the elections for the Kuwaiti Parliament in October 1992, a month before the U.S. presidential elections.¹²

With regards to the recent political situation in Kuwait, there are two points worth noting. First, it is fair to say that the role of the legislature has been somewhat ineffective. During the period of the current President Sheikh Sabah Al-Ahmad Al-Sabah, who has governed Kuwait since January 2006, Parliament has already been dissolved and new elections held three different times.¹³ These numerous dissolutions have affected the ability of the legislature to act as the main role of Parliament. Second, there has been a significant reduction in the rights of freedom of expression, particularly when it comes to criticising the Government. According to the ‘Reporters without Borders’ 2010 report, the press freedom index of Kuwait fell 27 places, from the 60th to

¹² Alkhateab, *Kuwait: from the State to the Emirate*. الكويت: من الدولة إلى الإمارة, *Supra.*, 152- 153.

¹³ Article 107 of the Constitution gives the President the power to dissolve the Parliament, but a new election must be held within two months. The three dissolutions were in: May 2006; March 2008; and March 2009.

the 87th position.¹⁴ This drop is mainly a result of a writer being imprisoned twice¹⁵ for criticising the Government and because of other practices related to freedom of expression that I will address while discussing the relative Kuwaiti laws.

The activation of the Constitution is the basis of political conflict in Kuwait, as the government does not want to follow the Constitution so attempts to deactivate it by passing legislation that limits rights and freedoms. As a result of this strategy, the ruling family cannot be held accountable. The practice reveals that terrorism was practiced widely by the state against the people, a situation that arises in many countries, especially Arab states.

The Kuwaiti Laws that Deal With Terrorism

As I indicated before, Kuwait has not codified terrorism in its legal system. Instead, it has chosen to use overly broad security laws that can also be used against dissent. These laws somehow limit human rights, especially the freedom of expression and the freedom of assembly, as they could be considered as crimes against national state security. Moreover, because these laws are too broad, they can contain terrorist acts as well. Nonetheless, as long as there is no agreeable definition of the term terrorism, a problematic issue related to law enforcement will appear, in which these broad laws will be interpreted and applied arbitrarily to achieve national security. I will further explain this when presenting each law separately. These laws that deal with such crimes are listed by the date when they were enforced:

¹⁴ Reporters without Borders, '2010 World Press Freedom Index,' online: Reporters without Borders, 20 October 2010 <<http://www.rsf.org>> at 11.

¹⁵ *Id.*

- Citizenship Law (15) 1959 and its amendments.
- Penal Code (16) 1960 and its amendments.
- Criminal Procedure Code (17) 1960 and its amendments.
- Act of State Security Crimes (31) 1970.
- Law regarding Public Meetings and Assemblages (65) 1979.
- Law on Weapons and Ammunition (13) 1991.
- Law Concerning Crimes Relating to the Safety of Aircraft and Air Navigation (6) 1994.
- Law in Respect of Combating Money Laundry Operations (35) 2002.
- Law on Inspection Procedures for the Regulate of Weapons and Prohibited Explosives (4) 2006.

I will explain these laws, starting with the most significant, by demonstrating the norms that criminalize acts that should be considered terrorist in nature, or acts that are arbitrarily criminalized as state security crimes or other forms of offences but in fact should be lawful.

1. Act (31) 1970 of State Security Crimes¹⁶

The geopolitics of Kuwait were discussed in the previous chapter, and the Act of State Security Crimes was enacted during the period of the Parliament when the governed changed the final results during the elections, its results were forged. The Act main concern is to undermine the democratic practice in Kuwait by weakening the rule of the Constitution by emptying it from one of its main concerns, which is respecting people's rights and freedoms.

¹⁶ *Gazette Kuwait Al Youm*, جريدة الكويت اليوم, No. 787, Year: Sixteen.

This law includes 34 articles divided into two chapters; the first is related to the crimes associated with the state's international security, while the second is related to national state security. Article 1, which is related to international state security, states that the following will be sanctioned to death:

- a. Any person who intentionally commits an act that compromises the independence of the country, its unity or its territorial integrity.
- b. Any Kuwaiti who points a weapon against Kuwait or, who in any way, joins the armed forces of any country in a war status with Kuwait.
- c. All those who seek for a foreign country or communicate with or with anyone who is working to its advantage to carry out acts of aggression against Kuwait.
- d. All of those who seek hostile foreign states or communicate with or with one of those who are working to its advantage to help it in its military operations or to bring detriment to the military operations of the State of Kuwait.

Article 4 states that:

Any person who collects soldiers or performs aggressive acts against foreign countries that would expose Kuwait to the risk of war, or threaten its political relation with other countries, shall be punished by imprisonment of not less than the interim term of three years. If such acts result in the occurrence of war or the severing of diplomatic relations, the penalty shall be life imprisonment.

Since establishing the Counter Terrorism Committee (CTC), Kuwait has submitted five reports. First of all, the CTC was established by Security Council Resolutions 1373 (2001), which was adopted as a reaction to the 9/11 attacks. The Committee comprises all 15 Security Council members with the assistance of appropriate expertise. Its mandate is to monitor implementation of this resolution, which requested all states to implement a number of counter terrorism measures, such as:

- Prevent and suppress the financing of terrorist acts;

- Criminalize the financing of terrorism;
- Freeze without delay funds and other financial assets of persons involved in terrorist acts;
- Take the necessary steps to prevent the commission of terrorist acts;
- Deny safe haven to terrorists or their funders.

Also, states should provide the CTC with reports detailing the steps they have taken to implement resolution 1373.¹⁷

The CTC raises an interesting point related to the above article, by asking Kuwait the following question:

Are hostile acts against foreign States prohibited by article 4 of law No. 1970/[31] even if there is no risk of war or severance of diplomatic relations?¹⁸

Kuwait's answer is almost a repetition of the article itself. It says that:

Law No. [31] of 1970 amending the Penal Code contains, in article 4, a provision criminalizing any person who assembles an army or performs any other act of aggression against a foreign State that may expose Kuwait to the risk of war or severance of political relations. This law imposes a severe penalty that may extend to life imprisonment.

It should be mentioned that this applies not only to terrorists in the sense of the question but also to any person who takes action against another State from inside the State of Kuwait.

I argue that the CTC question is still not answered. Does or does not the law criminalize these acts if there were no diplomatic relations between Kuwait and the other country and

¹⁷ Security Council Resolution 1373, 2001 SC Res. 1373, UN SCOR, S/RES/1373 [Resolution 1373].

¹⁸ 'Kuwait's Report to the CTC (2002),' Security Council, Distr.: General, 6 August 2002, S/2002/886. Letter dated 17 July 2002 from the Permanent Representative of Kuwait to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism, online: UN Security Council, Counter Terrorism Committee, 6 August 2002 <<http://www.un.org>> at 10.

no risk of war? For example, after the Gulf War, there were no diplomatic relations between Kuwait and Iraq for more than ten years. If some Kuwaitis were engaged in bombing in Iraq, would they be prosecuted under this article?

Article 8 states that:

A penalty of life imprisonment will be the punishment for any person who damages or defects or intentionally obstructs weapons or ships or aircrafts or equipment or facilities or means of public transport facilities or rations or ammunition or drugs or any of so-prepared to defend the country...

It should be noted that the law did not criminalize the act of engaging in hostility outside the country, which creates a gap not addressed by the legislator. For example, if a Kuwaiti citizen engaged with Al Qaida actions in Afghanistan or any other country, would Kuwait be able to prosecute him or her? In a CTC report,¹⁹ Kuwait's response about this issue is inconvenient. It relays on the general articles of its Penal Code, which does not consider all the dimensions of the issue. Article 12 of the Penal Code stipulates that:

The provisions of this law shall apply also to every Kuwaiti citizen who, outside Kuwait, commits a crime that is punishable under the provisions of this law and of the law in force at the place where this crime was committed.

The dilemma remains unsolved in case the act is criminalized in Kuwait but not criminalized in the other country. For example, when a Kuwaiti citizen bombs an American helicopter in Afghanistan or other country then I assume it does not criminalize

¹⁹ 'Kuwait's Report to the CTC (2004),' Security Council, Distr.: General, 31 December 2004, S/2004/945, Letter dated 17 December 2004 from the Chargé d'affaires a.i. of the Permanent Mission of Kuwait to the United Nations addressed to the Chairman of the Counter-Terrorism Committee, online: UN Security Council, Counter Terrorism Committee, 31 December 2003 <<http://www.un.org>> at 10.

such an act. The other scenario surrounds if the act is criminalized in the other country and not criminalized in Kuwait. Kuwait responds in the CTC report that it is a state party in 11 conventions out of 12,²⁰ and three regional conventions in combating terrorism,²¹ and once ratified these conventions, they will become part of the domestic law.²² Kuwait continues that:

these are considered special terrorist crimes, particularly since the State of Kuwait has no special law that criminalizes terrorist activities and defines them in an exhaustive manner.²³

However, I argue that some of these conventions that Kuwait had signed, have not been ratified because of the broad definitions, such as the Arab Convention on the Suppression of Terrorism (1998), and the Gulf Cooperation Council (GCC) Counter-Terrorism Convention, adopted on 4 May 2004. Although the other conventions that Kuwait ratified are important, they do not include a definition of “terrorism,” but only criminalize certain acts, such was the case with The Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971. The only convention that defined “terrorism,” is the 1999 ‘International Convention for the Suppression of the Financing of Terrorism’, which is still not ratified as of the day this paper was written.

The 2006 Bahraini ‘Law on Protecting the Society from Terrorism’ criminalizes both terrorist offences that take a place in or outside Bahrain, and either against Bahrain

²⁰ ‘Kuwait’s Report to the CTC (2004),’ *Supra*, 10.

²¹ *Id.*, 9.

²² *Id.*, 10.

²³ *Id.*, 10.

or any other country.²⁴ The Bahraini approach can serve the majority moreso, but only if there is an agreement about the definition of “terrorism”. I will discuss the definition of “terrorism” in the Bahraini law further in Chapter IV, which will be specified as the Bahraini experience in regards to counter terrorism.

Back to the Kuwaiti law, as for internal state security, the articles deal with any assault on the Prince’s life or his powers. Article 25 has criminalized all criticisms of the Prince, and discusses such acts and how they are dealt with by stating that:

Shall be punished by imprisonment for a term not exceeding five years, any person who appeals in public or in a public place, or in a place where it can be heard or seen publically, by saying or shouting or writing or drawings or picturing or any other means of thought expression, the rights and authority of the Prince, or reproach the Prince person or violate the pryncedom attribute.

I argue that this article not only tightens the freedom of expression, but can also be used against opposition groups. As a result of this article, there are prisoners of conscience in Kuwait who were imprisoned because they published their opinions, criticizing the Prime Minister, and such criticisms were seen as intervention in the Prince’s powers.

Article 29 prohibits the change of the state’s governance system, embracing doctrines that have a destructive aim against the state’s statutes and any acts of force that break social or economic systems. I claim that this article includes ambiguous terms, such as the “state’s statutes” and the “social system,” and these terms may also be abused under the context of protecting the state’s national security.

²⁴ Articles 12 and 13 of the Bahraini Law on Protecting the Society from Terrorism (58) 2006, Issued in 12 August 2006, online: Legislation and Legal Opinion Commission < <http://www.legalaffairs.gov.bh>>.

Based on the articles above, Muhammad Abd al-Qader al-Jasem, a Kuwaiti writer and lawyer, was charged because of his online published critiques about the governance system.²⁵ He was imprisoned for these charges and also for criticizing the Prime Minister, which the court considered an insult and defamation under the Criminal Code.²⁶ Al-Jasem and another prisoner of conscience were set free by the President on February 10, 2011²⁷ by the end of the Egyptian revaluation, which was probably a Presidential strategy to avert the people's anger that had resulted due to the arbitrary measures in Kuwait.

Going back to the Act of State Security Crimes, Article 31 prohibits weapons training to achieve an unlawful purpose. Article 34 provides that:

All who participated in a gathering in a public place, consisting of at least five people, where the purpose is to commit a crime or breach of public security and stayed in the gathering after being ordered to leave by the men of public authority, will be punishable by imprisonment for a term not exceeding one year and a fine not exceeding one hundred dinars, or one of these Penalties.

I argue that the law did not confer adequate protection to one of the most important elements of the state, which is "people," and their freedom of expression and association. It did not include any crimes directed at civilians but only against state security. It also involved broad and vague terms such as "changing the social system." This article again simply heightens the extensive protection directed at the Prince and his powers.

²⁵ 'Defaming Prince, Kuwaiti detains journalist Mohammed al Jassim,' *بتهمة الطعن بالأمير.. اعتقال الصحفي الكويتي*, محمد الجاسم, online: Arabic CNN, 4 October 2010 <<http://arabic.cnn.com>>.

²⁶ 'Kuwait urged to release blogger who criticized Prime Minister,' online: Amnesty International, 26 November 2010 <<http://www.amnesty.org>>.

²⁷ 'Al Wasmi will be released today, and drop the issues of al Jassim,' *إطلاق الواسمي اليوم.. وإسقاط القضايا عن*, الجاسم, online: Alqabas Newspaper, 10 February 2011 <<http://www.alqabas.com.kw>>.

Kuwait sites the ‘State Security Crimes Act’ in its report to the CTC as part of its measures to prevent terrorism.²⁸ However, without defining “terrorism,” repressive laws can be and actually are justified as required to counter terrorism. With the absence of a definition of “terrorism,” measures that are taken to counter acts coming under this heading, could suffer from a lack of legitimacy, since they are not within the framework of the law.

Bahrain also has a similar law. It provides a death penalty for any act that could affect the safety of the President and the Crown Prince.²⁹ It also prohibits acts that could “change of the state’s governance system,” and any gathering of five people or more if they intend to cause “turbulence.”³⁰ “Turbulence” is considered a crime in Bahrain and although the law provides examples of this crime, such action is not clearly defined. For instance, if one or more persons violate another during an assemblage, this can be considered as “turbulence.” Again, the term “violation” is not clearly defined but could include physical and oral violation. It can only be said that there is a lack of precision. This crime is against the rule of law, as it is not clearly defined and could include lawful acts that affect the freedom of assembly.

In regards to the Kuwaiti ‘State Security Crimes Act’, in 1999, a draft law was suggested to establish a chapter titled, ‘Crimes Against Humanity and Peace and War Crimes’³¹ under this Act. This draft law is empty of criminalizing terrorist offences. It only focuses on the major crimes of international humanitarian law, which means that

²⁸ ‘Kuwait’s Report to the CTC (2002),’ *Supra*, at 2, 6-7.

²⁹ Article 159 and 160 of the Bahraini Penal Code.

³⁰ Article 180, *Id.*

³¹ Decree No. 205 of 1999 to Submit a Draft Law to the Kuwaiti National Assembly. مرسوم رقم 205 لسنة 1999.

criminalizing terrorism is not a priority in Kuwait. The explanatory memorandum of the draft law shows that this draft is prepared to follow-up from the 1948 ‘Convention on the Prevention and Punishment of the Crime of Genocide’ and from the 1968 ‘Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity’ that Kuwait ratified in 1995. The Committee on Legislative and Legal Affairs in the National Assembly rejected this draft law mainly because these acts are criminalized in the existing Penal Code under the crimes of killing and harming. I believe that the legislature is looking at terrorism in the same way, in which terrorist acts can be found in the Penal Code, for example, under the crimes of killing, bombing, and kidnapping. I argue that when it comes to international obligations in general, the legislature in Kuwait hesitates before moving towards ratification of the related draft laws, and sometimes prefers to reject these drafts instead of making some amendments on them, amendments that can contribute to the rule of law. This can be said about the fact that the 1999 ‘International Convention on the Suppression of Terrorism Financing’ is not ratified yet. The importance of this Convention is that it contains international guidance directed at defining “terrorism.” However, I argue that without ratifying this Convention that includes international guidance, the legislature cannot define this crime domestically. As a result of not having a concrete definition, combating terrorism in Kuwait would not be in line with the rule of law.

2. Law (65) 1979 regarding Public Meetings and Assembly³²

The Law regarding Public Meetings and Assembly, which consists of 22 articles, and which is referred to as the unspeakable law, was enacted by the Government (Council of Ministers) during the dissolution of Parliament in 1979, a period that I discussed in Chapter I. Although the Constitutional Court, in 2005,³³ repelled two articles, and revoked the portion relative to public assembly in 13 other articles, the law is still being applied through the enactment of articles that were not repealed. Article 10, which is deemed unconstitutional in its treatment of “public assembly,” states the following:

Each public meeting should have an organizing committee responsible for maintaining order at the meeting and preventing any deviation from the legality and purpose of the meeting, as well as interdicting any acts or statements construed as contradicting religious teachings, morality, state credibility, Arabic sovereignty, or leading to prejudice upon allies and friendly nations, inciting criminal activity, breach of security, or disruption of public order. The organizing committee is also able to dissolve the meeting and call upon the help of police forces if necessary.

The meaning of “harming the credibility and Arabic sovereignty of the state,” and what is considered infringement on “public order” are unclear. It should be noted that the Kuwaiti Constitution states in article 44 that:

Individuals have the right of private assembly without permission or prior notification, and the police may not attend such private meetings.

³² Kuwait's Legislation (5), the Penal Code, Part II, Kuwait Lawyers Association, جمعية المحامين الكويتية, (2010) at 517.

³³ Constitutional Court Decision on Appeal (1) 2005, Gazette Kuwait Al Youm , جريدة الكويت اليوم , No. (769) Year: Fifty Two, 21 May 2006.
جريدة الكويت اليوم، العدد 769 - السنة الثانية والخمسون، 21 مايو 2006

A recent case involving the application of this law took place in December 2010, where the special forces security officers forcibly interrupted a *diwaniya*,³⁴ while an informal political gathering was being held in a private house in Kuwait, injuring four members of parliament, a Kuwait University professor, a journalist, and others.³⁵ The purpose of the gathering was to discuss a constitutional issue related to parliamentary practice. An Interior Ministry spokesperson said that the gathering violated the 1979 Public Meetings and Assembly Law, in which any gathering of more than 20 people must have a police permit in advance.³⁶ During the December 2010 gathering that is mentioned above, a law professor from Kuwait University, Dr. Obaid al-Wasmi, challenged the officers claiming that their measures were illegal. He was arrested and charged with four offences against the state's security, one was disrespecting the forces based on the criminal code, and another one was violating the Law regarding Public Meetings and Assembly.³⁷ Dr. al-Wasmi, however, was set free before the beginning of his trial upon the President's wishes in February 10, 2011.

Unfortunately, the 2005 Constitutional Court's decision about this law was not clear and conclusive. It repelled the parts relative to public assembly in many articles, including article 10 that is mentioned above, without identifying how the articles can be read. This uncertain decision gives the government an excuse to keep applying the law in

³⁴ A private place that usually Kuwaitis (especially men) gather during the evening time as part of the social life.

³⁵ 'Kuwait: Permit Peaceful Political Gatherings,' Online: Human Rights Watch, 11 December 2010 <<http://www.hrw.org>>.

³⁶ 'Kuwait: Permit Peaceful Political Gatherings,' *Supra*.

³⁷ Al Wasmi to the Criminal Court for 6 Charges, 4 State's Security Crimes,' 4 منها 6 تهمة.. إلى الجنایات بـ 6 تهمة, online: Alqabas Newspaper, 21 October 2010 < <http://www.alqabas.com.kw>>.

the part that is constitutional.³⁸ It should be noted that this law is not mentioned as part of an anti-terrorism mandate in any of Kuwait's reports to the CTC.

3. The (16) 1960 Penal Code and its Amendments³⁹

As a criminal law, the Kuwaiti Code criminalizes the acts of murdering,⁴⁰ encouraging suicide,⁴¹ which could include suicide bombing, harming,⁴² kidnapping,⁴³ and vandalism.⁴⁴ The punishment ranges from the death penalty to imprisonment. These crimes can be committed with the intention of terrorism and threatening civilians and the state security. However, the Code does not suggest special punishment if these crimes are committed with a terrorist motive.

Kuwait seems to be content with the current laws and is not willing to criminalize terrorism. According to the Kuwaiti 2001 report submitted to the Counter-Terrorism Committee (CTC) pursuant to paragraph 6 of resolution 1373 (2001), Kuwait answered the Committee's question about the terrorist offences and penalties in Kuwait as follows:

The Kuwaiti penal code considers as criminal offences acts and activities likely to cause terror or fear and sabotage committed against the regular authorities of the State.⁴⁵

³⁸ By a Princely willingness, al Wasmi is released, ' برغبة أميرية انعقدت الجنايات وأطلقت سراحه الوسمي حر', online: Alqabas Newspaper, 11 February 2011 <<http://www.alqabas.com.kw>>.

³⁹ Issued in 2 June 1960, and was amended by the: Law (46) 1960; Law (46) 1964; Law (31) 1970; Law (31) 1970; Law (62) 1976; Law (15) 1978; Law 70 (1970). Kuwait's legislation (5), the Penal Code, Part I, Kuwait Lawyers Association (2010), at 18.

⁴⁰ Articles 149-151, 154 of the Penal Code.

⁴¹ Article 158, *Id.*

⁴² Articles 160-164, *Id.*

⁴³ Articles 178-181, 184, *Id.*

⁴⁴ Articles 170-171, *Id.*

⁴⁵ 'Kuwait's Report to the CTC (2002),'*Supra*, 3.

The answer suggests that the priority is to protect the state's authorities, while disregarding the people's safety. The CTC asked about the legislation or other measures that recruitment to terrorist groups and the supply of weapons to terrorists, Kuwait responded by mentioning the penalties for the crime of hijacking ships or aircraft, the crime of destroying public facilities, the crime of sinking or damaging ships and acts of piracy at sea,⁴⁶ as well as other crimes that are listed in the Penal Code or the State Security Crimes Act that I discussed previously. Again, I come back to the lack of a definition, as without an agreeable definition, distinguishing between terrorists and non-terrorists is difficult and it is done arbitrary and fails to adhere to appropriate legal standards.

4. The (17) 1960 Criminal Procedure Code and its Amendments⁴⁷

This law provides several guarantees to ensure a fair trial. These guarantees include the prohibition of torture and coercion of the accused or the witnesses during the investigation, interrogation and trial.⁴⁸ If the court finds that the statements or confessions of the accused have been issued as a result of torture or coercion, they shall be deemed invalid.⁴⁹ Torture is certainly forbidden according to the 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (CAT). And

⁴⁶ 'Kuwait's Report to the CTC (2002), *Supra*, 4-5.

⁴⁷ Issued in 2 June 1960, and was amended by the: Law (30) 1961; Law (27) 1965; Law (7) 1981. Kuwait's Legislation (5), the Penal Code, Part I, Kuwait Lawyers Association, جمعية المحامين الكويتية (2010) at 237.

⁴⁸ Article 12 of the Criminal Procedure Code.

⁴⁹ Article 159, *Id.*

although that Kuwait is a state member to the Convention since 1996,⁵⁰ it is still practicing torture as an effective way of gathering information. In 2010, the Appeal Court found the suspects in the bomb attempt on the American base ‘Camp Arifjan’ not guilty because they were tortured and forced to confess.⁵¹

The accused has the right to be accompanied by a lawyer during a confession and any enticing or coercing during this time is strictly prohibited.⁵² The accused has the right to interrogate the witnesses.⁵³ However, a problematic issue arises here in regards of the use of secret intelligence, where neither the accused nor the judge can question the secret source. The legitimacy of the secret intelligence’s evidence is not regulated in the criminal procedure law or in any other law. The Kuwaiti Supreme Court, however, agreed to accept this evidence when by stating that:

If the officer chooses to testify separately and refused to disclose the identity of the confidential sources, this does not compromise the integrity of his or her testimony.⁵⁴

Kuwait depends on the secret intelligence in many terrorist cases. For example, the ‘Camp Arifjan’ case was based on information from the Bahraini investigation authorities about one of the Kuwaiti suspects who was planning to bomb an American base in Kuwait.⁵⁵ However, as I mentioned previously, he and the other suspects were found not

⁵⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Status: Signatories: 77. Parties: 147, online: United Nations Treaty Collection <<http://untreaty.un.org>>.

⁵¹ ‘The Case of attempting to bomb camp Arifjan: Court of Appeal Supports the Innocence of all Defendants,’ قضية محاولة تفجير معسكر «عريفجان»: «الاستئناف» تؤيد براءة جميع المتهمين, online: Alqabas Newspaper. 29 October 2010 <<http://www.alqabas.com.kw>>.

⁵² Article 75 of the Criminal Procedure Code.

⁵³ Article 98, *Id.*

⁵⁴ *The Judiciary and the Law Journal*, مجلة القضاء والقانون, Ministry of Justice, the Kuwaiti Supreme Court, , Year 34, vol. 3, at 545.

⁵⁵ ‘Court of Appeal: Arifjan Web; Innocence of the charges’ شبكة عريفجان براءة من التهم, online: Alrai Newspaper. 12 October 2010. <<http://alraimedia.com>>.

guilty because their confessions were made due to the torture they endured. Another case where the secret intelligence played a role involved the plotted assassination of President George H.W. Bush during his visit to Kuwait in 1993,⁵⁶ as Kuwait received information from outside the country about the assassination attempt.

Kuwait, in its report to the CTC, declares that it depends on the intelligence organs in its combating secret recruitment or collection of funds by stating that:

The method followed in Kuwait to combat secret recruitment or collection of funds is based on the activity of the State security investigation organs and the criminal investigation organs, in cooperation with intelligence organs inside and outside the country. The organs of the Ministry of the Interior carry out this work in accordance with the laws and regulations governing their activity.⁵⁷

I claim that although the secret intelligence plays a significant role in discovering the criminal plans and in suppression of the financing of terrorism, it is dangerous to keep this evidence out of the court's power. As any other evidence, this evidence may be mistaken and should be evaluated and reviewed by the court. Also, it could be abused and effect many rights and freedoms. A fair trial depends on the legitimacy of the evidence. The use of secret intelligence as evidence in a criminal trial could lead to unfair trials. While intelligence agencies would protect their sources to insure national security or international relations, openness is required to ensure criminal justice.⁵⁸

There are preventive measures initiated to ensure public security. These include the court's right to force the convicted, whether guilty or not, to sign a pledge to pay a

⁵⁶ 'How Do We Know that Iraq Tried to Assassinate President George H.W. Bush?' online: George Mason University's History News Networ, April 1997 <<http://hnn.us>>.

⁵⁷ 'Kuwait's Report to the CTC (2002),' *Supra*, 8.

⁵⁸ 'Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182,' online: Final Report Vol. I, Chapter IV, Intelligence and Evidence <<http://epe.lac-bac.gc.ca>>.

certain amount if he or she commits a crime within a certain period. In such an instance, the convicted must provide a guarantor for the payment of a certain amount or are forced to deposit a certain amount in order to guarantee the pledge.⁵⁹

5. Law (13) 1991 on Weapons and Ammunition

The first Gulf War left large quantities of weapons in Kuwait. This law was established nine months after the war was ended. This law, which repealed the old law '(16) 1961', is more detailed and includes tougher penalties. The law includes penalties of imprisonment for a term not exceeding seven years or a term not exceeding five years with a fine⁶⁰ for the commission of "[p]ossession or acquisition of weapons and ammunition without authorization from the Minister of the Interior",⁶¹ and no licenses can be given to possess or acquire cannons, machine guns and silencers.⁶²

Kuwait refers to this law in its 2002 report to the CTC as one of the laws currently enforce criminalize acts under "counter-terrorism".⁶³

6. Law (4) 2006 on Inspection Procedures for the Regulate of Weapons and Prohibited Explosives⁶⁴

Due to the fact that the proliferation of weapons without licenses is one of the effects of the Iraqi invasion of Kuwait, this has left large quantities of weapons in the hands of

⁵⁹ Article 24 of the Criminal Procedure Code.

⁶⁰ Article 21 of Law (13) 1991 on Weapons and Ammunition.

⁶¹ Article 2, *Id.*

⁶² *Id.*

⁶³ 'Kuwait's Report to the CTC (2002),' *Supra*, 6-7.

⁶⁴ *Gazette Kuwait Al Youm*, جريدة الكويت اليوم, No. 704, Year: Fifty-first, 20 February 2005.

many people. In 1992, the legislator established a temporary Law on Inspection Procedures for the Regulate of Weapons and Prohibited Explosives that was valid until September 1994. However, in 2005, the legislator found it necessary to re-legislate such a law to address the "terrorist crimes," a term explicitly stated in the explanatory memorandum of the 2005 Law as follows:

Due to the latest events that have occurred, terrorist offences have been committed in the State which expose the existence of large quantities of these weapons that could threaten the state's security and citizens...it is necessary to immediately establish this legislation in order to preserve the state's security.

The law contains five articles; the first article stipulates that the Attorney General can authorize the police to search the persons and housing, transportation, public or private areas during a period of time, if investigations showed the seriousness of possession or acquisition of weapons. Article 1 also states that this law is valid for a period of two years starting from 2005. The second article states the importance of adhering to the rules of the Criminal Procedure Code.

Although the legislator confirmed the existence of terrorist crimes, the issue of terrorism was not addressed. The legislator only established this law to control the owning of unlicensed weapons, which although partially resulted in the wake of the Iraqi invasion, the invasion is not the sole cause of weapons availability amongst citizens. Also, the mere availability of such weapons in itself will not generate terrorist crimes. It is necessary to combat terrorism in more comprehensive legislations. As of the date this paper was written, Kuwait has provided the CTC with four reports, but none of them included this law.

7. Law (35) 2002 in Respect of Combating Money Laundry Operations⁶⁵

Kuwait is not a major regional financial sector.⁶⁶ It has five commercial banks, and four Islamic banks. Until 2004, there was only one Islamic bank. They all provide the regular banking services. Money laundering is not a major problem in Kuwait and, even if it exists, it would be due to drugs trafficking and liquors smuggling.⁶⁷ The Law on Money Laundering was established in 2002 after the events that transpired on September 11th, 2001. However, it is devoid of text on the criminalization of terrorist financing. In November 2009, the Prime Minister referred to Parliament in a draft bill on combating money laundering and terrorism financing, which superseded the existing law on money laundering. The main disadvantage of the proposed bill is its failure to define terrorism.

The definition of terrorism is from the 1998 'Arab Convention for the Suppression of Terrorism,' which was criticized for its overbroad definition. Article 1 (e) of the 2009 draft law on the 'Combating Money Laundering and Terrorism Financing' defines "terrorism" as:

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources.

⁶⁵ Kuwait's Legislation (5), the Penal Code, Part II, Kuwait Lawyers Association, جمعية المحامين الكويتية, (2010) at 369.

⁶⁶ Jamal Abdu-Raheim, *Combating Money Laundering and Terrorism Financing in the Arab Gulf States and the Middle East*. مكافحة عمليات غسل الأموال وتمويل الإرهاب, Part I. (Beirut: Dar al Hujja al Baidaa, 2004) 161.

⁶⁷ *Id.*, 161.

This definition is not within the rule of law as it is very broad and these acts are not criminalized as terrorist offences in the Penal Code or any other law that determines penalties for such acts. Many questions related to the rule of law can be raised, such as: Could any act of violence or threat be qualified as terrorism even if the aim was not realized?⁶⁸ Is damaging the environment or public properties an objective or a result of the violence act?⁶⁹ The phrase, “seeking to jeopardize national resources.” is also unclear in regards to its meaning. It is important to realise that the definition of “terrorism” should be used not only for financing law, but also to replace the overly broad definitions in the state security laws. Based on this draft law, however; these acts are unlawful only within the crime of terrorism financing.

Article 1 (f) of the draft law defines “terrorism financing” as:

Every act that contains a collection, procurement, delivery, assign, transport, provision or transfer of funds or its proceeds of any terrorist activity at interior or abroad, or to do for the benefit of this activity or its elements any legitimate banking, financial, or commercial operations, or collecting directly or indirectly or through an intermediary funds to use for [the terrorist activity’s] advantage, advocacy and promotion of its principles, or managing training places, accommodation of its components, or providing them with weapons, documents, or any supporting or funding means with the knowledge about it, whether the terrorist act occurred or not.

I argue that without an appropriate definition of “terrorism,” the crime of “financing terrorism” would not be within the framework of law. It is important to first criminalize terrorism under the criminal law approach, in which the elements of the acts are certainly

⁶⁸ Giuseppe Nesi (ed), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight against Terrorism* (Burlington: Ashagte, 2006) 165.

⁶⁹ *Id.*

defined, and only then is it possible to criminalize other acts related to terrorism, such as the crime of financing terrorism.

Despite the legislative shortcoming, Kuwait responded in part to Security Council Resolution 1373. The 2002 Kuwaiti Report to the CTC mentions the measures that have been taken in Kuwait as follows:

the administrative mechanisms are as follows: the Central Bank of Kuwait receives rulings from the competent bodies in the State, namely, the Office of the Prosecutor General, the judicial authorities and the Ministry of Foreign Affairs, to impose direct or indirect prohibitions on property, financial assets, economic resources or financial or other services affecting the entities subject to the control of the Central Bank of Kuwait. On receiving such a ruling, the Bank immediately circulates it to all the said entities for immediate action and thereafter informs the competent bodies concerned of the outcome of the measures it has taken.⁷⁰

The 2001 Kuwait report to the CTC contains the measures take to control charitable work. The Cabinet Council issued Resolution 867 in October 2001, which stipulates the need to organize the work of charitable committees as overseen by the Ministry of Social Affairs and Labour on charitable work inside the country and by the Ministry of Foreign Affairs on charitable work abroad.⁷¹ The 2004 Kuwaiti report to the CTC shows that a committee was set up for inspection of charitable work. According to the Decree No. 2724 of 2003 issued by the Deputy Minister for Social Affairs and Labour on 23 July 2003, this committee is “responsible for a number of pivotal tasks relating to the

⁷⁰ ‘Kuwait’s Report to the CTC (2002),’ *Supra*, 6.

⁷¹ ‘Kuwait’s Report to the CTC (2001),’ Security Council, Distr.: General, 21 December 2001, Letter dated 19 December 2001 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, online: UN Security Council, Counter Terrorism Committee, 21 December 2001 <<http://www.un.org>>, 3. And ‘Kuwait’s Report to the CTC (2002),’ *Supra*, 3.

inspection of charitable work in the country.... [i]t monitors and prevents all forms of fund-raising that do not conform to laws and Cabinet decisions.”⁷² In addition, the central bank issued instructions to banks on anti-money laundering and terrorism financing. However, it is still unclear as to the extent that the application of these instructions is truly understood.

Before 2004, the Islamic bank, Kuwait Finance House, was the only bank exempted from the observation of the Central Bank. Kuwait Finance House was authorized by the Ministry of Trade and Industry, and not the Central Bank, and the Ministry was in charge of auditing the bank records.⁷³ However, after 2004, all banks are under the Central Bank observation. In 2002, another measure had been taken, in which all insurance companies, money exchangers, gold and jewellery markets, brokers in the Kuwait Stock Market, and all financial intermediaries have come under the Ministry of Trade and Industry control. These sectors must comply with all relevant regulations of the clients’ identification; retention of records for five years, and reporting on the suspicious operations.⁷⁴

After displaying the measures of combating money laundering and terrorism financing, I argue that if the 2009 draft bill proposed by the Government on Combating Money Laundering and Terrorism Financing includes proper legal definitions of “terrorism” and “financing terrorism,” the rule of law will be advanced in a practical way that ensures combating terrorism and terrorism financing, without jeopardizing the fundamental public rights and freedoms.

⁷² ‘Kuwait’s Report to the CTC (2004),’ *Supra*, 5.

⁷³ Abdu-Raheim, 164- 165.

⁷⁴ *Id.*, 164.

8. Citizenship Law (15) 1959 and its Amendments⁷⁵

The Citizenship Law addressed the question of withdrawal and termination of citizenship cases that threaten state interest or security. The difference between withdrawal and termination is that withdrawal applies to naturalized citizens while termination applies to original Kuwaiti citizens. Based on this distinction, in the event of withdrawal, citizenship may be withdrawn from family members who acquired it by affiliation.

Article 13 of the Citizenship Law sorts the withdrawal of the nationality. It states:

May decree- on the basis of the Minister of the Interior, to withdraw Kuwaiti nationality from the Kuwaiti who earned the citizenship... in the following cases:

4- If the state's interest or its external security makes it necessary [to withdraw the citizenship from a Kuwaiti citizen], a withdrawal of citizenship from another who became Kuwaiti due to this person, may also be required.

5- If there is evidence to the competent authorities for having promoted principles that would undermine the social or economic system of the country or the adherence to a foreign political body, and a withdrawal of citizenship from another who became Kuwaiti due to this person, may also be required.

Article 14 sorts the case of terminating the citizenship by stating that:

May decree - on the basis of the Chairman of police and public security, the termination the Kuwaiti citizenship... as in the following cases:

1. If the person joins the military service of a foreign state and has remained despite being ordered to leave by Kuwait's Government.

2. If the person worked to the benefit of a foreign country that is at war with Kuwait, or whose political relations with Kuwait have ended.

3. If the person's regular residence was abroad and he joined an organization whose purpose is to undermine the social or economic system of Kuwait, or if [the Kuwaiti

⁷⁵ The Citizenship Law was amended for more than 10 times. The Kuwaiti Legislation Set, Part I, the Council of Ministers, Legal Advice and Legislation Department, إدارة الفتوى والتشريع, 8th edn, December 2006, at 292.

courts] convicted him of crimes that the state decides affect his loyalty towards his country.

In these cases, the citizenship can be terminated solely from the individual at fault, and not from those who earned it due to him.

Questions can be raised about the reason for keeping the withdrawal or termination of citizenship with the Government (Council of Ministers) distanced from the judicial mandate. It should be noted that it is prohibited that the judiciary look at citizenship cases. That is what the 'Decree-Law for the Establishment of a Department in the High Court for Reviewing Administrative Conflicts' states in Article 1 (5):

A Department of Administrative in the High Court that consists of three judges and includes one or more rooms as needed, and shall be the only body responsible for reviewing and having the judicial mandate of elimination and compensation of the following issues: applications submitted by individuals or bodies for the abolition of final administrative decisions, except decisions concerning issues of nationality, stay and extraditing Non-Kuwaitis, licenses of newspapers, magazines and houses of worship.

Accordingly, there is no judicial review on the withdrawal or termination of citizenship. Applying these articles raises three issues. Firstly, families would be affected as a result of finding themselves stateless. Next, the law disregards the concept that the punishment must be personal. Finally, there is the dilemma of keeping the citizenship cases away from the judiciary.

In the coming paragraphs, I will examine two cases, one of withdrawal and the other of termination of citizenship. The first case is known as 'Mosque Shaaban Case' which is a Shi'ite mosque in Kuwait, and where the mosque's Imam, Abbas al-Mohri, lost his Kuwaiti citizenship. First of all, the case goes back to 1979, during the period of dissolution of Parliament. Secondly, Shi'ite felt, particularly at that time, that there was

discrimination against them. This discrimination led to have a weekly gathering in Mosque Shaaban to discuss this issue, especially since the Islamic revolution in Iran had been successful, which gave the tone that had been used in Mosque Shaaban the same character of the Iranian Revolution. The other reasons for gathering there was to claim the return of parliamentary life and enforce the constitution that could ensure equality between people, which was supported by Kuwaitis from the Sunni's community. As a result, the government had forbidden the weekly gathering at the Mosque, which lasted for five weeks. This led to a reaction of the Shiite, who wanted to protest. Instead, the option of pacification had been taken without the intervention of security forces.⁷⁶ However, the mosque's Imam, Abbas al-Mohri, and 18 of his family members were stripped of their Kuwaiti citizenship, and were deported to Iran. It is important to mention that al-Mohri was appointed as Imam by Khomeini, who returned to Iran in 1979. This act caused an outrage within the Kuwaiti government, especially with the Persian ambitions in the Gulf region.⁷⁷

Whether or not al-Mohri posed a threat to Kuwait's security, I argue that the act of withdrawing his citizenship and his family members, who may not be involved in his activities, is an arbitrary measure. Especially since this measure was taken by the Government in the absence of the judicial review. Moreover, there was an erosion of freedom of expression and freedom of assembly.

⁷⁶ Alkhateab, *Kuwait: from the State to the Emirate*. الكويت: من الدولة إلى الإمارة, at 205-206.

⁷⁷ Dr. Yousif Ghuloom, Department of Political Sociology, Kuwait University. Interview (December 27, 2010).

The other case is about the termination of Sulaiman Abu Ghaith's citizenship. In October 2001, he appeared on Al Jazeera News as the official spokesman of al-Qaida.⁷⁸ The Government (Council of Ministers) issued a decree to strip his citizenship.⁷⁹ Since Abu Ghaith is an original Kuwaiti citizen, the citizenship can be stripped from him only and not his family. However, he had a daughter after he lost his citizenship and based on the Kuwaiti law, the Kuwaiti citizenship can only be gain from the father's side. His daughter, who lives in Kuwait with her Kuwaiti mother, is stateless.⁸⁰ I claim that withdrawing the citizenship is an extreme measure that should not be taken without considering all of the case's dimensions, especially since it affects people are not engaged in the terrorist activities, such as the family members. Not to mention that withdrawing citizenship in such cases is a punishment that should be reviewed by the judiciary.

Another measure, which is unlawful and widely practiced, but less drastic than withdrawing one's citizenship, is the withdrawal of the accused's passport by the police. This practice is not codified, and it is practice to insure that the accused would not leave the country. Although it might be reasonable to hold the accused's passport if he or she is an alien who might leave Kuwait before finishing the investigation, this practice should be codified based on certain standards so that it is not just done arbitrarily. During my work on the Committee on the Defense of Human Rights at the Kuwait National Assembly, I dealt with a case where the Ministry of the Interior Affairs, as the complainant said, had held his passport although no charges were placed against him. Of

⁷⁸ Kuwait Dropped the Citizenship of al-Qaeda Spokesman,' الكويت تسقط الجنسية عن الناطق باسم القاعدة , online: Al Jazeera News, 14 October 2001 <<http://www.aljazeera.net>>.

⁷⁹ 'Kuwait Disowns Bin Laden Aide,' online: BBC News, 14 October 2001 <<http://news.bbc.co.uk>>.

⁸⁰ 'Suleiman Abu Ghaith's wife, Fatima, Experiencing a Great Suffer,' online: Aria News. n.d. <http://wn.com/معاينة_كبيرة_تعيشها_فاطمة_زوجة_سليمان_ابو_غيث>.

course, I found out there was a good reason behind this, as he had claimed that he needed his passport to go to jihad in Iraq. I argue that since there is usually a strong reason behind this practice, it should be codified to ensure the correct balance between enforcing the state's security and respecting people's right of mobility.

9. Law (6) 1994 on Concerning Crimes Relating to the Safety of Aircraft and Air Navigation⁸¹

The 'Law on Concerning Crimes Relating to the Safety of Aircraft and Air Navigation' provides protection to passengers, airplanes, and airports. Article 3 states that:

Shall be punished by imprisonment of a provisional period of not less than ten years everyone who has unlawfully used force or threat of force or any other form of coercion to seize an aircraft in flight or to control it or to change its route and, if that accompanied by the detention of a person to a destination he had not been heading to, the penalty shall be life imprisonment or imprisonment of a provisional period of not less than ten years.

Article 4 states that:

If any of the offenses set forth in the preceding two articles resulted in injuring or hurting a person, or destroying an aircraft or damaging it, or damaging equipment of the airport, the penalty is death or life imprisonment.

In all cases, the perpetrator shall pay for the value of things that he destroyed. The penalty is death if any of these crimes results in the death of a person.

Under Article 7, it is not permissible though the application of Article 4 of this law to replace the death penalty with life imprisonment nor to replace life imprisonment with the maximum sentence of temporary detention. Also, it is prohibited to both, give an order to halt the implementation of the sanctions, and to refrain from sentencing.

⁸¹ *Gazette Kuwait Al Youm*, جريدة الكويت اليوم, No. 148, Year: Forty.

Article 8 provides that: “Crimes set forth in this Law and related crimes shall be seen by the State Security Court.” It should be noted that the State Security Court, which was established in 1969, was repealed in 1995.⁸² The State Security Court was established during the Parliament that had forged results in 1967, that was discussed in Chapter I. The Court included three judges.⁸³ According to article 2, the Court had jurisdiction over the following crimes:

1. The crimes set forth in Articles (92) to (107) of the Penal Code.
2. Crimes of arson when used by the means set forth in Article (247) of the Penal Code.
3. Crimes related to any of the offenses set forth in the preceding paragraphs.
4. Any other crimes referred to it on a special resolution of the Council of Ministers, taking into account their nature or circumstances, except in the crimes set forth in Law (3) 1961 of Press and Publication.

It should be noted that the Court has had a broad power over a wide variety of cases. The Court’s hearings are confidential, but the accused and his/her council have the right to attend the hearing.⁸⁴ Although the Law states that the Court hearing should be held at the headquarters of the High Court of Appeal, the Government changed the location two times. Once was to a building belonging to the Ministry of Education in the al-Sulaibia area, and the other was to the Hawalli Provincial Court.⁸⁵ The reason behind this could be just practical or due to security concerns. The Court’s decisions were final and could not be appealed, until 1991 when the law was amended. Based on the amendment, the

⁸² The law was repealed by the (55) 1995 Law.

⁸³ Article 1 of the State’s Security Court Law (26) 1969. *Gazette Kuwait Al Youm*, جريدة الكويت اليوم, No. 731, Year: Fifteen, 15 June 1969.

⁸⁴ Article 7, *Id.*

⁸⁵ Ministry of Justice Resolution No. (3) 1985, *Gazette Kuwait Al Youm*, جريدة الكويت اليوم, 8 January 1985, No. 1595, Year: Thirty-first.

decisions can be appealed only before the Supreme Court. Nevertheless, and as I mentioned previously, the law of the State's Security Court was repealed in 1995. Repealing the State Security Court was a good step in defeating extra-legality, especially given the fact that the judgments of the State Security Court are final and not subject to challenge by any means of appeal.

International Treaties

Kuwait had ratified several international anti-terrorism treaties that become part of the domestic law, which are:

- Law (5) 2006 on Approving the United Nations Convention against Transnational Organized Crime and its Protocols.
- Law (27) 2004 on Approving the International Convention for the Suppression of Terrorist Bombing.
- Law (15) 2003 on Approving the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.
- Law (19) 1979 on Approving the Convention for the Suppression of Unlawful Seizure of Aircraft.
- Law (62) 1979 on Approving the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

It should be noted that the 1999 'International Convention on the Suppression of Terrorism Financing,' which in article 2 (1) (b) provides a good restrained general definition of terrorism, has not been ratified in Kuwait as of the date this thesis was written. I will discuss the definition that came into existence as a result of this Convention in Chapter III, while providing additional reasons that show the importance of having an appropriate definition.

There are also bilateral treaties in the security field between Kuwait and other states, such as Bahrain, Iran, Germany, and Hungary. These treaties include the terms of “terrorism”, “suppression of terrorism” and “terrorism funding” and all of them prohibit terrorist offences. However, none of them define terrorism. I raise the question of how could Kuwait apply its obligations on the suppression of terrorism, especially since these treaties have been ratified and become part of the domestic legislation, if “terrorism” is not certainly defined.

Also, there are regional treaties that have not ratified yet, which are:

- The 1998 Arab Convention for the Suppression of Terrorism.
- The 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism.
- The 2004 Convention of the Cooperation Council for the Arab States of the Gulf (CCASG) for the Suppression of Terrorism.

These three treaties include almost the same definition of “terrorism,” which was widely criticised as the definition is very broad and would tighten human rights.

Does Kuwait need an Anti-terrorism Law?

After displaying the Kuwaiti laws that deal with terrorism, I claim that because all these laws are broad, they can contain the terrorist operations. However, because of their broadness, they cause serious violations against human rights. The most significant violations can be described as follows:

- Limitation of freedom of expression and freedom of assembly, and the consequent arbitrary arrests, and prisoners of conscience.

- Violation of the freedom of movement due to the withdrawal of the passport without legal basis.
- Withdrawal of nationality, which could include the family of the accused consequent arbitrary expulsion; and most serious is that they might become stateless.

The question is: is it because the current laws have the capacity of including terrorist acts, that there is no need to establish special anti-terrorism laws? My answer is no. The first step that should be taken is to amend the current broad laws to be compatible with the general principles of criminal law, and with basic human rights. The broad definitions and norms for example, in the 'Act of State Security Crimes' and the 'Law regarding Public Meetings and Assemblages' are serving the Government's interests more than the state's security. The practice of these two laws in particular, shows the abuse of these laws as they limit people's rights and freedoms, which is incompatible with human rights. There is a danger that the current laws, in particular the 'Act of State Security Crimes' and the 'Law regarding Public Meetings and Assembly,' can be used by the state to target dissent and infringe individual freedoms. This belief is founded on the basis that the protection of individual freedom and the state organization of the social good should work hand in hand. In turn, it is necessary to establish equilibrium between freedom and authority. From here came the principle of criminal legality and the basic foundation of no crime or punishment except by law. This should be done by codification of sources of criminalization and punishment of specific legal provisions that shall be applied by the judge. The lack of commitment by the legislator to these constraints opens the door for interpretation and deviation from the meaning and the

substance of the text, leading to a departure from the principle of legality and an assault on individual freedom.

Civil liberties and human rights are not less important than national security. In fact, there cannot be national security without these fundamental rights. I agree with David Luban in that these rights are actually forms of security as they help protect society from power abuse by the police.⁸⁶ Disregarding basic rights, like the right to a fair trial under the pretext of ensuring state security, will not serve the goal of combating terrorism. Instead, it just results in a neglect of the rights of innocent civilians. In addition to the freedom of expression, freedom of the press and freedom of assembly, providing rights are in many cases the start to changing the governments' arbitrary approaches when dealing with suspects. Human rights defenders cannot be counted as terrorists just because they call for more rights and freedoms that are not consistent with the interests of the government or the ruling authority. It is essential that the law clearly defines crimes narrowly and precisely so peaceful acts of dissent and protest are not mixed up with terrorism.

Another step which should be taken is to establish anti-terrorism laws that respect the basic criminal law principles;⁸⁷ human rights; the related Security Council's Resolutions; and the 1999 International Convention on the Suppression of Terrorism Financing, which I will discuss in depth in Chapter III. "Terrorism", "terrorist offences", and "financing terrorism" should be defined clearly and narrowly. The 2009 Kuwaiti

⁸⁶ Richard Ashby Wilson (ed), *Human Rights in the 'War on Terror'* (New York: Cambridge University Press, 2005) 245.

⁸⁷ Nicole LaViolette and Craig Forcese (ed), *The Human Rights of Anti-terrorism* (Toronto: Irwin Law, 2008) 97.

draft law on Combating Money Laundering and Terrorism Financing is a great example of how there is a concrete definition is lacking. Terrorism financing cannot be criminalized without first criminalizing terrorism. In order to successfully do this it is essential that terrorism is first defined within the framework of the criminal law system.

Commitment to clarity is important so that the audience of such texts has real knowledge and understanding of their substance of the law. It would be inadmissible for the enforceability of the text to be associated with personal whims and standards or to violate them, but must be formulated in a manner that prevents the divergence of views from their intended purpose. Terrorist offences are now wearing a much more serious character than in the past, and some aspects of criminality expose the entire nation to grave danger and threaten its safety. Consequently, this type of crime should be punished swiftly, but in accordance with the law.

Chapter II

Anti-terrorism in Bahrain

Bahrain has witnessed sharp clashes between the Authority and the people, who started a revolution in February 14, 2011,⁸⁸ after years of peaceful opposition. The revolution began when thousands of Bahrainis gathered and walked to the Pearl Roundabout in the centre of the capital Manama, for a peaceful assembly called the “Day of Rage.” They demanded greater freedoms, social justice and political reforms, including constitutional changes.⁸⁹ Most of the protesters were from the Shi’a community, who suffer from intentional economic and political marginalization and discrimination by the ruling Al Khalifa family and the state’s dominant Sunni minority.⁹⁰ On the other hand, the security forces dealt with this peaceful protest by using extremely violent measures such as firing shotguns, using tear gas, batons and rubber bullets to disperse the crowd. Within a week, seven protesters were killed and hundreds were injured. Among the injured were medical workers who were targeted by police while helping injured protesters.⁹¹

To prevent the assembly, the army blocked access to the roundabout by using tanks and armoured vehicles. On February 18th, the army fired at protesters who were walking towards the Pearl Roundabout. However, later that day, the Crown Prince ordered the army and riot police to withdraw from central Manama. The following day, thousands of Bahrainis protested in the Pearl Roundabout, demanding political reforms,

⁸⁸ ‘Amnesty International Report 2011: State of human rights in the Middle East and North Africa,’ January to mid-April 2011, Index No. POL 10/012/2011, online: Amnesty International, 13 May 2011 <<http://www.amnesty.org>> at 16.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

which included; a new constitution, an elected government, a greater share of the country's wealth and the release of all political prisoners.⁹² The Crown Prince responded by promising a national dialogue with opposition groups, which the protesters neither welcomed nor trusted.⁹³ In early March, political prisoners were released and there was no longer violence against protesters.⁹⁴ The protesters kept gathering in Central Manama demanding more reforms. On March 14th, armed forces from Saudi Arabia and the UAE were sent to Bahrain⁹⁵ and then later, so were forces from Qatar⁹⁶ and Kuwait,⁹⁷ which are known as the 'Peninsula Shield Force.'⁹⁸ The King of Bahrain, Hamad Al Khalifa, justified this step to protect Bahrain from foreign threats and because the Peninsula Shield Force would not interfere with internal affairs.⁹⁹ Subsequent statements by Bahraini officials pointed to the fact that the external threat is represented by Iran.¹⁰⁰

⁹² 'Amnesty International Report 2011: State of human rights in the Middle East and North Africa,' *Supra*, 16.

⁹³ 'مشييمع' Mushaimai denouncing the government and the opposition, and announce his return to Manama, online: Arabic CNN, 21 February 2011 <<http://arabic.cnn.com>>.

⁹⁴ "Amnesty International Report 2011: State of human rights in the Middle East and North Africa," *Supra*, at 17.

⁹⁵ 'Peninsula Shield' Forces arrived to Bahrain,' *تصل البحرين* «درع الجزيرة» قوات, online: Alqabas Newspaper, 15 March 2011 <<http://www.alqabas.com.kw>>.

⁹⁶ Thousands of Bahrainis Protest challenging the "emergency" status,' *آلاف البحرينيين يتظاهرون تحدياً لـ الطوارئ*, online: Alqabas Newspaper, 19 March 2011 <<http://www.alqabas.com.kw>>.

⁹⁷ 'Mohammad Al-Sabah: Proud to have Kuwaiti Forces Responding to the Presence of any External Threat to Bahrain,' *محمد الصباح: نفخر بوجود قوات كويتية لرد أي خطر خارجي عن البحرين*, online: Alqabas Newspaper, 28 March 2011 <<http://www.alqabas.com.kw>>.

⁹⁸ The Shield was set up in 1986 as a GCC multimember defense force made up with 5,000 soldiers, and contains more than 31 troops. The Peninsula Shield is currently headquartered at a Saudi Army base at Hafr Al-Batin, near the Kuwaiti and Iraqi borders, online: Global Security Organization <<http://www.globalsecurity.org>>.

⁹⁹ 'King of Bahrain: We foiled the externally 30-year-old plan' *عماً 30 عاماً* أحببنا مخططاً خارجياً عمره 30 عاماً, online: Alqabas Newspaper, 22 March 2011 <<http://www.alqabas.com.kw>>. See also 'GCC troops to stay in Bahrain till warding off threats,' online: Al Arabiya News, 23 March 2011 <<http://www.alarabiya.net>>.

¹⁰⁰ 'Bahrain: the external threat is not over, and the Iranian threat continues,' *البحرين: الخطر الخارجي لم ينته.. والتهديد الإيراني مستمر*, online: Alqabas Newspaper, 2 June 2011 <<http://www.alqabas.com.kw>>.

On the next day, March 15th, a state of emergency called “State of National Safety” was enacted for three months.¹⁰¹ As part of the emergency measures, a ‘National Safety Court’ was established. This is a special court that includes three judges, two civil and one military. The Court’s decisions are not final as appeals are allowed,¹⁰² but if the appeal is before the same court, questions arise about the neutrality and impartiality of this court, especially because it contains a military judge, which I argue is unreasonable and unjustified. The Court’s statute allows the right to counsel,¹⁰³ but in practice this right has not always been guaranteed.¹⁰⁴

The state of emergency authorized the Bahraini armed forces to take extreme measures to end the revolt.¹⁰⁵ Violence was once again used against the protesters; some were killed, hundreds were wounded, more than 500 men and women were detained and at least 40 people went missing.¹⁰⁶ A military court is responsible for looking at the relative cases.¹⁰⁷ The state of emergency ended, on June 1st, 2011, before the three month period was up.¹⁰⁸

The decision to end the state of emergency came after the military prosecution's decision to refer 21 defendants in the case of the "terrorist organization," which is related

¹⁰¹ ‘Bahrain's King declares state of emergency for three months,’ ملك البحرين يعلن حالة الطوارئ لثلاثة أشهر, online: Alqabas Newspaper, 16 March 2011 <<http://www.alqabas.com.kw>>.

¹⁰² ‘Minister of Justice declared: Trials now in Bahrain take place at special courts and not military courts,’ وزير العدل يصرح: المحاكمات بالبحرين الآن تجرى في محاكم خاصة وليست عسكرية online: Gulf Newspaper [Bahrain], 8 جريدة أخبار الخليج, May 2011, No. 12098, <<http://www.akhbar-alkhaleej.com>>.

¹⁰³ *Id.*

¹⁰⁴ ‘Bahrain Targets Activists as Military Trials Continue,’ online: Amnesty International, 14 June 2011 <<http://www.amnesty.org>>.

¹⁰⁵ ‘Amnesty International Report 2011: State of human rights in the Middle East and North Africa,’ *Supra*, 17.

¹⁰⁶ *Id.*

¹⁰⁷ ‘Bahrain Targets Activists as Military Trials Continue,’ *Supra*.

¹⁰⁸ ‘Bahrain: calls for a protest with the end of emergency,’ البحرين: دعوات للاحتجاج مع رفع الطوارئ, online: Arabic CNN, 16 June 2011 <<http://arabic.cnn.com>>.

to "the conspiracy to overthrow the regime by force" and "spying for a terrorist organization working for a foreign country," to The National Safety Court. It is a special court that includes three judges, two civil and one military. The Court's decisions are not final as appeals are allowed,¹⁰⁹ but if the appeal is before the same court, questions arise about the neutrality and impartiality of this court, especially because it contains a military judge, which I argue is unreasonable and unjustified.

There were 12 charges by the prosecution against the defendants referred to the court which included: establishing and conducting a terrorist group to overthrow and change the state's constitution and its royal regime; spying for a terrorist organization abroad working for a foreign country and committing hostile acts against Bahrain. The list of charges also included: trying to overthrow and change the state's constitution and royal regime by force; promoting and calling for the overthrow or change of the state's political regime by force; collecting and financing terrorist organizations with their knowledge about its terrorist activity; possession and acquisition of prints and publications including promotion to overthrow the state's political regime by force and through illegal means; insulting the military; and inciting against a group of people and disrespecting them.¹¹⁰ These are some of the overbroad charges that are not in line with the rule of law and do not serve countering terrorism.

¹⁰⁹ 'Minister of Justice declared: Trials now in Bahrain take place at special courts and not military courts,' *Supra*.

¹¹⁰ 'Bahrain: the end of the state of emergency on June 1,' 1 يونيو, online: Arabic CNN, 8 May 2011 <<http://arabic.cnn.com>>.

I would say that this revolution, or at least the widespread opposition, was expected by the Government which established the ‘Law on the Protection of Society from Terrorist Acts’ in 2006 to counter these clashes. I will discuss this below.

In regards to the external geopolitics of Bahrain, the Persian ambitions were always represented in Bahrain because of the Persian rule during 1602 – 1783.¹¹¹ In 1859, Bahrain, through Al-Khalifa’s governing, signed a protection agreement with Great Britain, which ended in 1971.¹¹² That agreement has prevented Persia from including Bahrain in Iran’s territory.

I argue that it could be because Shiite represents the majority in Bahrain, and because of the ambitions of Iran, an Islamic Shiite country, rulers in Bahrain are worried about extending the Shiite community’s rights that may cause the coup of the Bahraini regime. Regardless whether or not there is a scheme to overthrow the government, it must be admitted that there are serious violations against human rights committed under the guise of protecting the state’s security.

The Bahraini Law (58) 2006 on Protecting Society from Terrorist Acts

The Bahraini anti-terrorism law defines “terrorism” in Article 1 as:

Any threat or use of force or violence, whatever the motives or the purposes, resorted to by the criminal in carrying out either an individual or collective criminal project, in order to disable the provisions of the constitution or the laws or the rules, to disrupt the public order; to expose to danger the safety and security of the kingdom; or to harm the national unity or the security of the international community, if the act harms individuals or disseminates among them horror or panic or puts in danger their lives, freedoms or

¹¹¹ ‘Bahrain,’ Encyclopaedia Iranica, online: <<http://www.iranica.com>>.

¹¹² *Id.*

security; or damages the environment; the public health; the national economy; the public or private facilities, buildings and properties; or their occupation or obstructing their work, or obstructing the public authorities or religious buildings or educational faculties from doing their work.

The “terrorist offence” is defined in Article 1 as: “crimes set forth in the Penal Code or any other law, if the purpose of committing them is [to terrify].” I argue that these two broad definitions could be abused and actually is being abused amongst opposition groups who are exercising their freedom of expression peacefully. Human Rights Watch (HRW) report shows that in August 2010, authorities detained an estimated 250 persons, including non-violent critics of the government, and shut down websites and publications of legal opposition political societies. Twenty-five oppositionists were detained and charged under the Bahraini Criminal Code, the State’s Security Crimes Chapter, for “spreading false information” and “meeting with outside organizations.”¹¹³ The HRW report mentions that the authorities prevented detainees from meeting with their lawyers prior to the first session of their trial. The report also pointed out that under the Law on Protecting Society from Terrorist Acts, the government charged at least 23 oppositionists.¹¹⁴ This law allows, for the purpose of investigating acts of terrorism, to extended periods of detention for maximum 60 days without charge or judicial review.¹¹⁵ This period is much longer than it is in the Bahraini Criminal Procedure Code, where suspects must be taken before the Prosecutor within 48 hours.¹¹⁶

¹¹³ ‘World Report 2011: Bahrain,’ online: Human Rights Watch, 2011 <<http://www.hrw.org>>.

¹¹⁴ *Id.*

¹¹⁵ Article 26 of the Bahraini Law on Protecting Society from Terrorist Acts..

¹¹⁶ Article 57 of the Bahraini Criminal Procedural Law (46) 2002, online: Legislation and Legal Opinion Commission < <http://www.legalaffairs.gov.bh>>.

Issues related to the limitation of rights and freedoms always have different dimensions, where victims will not only be banned from practicing their rights and freedoms, but also mistreated. Since detention is away as a result of judicial review, torture and ill-treatment practices can be exercised without fear of accountability, and this is what the HRW affirmed in its reports.¹¹⁷ It should be noted that although the detention should be for more than 60 days, HRW report shows that:

Prosecutors charged ... four men with various national security and counterterrorism crimes and ordered *another* [emphasis added] 60 days of detention.¹¹⁸

The March 2003 Bahraini report to the CTC includes a question by the CTC: Does Bahrain intend to propose new legislation relating specifically to terrorist acts? Bahrain responded that it has already drawn up a draft amendment to the Penal Code that criminalizes terrorist acts.¹¹⁹ According to the October 2003 Bahrain's report to the CTC, the Committee requested the draft amendment to the Penal Code and Bahrain promised to provide it as soon as possible.¹²⁰ However, Bahrain instead sent its next report to the CTC in 2007 and included a copy of the Law (58) 2006 on the Protection of Society from Terrorist Acts¹²¹ after ratifying it, which did not give the CTC the ability to review it when it was enacted.

¹¹⁷ 'World Report 2011: Bahrain,' *Supra*. See also 'Bahrain: Pursue Torture Allegations,' online: Human Rights Watch, 1 September 2010 <<http://www.hrw.org>>.

¹¹⁸ 'The Arab Convention for the Suppression of Terrorism,' online: Amnesty International, January 2002 <<http://www.amnesty.org>> at 21.

¹¹⁹ 'Bahrain's Report to the CTC, March 2003,' Security Council, Distr.: General, 6 March 2003, S/2003/268, Letter dated 3 March 2003 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, online: UN Security Council, Counter Terrorism Committee, 6 March 2003 <<http://www.un.org>> at 6.

¹²⁰ *Id.*

¹²¹ 'Bahrain's Report to the CTC (2007),' Distr.: General, 31 December 2007, S/2007/772, Letter dated 19 December 2007 from the Chairman of the Security Council Committee established pursuant to resolution

It is worth mentioning that Bahrain, similar to Kuwait, has a broad Criminal Code that criminalizes acts against the state's security. As I mentioned in Chapter I, it prohibits any acts that affect the safety of the President and the Crown Prince, that could change of the state's governance system and that allow assemblies that could cause turbulence. Bahrain sites to the CTC some articles of the Penal Code that deal with terrorism.¹²² For example, article 148 of the Criminal Code states that:

Whosoever conspires forcibly to overturn or alter the Constitution of the State, the rule of the Amir or the form of government, or to usurp such rule shall be subject to rigorous imprisonment for life or for a term...

And article 152 states that:

Whosoever forms a band which attacks a group of people, puts up armed resistance to police officers to prevent law enforcement, heads such a band or occupies any leading position therein shall be subject to the death penalty...

A relative point is that Bahrain ratified the 'Arab Convention for the Suppression of Terrorism' in 1998 by its Law No 15/1998, which means that the Convention is part of the Bahraini domestic law. It is well known, and as I will discuss this in Chapter III, that the Conventions definitions and norms are overly broad. Moreover, although the Convention is not within the framework of law, Bahrain recognises it as one of the counter terrorism laws. In its report to the CTC, Bahrain states that "the offences provided for by the [Arab] Convention are criminalized and punished under the Penal Code."¹²³ This

1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, online: UN Security Council, Counter Terrorism Committee, 19 December 2007 <<http://www.un.org>> at 3.

¹²² 'Bahrain's Report to the CTC, March 2003,' at 4-5.

¹²³ 'Bahrain's Report to the CTC, October 2003,' Security Council, Distr.: General, 27 October 2003, Letter dated 27 October 2003 from the Chairman of the Security Council Committee established pursuant to

statement allows the authorities to consider the person, who commits any of the ‘State Security’ crimes which are criminalized by the Penal Code, as a terrorist. In this regard, it is important to emphasize on two points. Firstly, the rule of law and secondly, the importance of protecting people from the police’s arbitrary power. If legislations are not within the rule of law, all measures, no matter how much they attempt to ensure security, can and will be abused. Once we sacrifice on the rule of law, innocent people who exercise their freedom of expression or their right of assembly could be subject to arbitrary arrest or even the death penalty.

Since the law in Bahrain is too broad, the rule of law has been emptied of its purposes. Therefore, neither the law nor the practice, are in line with the general principles of criminal law and basic human rights. The UN special rapporteur on human rights and counterterrorism had expressed concern earlier and urged the King of Bahrain to amend the Law on Protecting Society from Terrorist Acts, which contains an excessively broad definition of terrorism and terrorist acts.¹²⁴

As for the punishments, the ‘Law on Protecting Society from Terrorist Acts’ prescribes the life- imprisonment for several acts, such as:

- Acts where a person intentionally causes a disaster or damage to any public transportation...¹²⁵
- Acts that disrupt the provisions of the Constitution or laws, or prevent state enterprises or public authorities from exercising their duties.¹²⁶

resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, online: UN Security Council, Counter Terrorism Committee, 27 October 2003 <<http://www.un.org>> at 6.

¹²⁴ ‘Universal Periodic Review of the State of Bahrain,’ online: Human Rights Watch. 6 April 2008 <<http://www.hrw.org>>.

¹²⁵ Article 5 of the Bahraini Law on Protecting Society from Terrorist Acts.

Due to the existence of this law, public freedoms are now in danger. Many acts that are supposed to be legal could be criminalized under the broad wording of this law. It is not surprising that the Bahraini protesters started a revolution in February 2011, since the law is arbitrary and the authorities' practices are more abusive.

A broad law cannot solve the State's security issues, but instead exasperate the problem. What Bahrain is experiencing today, is a result of an accumulating lack of rights and freedoms. The Law on Protecting Society from Terrorist Acts has proceeded to protect the interests of the ruling family and ensure their stability. The practice in Bahrain stressed that the government is tightening people's basic freedoms and rights. As Amnesty International report pointed out, the revolutionists in Bahrain "demand political reforms, including a new constitution, an elected government, and a greater share of the country's wealth and the release of all political prisoners."¹²⁷ These claims that have been carried out by opponents correspond by the government through detention and torture. An Amnesty International report, realised in 17 March 2011, a month after the revolution, shows that:

more than 500 men and women have been detained; at least 40 people were said to be missing and at least four people detained in relation to the protests died in custody in suspicious circumstances. The government said that all deaths were caused by illness.¹²⁸

The report sadly mentions that around 47 doctors and nurses, some detained for weeks, are facing trial in a military court after they were charged for their role in treating anti-

¹²⁶ Article 6 of the Bahraini Law on Protecting Society from Terrorist Acts.

¹²⁷ 'Report 2011: State of human rights in the Middle East and North Africa, January to mid-April 2011.' *Amnesty International*. May 13, 2011. <http://www.amnesty.org/en/library/info/POL10/012/2011/en> (accessed May 19, 2011) 16.

¹²⁸ *Id.*

government protesters.¹²⁹ These practices by the government cannot be legitimized, not even under the cover of combating terrorism or protecting the state's security. The state's security includes the security of the people, but the governor's security only includes those who are on the seat of government.

¹²⁹ 'Report 2011: State of Human Rights in the Middle East and North Africa, January to mid-April 2011,' *Supra*, 17.

Chapter III

Defining “Terrorism”

Defining “terrorism” is not an easy feat domestically or internationally. Each state, based on its national interests, would define terrorist offences defiantly. This is a problem within the international community as well. Nevertheless, generic common guidance is essential as a first and a serious step to counter terrorism within the rule of law. In the meantime, with the absence of a satisfactory international definition, defining terrorism domestically could be exercised in a manner commensurate with the interests of authoritarian rulers who disregard the rule of law and human rights. In this chapter, by demonstrating the Security Council Resolutions, I will discuss the importance of defining “terrorism.” These resolutions, however, still fail to adequately define and explain this term, which increases the difficulty of reaching an international or domestic agreement about a certain meaning. I will also present the 1999 ‘International Convention for the Suppression of the Financing of Terrorism,’ which provides guidance when attempting to define “terrorism.” Then, I will examine a regional definition, which comes under the ‘Arab Convention for the Suppression of Terrorism.’ Finally, I will explain the importance of having appropriate definition that can balance between serving the aim of counter terrorism and protecting human rights.

International Definition of “Terrorism”

“Terrorism” as a global crime has not yet been internationally defined. There is no agreed definition, although there is an agreement on criminalizing it. Many international

conventions address the issue of terrorism by criminalizing specific acts, such as hijacking and bombing, but do not define “terrorism” as a whole. After the 9/11 attacks, the Security Council adapted Resolution 1373 (2001),¹³⁰ calling on all states to criminalize the financing of terrorism and to criminalize terrorist acts under the domestic laws. Resolution 1373 is devoid of a definition of “terrorism”, however. This gap has allowed states to define terrorism based on their own understanding and interests, which results in overbroad definitions that allow criminalizing dissent and protest.¹³¹ An international guidance that was not referred to in Resolution 1373 is the definition provided by the 1999 ‘International Convention for the Suppression of the Financing of Terrorism.’ Article 2 (1) (b) of the Convention states that:

act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the 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 to abstain from doing any act.

Another guidance is the one suggested by Security Council Resolution 1566 (2004). The Security Council in Article 3 recalls that:

criminal 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, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not

¹³⁰ Security Council Resolution 1373, 2001, *Supra*.

¹³¹ LaViolette and Forcese, *Supra*, 111.

prevented, to ensure that such acts are punished by penalties consistent with their grave nature...

Resolution 1566 determines certain elements and provides guidance for the definition of “terrorism.” This resolution came too late, however, as many countries had already adhered to Resolution 1373 and defined “terrorism” without standing on any international guidance.¹³² Nonetheless, countries that have not yet defined “terrorism,” such as Kuwait, should adhere to the guidance provided by Resolution 1566. I raise a question about the 2006 Bahraini anti-terrorism law, which was established after adopting Resolution 1566. Why was “terrorism” defined overbroad in the Bahrain law and did not follow the guidance provided by Resolution 1566?

Regional Definition of “Terrorism”

The 1998 ‘Arab Convention for the Suppression of Terrorism’ contains one of the first attempts to define “terrorism.” Arab governments consider the Convention to be a remarkable achievement in that it helps to suppress terrorism regionally. However, civil society groups, especially human rights organizations, consider it to be flawed because it restricts individual freedoms and increases the executive government’s power.¹³³ With the absence of an international guidance, especially since the convention was established before the ‘International Convention for the Suppression of the Financing of Terrorism’ and before the Security Council Resolution 1566, the definition in the Arab Convention

¹³² LaViolette and Forcese, *Supra*, 117.

¹³³ Abdu-al Hussan Shaiban, *Islam and International Terrorism* , الإرهاب الدولي (London: Dar Al-Hikma, 2002) 81.

can only be described as overbroad. Article 1 (2) of the convention defines ‘terrorism’ as:

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources.

Article 1 (3) defines ‘Terrorist offence’ as:

Any offence or attempted offence committed in furtherance of a terrorist objective in any of the Contracting States, or against their nationals, property or interests, that is punishable by their domestic law...

It can be noted that the above two definitions are broad in a way that does not serve the purpose of criminalizing “terrorism.” In 2006, Article 1 (3) was amended, but the new version still does not line up with the international guidance provided by the ‘International Convention for the Suppression of the Financing of Terrorism’ and Resolution 1566. The amendment offered a new paragraph which reads that a ‘terrorist offence’ would also include any attempt to commit or praise terrorist crimes, to publish or print any kind of writing or records for distribution or inspecting.¹³⁴ This new paragraph only broadens the definition and complicates our understanding of what a ‘terrorist

¹³⁴ The new paragraph as it is stated in the Arabic version of the Convention:

وكذلك التحريض على الجرائم الإرهابية أو الإشادة بها ونشر أو طبع أو إعداد محركات أو مطبوعات أو تسجيلات أيا كان نوعها للتوزيع أو لاطلاع الغير عليها بهدف تشجيع ارتكاب تلك الجرائم

‘Arab Convention for the Suppression of Terrorism,’ League of Arab States, 29 November 2006, the Arabic version of the amendment of the third paragraph of Article I of the Arab Convention for the Suppression of Terrorism, approved by the Council of Arab Ministers of Justice, by Resolution 2006/11/29 -22-[d]-648.

offence' is. The definitions provided in the Arab Convention are not convincing and were broadly criticized as they tighten human rights.¹³⁵

Amnesty International points out several issues related to definitions. Firstly, the term 'violence' is not defined and could include peaceful acts by political opposition. The 'threat' to violence is another ambiguous term that could be abused by governments as people are arrested and charged just because they belong to certain political opposition parties that use violence.¹³⁶ Amnesty International refuses the wide criminal responsibility and cites article 25 of the Rome Statute which limits the criminal responsibility to the act of committing, ordering, soliciting, and includes the commission of a crime.¹³⁷

The 'Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999)' is another regional convention that defines "terrorism." This convention, however, does not provide a useful definition as it is almost a word-for-word copy of the Arab Convention. In May 2004, a third regional convention was established, the 'Gulf Cooperation Council (GCC) Counter-Terrorism Convention.' This convention does not say anything new, and it is also an almost word-for-word copy of the Arab Convention. Notably, Kuwait did not ratify these conventions. On the other hand, Bahrain did ratify them, which means that these three conventions are part of the Bahraini domestic law.

¹³⁵ 'The Arab Convention for the Suppression of Terrorism,' *Supra*, 18-19.

¹³⁶ *Id.*

¹³⁷ *Id.*, 19.

The Importance of Defining “Terrorism”

Defining “terrorism” is a controversial issue. Either internationally or domestically, it is challenging to agree on an appropriate definition. However, leaving this phenomenon out of the legal framework is not acceptable, while neither is defining it broadly a solution.

Many of the anti-terrorism laws have defined “terrorism” broadly and do not stand on legal foundations. Defining “terrorism” is a process that must stand on basic criminal law principles that are able to control the improper broad definitions.¹³⁸ The sufficiency of criminal law suggests a balance between the need to insure both public safety and human rights. In the suppression of terrorism, adapting the criminal law approach promotes the general requirements in criminal law, such as proof of fault¹³⁹ and the right to a fair trial.

The criminal law approach focuses on criminal wrongdoing rather than the person’s status or associations.¹⁴⁰ For example, criminal law does not consider the religion or ethnic background of the accused, but rather whether he or she committed a certain forbidden act. The Bahraini anti-terrorism experience, for instance, shows that it focuses on the suspects’ background. Because the opponents are from a religious community that is not the same of the rulers, this fact makes the opponents’ acts illegal. Further, because the criminalized acts under the Bahraini or Kuwaiti law are not as certain as they should be in a criminal law, arbitrariness may interfere during the both the investigation and trial stages. For example, “harming the state’s security” is a broad term that cannot be prohibited under the basic criminal law principles. Also, criminal law, in general, does not consider the motive of the accused or whether he or she committed the

¹³⁸ LaViolette and Force, *Supra*, 97.

¹³⁹ *Id.*, 103.

¹⁴⁰ *Id.*, 103.

crime for religious or political motivation. It focuses on breaking the law and whether such a break was committed intentionally. This will ensure bringing criminals to justice while at the same time protecting innocents.¹⁴¹

There are several elements that are contained in the existing domestic laws. Some of them seem essential, while others go beyond the purpose of counter-terrorism and actually limit human rights and criminalize peaceful dissent and protest. The element that I will focus on is the target of the attack or the victim. Civilians should be the main concern when it comes to protection. For instance, the ‘International Convention for the Suppression of the Financing of Terrorism’ protects only civilians from killing and serious bodily harm. Any definition should focus on protecting civilians only. As Kent Roach argues, those events like 9/11 and the Madrid and London bombings, emphasise that murdering and harming civilians are the main problem with terrorism.¹⁴² In addition, Roach continues to point out that acts of damaging properties, for example, should not be immune from the law. Nonetheless, at the same time, an act such as this should not be considered as terrorism,¹⁴³ which implies an extreme and dangerous crime. Narrowing the definition by focussing on protecting the civilians would strengthen the rule of law. An appropriate definition that stands on criminal law principles must be specific. This specificity can be reached by criminalizing the acts that serve counter-terrorism. An example of an anti-terrorism law that is not within the line of the rule of law is the ‘Bahraini Law on Protecting the Society from Terrorist Acts,’ which includes under its protection the safety of the public order, the safety and security of the kingdom, national

¹⁴¹ LaViolette and Forcese, *Supra*, 103- 104.

¹⁴² *Id.*, 116.

¹⁴³ *Id.*

unity or the security of the international community, the environment, public health, the national economy and public properties. Some of the terms are overly broad and ambiguous and cannot fall under criminal law. These include acts against the “public order” or the “national unity.” Such acts that disrupt these interests must be well defined before they are criminalized and should not be considered as terrorism since they do not harm civilians who are the focus when it comes to protection. Other terms can be considered as results more than actions, such as damaging the environment or affecting the public health. They are results of violence or non-violence, short-term or long-term acts and so they are not and cannot be specific. Therefore, they do not fall under the criminal law approach.

Another important element of having a definition is what Ben Saul refers to by underling on the ‘plain textual meaning.’¹⁴⁴ It is important to distinguish between certain crimes. For example, the crime of murder and the crime of murder as a terrorist offence should be distinguished by focusing on the element of “terror” that is involved with one rather than the other. Crimes of terrorism should be at a classified as such because they cause terror to civilians. The different definitions of terrorism that exist include the term “terror” or the phrase “cause terror.” However, the term “terror” is still unclear. While many words can be elastically defined, terrorism cannot be separated from its textual foundation.¹⁴⁵ A suggested definition of terror is what the ‘International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991’ (ICTY) referred to in

¹⁴⁴ Ben Saul, *Defining Terrorism in International Law* (New York: Oxford University Press, 2008) 62.

¹⁴⁵ *Id.*, 62.

the *Galic* case. The tribunal interpreted terror as “extreme fear.”¹⁴⁶ Although the interpretation does not provide much of an explanation, I argue that it is the judge’s responsibility to decide whether or not a state of “extreme fear” exists in each case. This task must be given only to regular independent courts and not special security courts. In other words, any measures should be within the framework of the law.

The UN Security Council’s attempts at defining and combating terrorism failed to emphasize the importance of respecting human rights. Human rights were mentioned in the Security Council Resolution 1373 (2001), which states that:

take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts.

Also, the Security Council declared in Resolution 1456 (2003) that:

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.

Whether or not human rights were mentioned in the Security Council resolutions, I claim that any definition or measure related to combating terrorism should be in line with human rights on the grounds that all states have international obligations. There are fundamental human rights that cannot be suspended or derogated, such as the right to life,¹⁴⁷ the right to safety from torture and all forms of cruel or inhuman treatment,¹⁴⁸ the

¹⁴⁶ *Galic* Case, ICTY-98-29-T (5 December 2003), online: ICTY, 5 December 2003, <<http://www.icty.org>> Para 137.

¹⁴⁷ Article 6 of the International Covenant on Civil and Political Rights (ICCPR), U.N.T.S. No. 14668, vol 999 (1976), at 171.

¹⁴⁸ Article 7, *Id.*

right to a fair and public hearing,¹⁴⁹ the right to freedom of thought, conscience, and religion¹⁵⁰ and the right of peaceful assembly.¹⁵¹ These rights are guaranteed under the International Covenant on Civil and Political Rights, one of the most multilateral treaties. It is worth mentioning that Kuwait is a state member of this Covenant since 1996 and so is Bahrain since 2006.¹⁵² Ratifying such an international treaty is a good move forward, however; it is essential to adhere to its norms. If there is a lack of respect for basic human rights, innocent people and peaceful protesters could be the victims of anti-terrorism measures.

Conclusion

As I argued before, it is important to define “terrorism” as a first serious step to counter terrorism. Domestic definitions should be in line with the international guidance provided by the 1999 ‘International Convention on the Suppression of Terrorism Financing’ and UN Security Council Resolution 1566 (2004). It is also important that any definition be based on the criminal law approach, in which the criminalized acts are clearly identified and within the rule of law. Human rights must also be valued and respected in both legislation and practice.

As for the Kuwaiti anti-terrorism measures, the starting point should be to define “terrorism” appropriately as I mentioned above. The existing broad laws on state security

¹⁴⁹ Article 14 of the ICCPR.

¹⁵⁰ Article 18, *Id.*

¹⁵¹ Article 21, *Id.*

¹⁵² ‘Status of Treaties,’ International Covenant on Civil and Political Rights, online: United Nations Treaty Collection <<http://untreaty.un.org>>.

should be amended in a way that respects both the rule of law and human rights. The practice in Kuwait shows that ambiguous terms are being abused, such as “the change of the state’s statutes,” “change of the social system,” “infringement on public order,” “harming the credibility and Arabic sovereignty of the state,” “promoted principles that would undermine the social or economic system of the country,” “crimes that affect the citizen’s loyalty towards the country” and other terms that cannot be justified under the rule of law. There are three other issues that Kuwait should consider. Firstly, the importance of openness in regards to secret intelligence’s evidence to ensure criminal justice. Secondly, preventing the use of torture when terrorism is suspected as this method is illegal in itself and it affects the validity of the evidence. Thirdly, the withdrawal or termination of citizenship should be practiced under judicial power and review. Also, the punishment should be personal so that it does not affect the family members of the convicted. As for combating terrorism financing, there should be a proper general definition of terrorism under the criminal law approach so that “terrorism financing” can be defined under the Combating Money Laundering and Terrorism Financing Draft Law, which should be ratified as soon as the dilemma of the definition is solved. Ratifying this law will be a step towards adhering to the related UN Security Council resolutions. In this regard, it is also essential to ratify on the 1999 ‘International Convention on the Suppression of Terrorism Financing,’ which not only regulates criminalizing terrorist financing, but also provides international guidance on defining “terrorism.”

As for Bahrain, repressive laws and violent practices should be stopped. The definition of “terrorism” should be within the rule of law and within the international guidance provided by both the ‘International Convention on Suppression of Terrorism Financing’ and the Security Council Resolution 1566. The state security norms should be amended and narrowed down so they will be within the framework of the law and human rights. Anti-terrorism measures in Bahrain should be neutral, must not target particular groups, be designed to maintain public security and ensure counter terrorism without infringing on human rights.

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