

DUE PROCESS IN THE CONTEXT OF COUNTER-TERRORISM “A CASE STUDY FROM IRAQ”

DR. BASSIM JAMEEL HUSAIN ALMUSAWI

WasitUnivesrity/ College of Law

balmusawi@uowasit.edu.iq

***Abstract** - This article provides a critical assessment of the current Iraqi criminal justice process, in counter-terrorism context to give an answer to the question of whether the approach of Iraqi legislator in criminal proceedings meets requirements of security in confrontation against terrorist and international law of human rights. The paper reveals that, there are many welcome procedures on the safeguard of rights and liberties to strike a right balance between providing due process and securing security of citizens while fighting terrorism. However, the problem is the difficulties faced by the state in its endeavor to secure national security against one of the most serious terrorist crimes. What follow is that it may be difficult for security authorities during dealing with these crimes to cope with or realize the wide standards of procedural safeguards and human rights for persons whom may be subjected to criminal investigations. This paper proposes that it may be well to enact new legal provisions or special Act that can expressly provide police with wide-ranging powers so as to arrive the correct strategy in the criminal confrontation against terrorism in the light of international standards. The study adopts qualitative research methods of a doctrinal nature by the analytical method of texts and legal regulations as well as the comparative method is useful to have some lessons from different attitudes by comparing the different legislations of some countries in dealing with the subject.*

***Keywords:** Due process & fair trial in Iraq; Criminal proceedings; Terrorism& International law ofHuman rights.*

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INTRODUCTION

The heinous crimes of terrorism cause heavy losses of lives, properties and gross violations of all human values and rights. Recently, countering terrorism has taken on a global dimension, prompting domestic legislatures to enact new rules and adopt strict measures in that confrontation. What follow is that Some strict measures and intrusive methods have been used by authorities around the world; and thus, this paper is dedicated to investigate the problem of facing terrorism. The paper focuses on the Iraqi criminal justice system, and showing in light of some other comparative legal systems what are appropriate measures that could be directed in the context of criminal procedures against criminal terrorist suspects particularly against sudden rise of the radical terror group in Iraq.

Nowadays, countering terrorism is a global dimension that has led the international community to enact new rules and adopt strict measures in that confrontation. In the light of this confrontation and its repercussions at the internal level of the countries, some laws have been enacted and strict measures have been adopted that have created a danger against the guarantees of persons during facing the criminal procedures.



In this respect, one of the most important duties of the state is to take and develop various measures in fighting terrorism, but at the same time measures taken must fully respect requirements of international human rights norms and fundamental freedoms. Despite the duty of governments to protect their citizens from abuse and preventing human rights violations, the research is based on the assumption that in light of the new international trend of combating terrorism and maintaining security, some legal systems of countries have initiated more stringent measures by sacrificing certain criminal justice guarantees and fundamental rights for persons facing criminal proceedings under the need of countering terrorist crimes.

Due to seriousness of terrorist crimes, anti-terrorism measures in many countries have witnessed various forms of human rights violations, and thus individuals rights and liberties have become victims of these measures. However, assessing the policy of the international and local legislator in the face of terrorist crimes and evaluating the effectiveness and legitimacy of these means and measures taken in this regard is not easy. In order to be aware of this issue, it is necessary to ask a number of questions that we are trying to answer throughout this paper such as: Is there any contradiction between measures taken to combat terrorism crimes and respect human rights? Is it easy to reconcile them in criminal proceedings and how can such a compromise being achieved? The research also involves an analysis of legal regulations under the relevant texts contained in anti-terrorism laws in some countries, in order to critically analyse whether these reflect a decline in respect for rights and freedoms with a focus on criminal procedures and criminal justice standards in Iraq.

In carrying out the legal analysis & finding out the right answers for above questions, this paper will concentrate on finding out the sufficiency & insufficiency of the current Iraqi legal system about safeguarding the right of liberty and security during fighting terrorism.

1. METHODS

The study deals with the evaluation of the effectiveness of criminal proceedings in Iraq during fight against terrorist crimes in the light of recent challenges faced in realizing international human rights norms, taking into account the seriousness of these crimes and security requirements. In order to cover the various aspects of such subject, the study will adopt qualitative research methods of a doctrinal nature by the analytical method of texts and legal regulations as well as the comparative method will be useful to have some lessons from different attitudes by comparing the different legislations of some countries in dealing with the subject.

In turn this research will attempt to assess the position of the Iraqi legislator during the verification of the adequacy of the current criminal procedures to meet the requirements of criminal confrontation against terrorist crimes and thus case law is relied on by the study. This study also relied on data collocated from both national and international resources. The hypothesis of the need of Iraqi legal system & the Iraqi Criminal procedures Code to increase the effectiveness of the rules of procedures is verified in the light of international norms particularly as listed by the United Nations Human Rights Committee and numerous decisions from the European Court of Human Rights.

This paper provides a concise summary about the existing Iraqi legislation related to terrorist crimes and human rights protection. For the purpose of taking into account, different aspects of the present topic and arriving at the correct strategy while dealing with terrorist crimes the study comprises following titles.

2. FIGHTING AGAINST TERRORISM WITHIN THE FRAME OF ORDINARY CRIMINAL CODE

In Iraq there have been numerous efforts taken to eliminate terrorism. military and security forces in Iraq carry on to join in the fighting against those who engage in the context of terrorism. Fighting against terrorism requires interfering with individuals' liberties such as detaining and questioning suspects after taking terrorists into police stations & providing custody other measures that are essential to effective investigation process and freezing terrorist assets. International agencies, as well, participate in assisting Iraqis in this war on terrorism adapting to meet the threat.[¹]

Treatment of those captured during war on terrorism leads to some of the legal issues regarding provisions of terrorist-related legislations. Some legal procedures during process of arrest and detention arising out of legal confrontation against those who involve in committing terrorist crimes required to be under analyses.

basic document of the Iraqi framework in the course of combating terrorism is the Anti-Terrorist Law No. 13 of 2005. The law does not deal with all criminal procedures to be followed by authorities while countering-terrorism. Its provisions are only devoted to deal with substantive perspectives that regulate a very specific matter relating to the criminal acts of terrorist crimes. Regarding criminal procedures, Iraqi legal system only has provisions of general rules governed by the Iraqi Criminal Procedure Code No 23 of 1971 which makes while a person facing criminal procedure no distinction between terrorists and other all citizens and hence the same rules of Criminal Procedural Code are applied to both terrorist crimes and other ordinary crimes. And here it may be well to mention that for many years in most countries around the world the reaction against the threat of terrorism and the counter-terrorism picture and criminal proceedings arising from terrorist crimes were not being distinguished from those arising from other ordinary crimes in various procedural stages.

Thereafter, due to the scourge of terrorism and serious consequences of the terrorist crimes after 11 September 2001, unlike Iraqi law which uses ordinary or common criminal proceedings during dealing with offences of terrorism in the pre-trial setting in the investigation stages within the ordinary criminal justice system, important new legislations around the world in this area have been passed. In according with these legislations, the counter-terrorism picture has been deviated from accepted normal norm, and because of the fact that the war on terror becomes an exceptional in its picture recently has been changed not only in kind but in amount from that, which prevailed before the attacks.^[2] In most countries legal reform has been made in terms of substantive and procedural law. Legislative measures and special investigative powers have been submitted to strengthen security. Several highly specific regulations, special investigative powers and harsh investigation techniques rules that interfere with rights of a person facing criminal proceedings replaced the softer versions applied under the provisions of general rules.^[3] These measures give the government the upper hand in the fight against this type of crimes.^[4] It is possible to presume a level of safety for citizens by these adopted various measures, however, have raised serious concerns about civil liberties and freedoms of individuals in plenty of cases and particularly implied serious violation against the rights of suspected or accused persons in criminal proceedings.^[5]

Otherwise it is worthy of note that human rights norms do not discriminate between persons facing criminal proceedings either who commit a terrorist crime or other crimes and as such even in terrorist crimes, any detention powers under national law must meet the requirements of International Human Rights Law. Another matter of note is that even though a number of international conventions have been imposing obligations on states to increase in investigative power or taking appropriate measures to combat terrorist acts including legislative measures but this obsoletely does not mean such measures can be against procedural guarantees stipulated under international law norms.^[6]

The fact that broader antiterrorism legislations around the world have been reformed to use tough forms of investigations measures and to authorize wide powers for authorities in order to combat a terrorist threat. In this respect, the case of concern is that under the examples where persons facing criminal proceedings in terrorist crimes there would be certain leeway concerning human rights. Such assume about these antiterrorism laws, which have been enacted across the world a greatly impinged upon human rights adopted in the international law, has been previously substantiated by a number of conducted studies in this regard.^[7]

3. FIGHTING AGAINST TERRORISM WITHIN THE FRAME OF EXTRAORDINARY CRIMINAL CODE

Comparatively, a number of countries have asserted that it is not necessary to pass any specific new legal rules regarding counter-terrorism because their existing legal systems already cover the specific conducts in relevant to 'terrorism' under their criminal laws.^[8] In contrast, a number of legislations around the world agree that due to the serious consequences of the terrorist crime, a distinction has to be made between the criminal procedures conducted against anyone suspected of being involved in

ordinary crime and these criminal proceedings conducted in the investigation of terrorism-related offences. As a consequence, in countries other than Iraq such as Jordan, Egypt, and in some western countries the legislative reforms in Anti-terrorist legislation stipulated a special alternative procedural route made to give authorities more power other than that provided by the ordinary penal system. All these have been made in order to avert terrorist violence and defeat challenges presented by these terrorist groups.

Egyptian and Jordan are among those Arab countries which, enacted special investigative powers under the Anti-Terrorist Law No 94 of 2009 and Jordanian Anti-Terrorism Law No. (55) of 2006. Under the rules of these laws, the new counter-terrorism regime has been introduced under which discrimination has been made between non-revocable due rights and those that can be withdrawn in the activities of the terrorist, which represents a notable parting from the past. In addition to these new procedural rules, the reform of a substantive nature has been taken place as well. The new substantive provisions of criminal law govern a very specific matter relating to the criminalizing acts of terrorist crimes which made certain terrorist activities punishable by the death penalty, and others were to be given very heavy punishments.

Regarding Iraqi criminal justice system as already has been indicated that there are no specific criminal procedures have been enacted to deal with the terrorist crimes. In criminal proceedings that are governed by the Iraqi Criminal Procedure Code no 23 of 1971, anyone charged with a criminal offence in both ordinary and terrorist criminal cases, shall have effective protection of all procedural rights and a fair trial during all phases of criminal proceeding. The application of procedural rights does not affect the rapid detection of the crime committed, but in the climate that prevents the police and investigative authority from arbitrariness in using their powers and authorities.

It is of the most significant to emphasise that after the great military victory achieved by Iraqi security forces and international coalition forces against the remnants of the terrorist [ISIS], we must pay attention to the importance of domestic law in confronting terrorism and combating its heinous crimes. The radical terrorist group calling themselves the Islamic State in Iraq and the Levant [ISIS] spread terror and fear within the society, prompting the Iraqi legislator to issue the Anti-Terrorism Law No. 13 of 2005 (QanunMukafahat al-Irhab), that is the main legal basis for arrests and prosecutions stemming from the threatening Security, but any special criminal procedures have never been enacted to be followed in connection with terrorist crimes other than those already established under the provisions of the Criminal Procedure Law No. 23, Of 1971. It can be argued that the enactment of such special legal provisions dealing with criminal procedure relevant to terrorist acts is becoming increasingly important so that Iraq would respond to severe devastation threatening the Iraqis' security. Particularly, the international legal position allows Iraq to take all necessary measures against terrorist activities, in particularly the provisions of Security Council Resolution 2249 of September 20, 2015, which noted the requirements of observing the rules of international law and human rights and the need to fight terrorist groups in Iraq. [9]

In the view of present author, the new intimidation is related above all to the ISIS & other forms of terrorism that their aim is to destroy as many of its enemies as possible from innocent citizens should render a motive to the erosion of old legal regime in the field counterterrorism by adopting new legal rules that concerning domestic security.

Comparatively, academic debate in Europe by the same token has been marked by references to the erosion of old legal regime in the field counterterrorism by adopting new legal rules that concerning domestic security.[10] Whilst, in Iraq there is no new criminal proceedings have been enacted that slant towards consolidating security policy.

4. THE ANTI-TERRORISM DETENTION LAWS AS LAID IN LEGAL TEXTS

There are many provisions in the Iraqi Constitution 2005 and the Iraqi Code of Criminal Procedure prohibit any violation against the right of individual to liberty and security. Any action against right to liberty of persons should be according to order issued from the judiciary. The constitution expressly



prohibits detention of any person even in cases involving terrorist crime for up to two days without charge.^[11]

An arrested person according to the code of criminal procedure must be promptly brought within twenty-four hours to be before the judicial authority of his arrest.^[12] Whilst in many other countries around the world the situation is different from Iraqi legal systems. In these countries, unlike in ordinary crimes, authorities have been granted broader powers of arrest and a longer period of detention for terrorism suspects.^[13] For example, most powers of arrest stipulated within the Police and Criminal Evidence Act 1984 (PACE), in the United Kingdom, never permits to detain suspect without charge more than up to total period of 96 hours.^[14] While in the terrorism-related crimes under the Terrorism Act 2000, as amended by the Act of Criminal Justice in 2003 and the Act of Terrorism in 2006, allowed extensions of investigative detention without charge up to a total period of 28 days.^[15] This is, by itself, a notable nonconformity between antiterrorist detention and ordinary period of detention in cases involving other than terrorist crime.

It needs to be stressed that with regard to the provisions of Iraqi law even in cases involving terrorist crimes a suspect facing criminal investigation has to be protected against acts of violence, right to obtain free communicate with counsel without any cost, and ensuring that such right to legal counsel should be notified to the suspect by authorities at outset of proceedings. In accordance with Article 123, which is amended by the Coalition Provisional Authority (CPA) Memorandum No. 7 / Section IV-C of the Iraqi Code of Criminal Procedure, which is applicable to the criminal proceedings during arrest and detention in investigating stage, a suspect must be allowed earlier access to a lawyer in police custody, notified about his right to attend a legal representative. In the event that the suspect does not have sufficient means to hire a lawyer due to financial inability, the investigator must appoint a lawyer for him and then the appointed lawyer, all legal aid shall be provided free of charge.^[16]

Likewise, there is procedural protection to reinforce the presumption of innocence embodied in the Iraqi Criminal Procedure Code, which provides for a numeral of guarantees that are in line with the rules of international law of human rights that aim protecting persons under criminal proceedings. There is no legal basis to act contrary to these provisions even in terrorist crimes, whatever the gravity of the offence being investigated. Accordingly, defendants have not to be compelled to speak even in terrorist crimes, and the code therefore guarantees an important guarantee for a person under criminal investigation, namely his right to keep silent.^[17]

In accordance with the Iraqi Criminal Procedure Code an accused does not take the oath, and an exception can be taken place to take the oath if the accused is in the place of testimony against other co-accused. If it is found that the defendant has testimony against another co-defendant, he will testify and his case will be separated from that of the co-defendant against whom he has already testify.^[18]

As well as in respect increasing the range of guarantees during the interrogation, the legislator after 2003 increased these guarantees by making important amendments to the provisions of Iraqi Code of Criminal Procedure in force, Article 123, in order to guarantee the rights of the accused and prevent the extraction of confessions from him.^[19] In accordance with the Iraqi Criminal Procedure Code as has been emended by Coalition Provisional Authority Memorandum 3/ Section V, the rights of silence & the privilege against self-incrimination become absolute and when a judicial officer arrests a person should inform him about his right to remain silent.^[20]

Throughout all stages of criminal proceedings, in the event of a person facing criminal interrogation uses the right to remain silent, it is neither an investigators nor courts has a legitimate authority to draw an adverse inferences from such silence. In light of these legislative provisions, authorities have no right to go beyond their limits during exercising their powers because such rights is absolute and should be taken place on all criminal offences either they are lenient or serious, in every cases, whereas under the provisions of many jurisdictions across the world the privilege against self-incrimination & right of silence should be applied generally, subject to circumscribed exceptions. It



has been stated that, the right's application "could be limited by reference to other legitimate aims in the public interest".^[21] In some situations which clearly call for an explanation, the drawing of inferences from silence of an accused come to be admissible and hence unlike Iraqi criminal justice system this right in other jurisdictions is not an absolute.^[22] This may therefore be seen as "a limited exception to the right of silence".^[23]

The Iraqi Criminal Procedure Code gives essential procedural rights for a person facing criminal proceedings during all stages of investigation, the confession if submitted should be issued explicitly and unequivocally and neither on the basis of suspicion nor illusion.^[24] In other words, a person during interrogation should willingly give statements without being obtained by interrogator through invalid means. In addition, confession is always invalid unless during interrogation an attendance of a lawyer is guaranteed. Therefore, in the event that guilt is properly admitted during interrogation at the will of the person detained, it will of course later be taken into account as decisive substantiation for the court in deciding the case after reaching the truth.^[25] This is an important guarantee for a person facing criminal proceeding during criminal investigation stage against torture.^[26] Otherwise, without providing these safeguards the privilege against self-incrimination may well be activated and taken place to motivating a court towards excluding confessions on the ground of invalid criminal proceedings by which the confessions have been extracted by investigations authorities.

From comparing criminal proceedings and guarantees contained in the provisions of the Iraqi legislation, especially the mentioned guarantees provided under the Iraqi Code of Criminal Procedure with the legislation of other countries, one can presume that the Iraqi legislator not only similar to those legislations in giving efficient safeguards for persons under criminal investigations but also have surpassed on those countries in the range of these guarantees.

It is paradoxical in this regard that other legislations do not grant such a high range of guarantees not only to those of the most serious terrorist crimes but also even for ordinary crimes, whereas our Iraqi legislator gives these guarantees in dealing with all crimes, even serious terrorist crimes. Therefore, we find that some of authors have criticized the legislative amendments introduced by the CPA Memorandum on the Code of Criminal Procedure in force, which increased the range of the safeguards of persons facing criminal proceedings, submitting that it is better for a country like Iraq and the situation in the country to focus on reform of the legal system for the rule of law in practice and reality rather than increasing the range of rights and guarantees to a level not even available to some of the States that contributed to the issuance of that memorandum.^[27]

Similarly, one of the jurists went on to say that "the reforms of the coalition authorities in Iraq were more protected by persons in custody than those under the French or English legal system".^[28] It has been previously mentioned that the analyses of aforementioned texts of Iraqi law reveal that the criminal justice system in Iraq exceeds many States in terms of the amount of procedural guarantees given to persons under detention despite the violence of the terrorist attacks against Iraqis, which surpasses any other country. In the United Kingdom, for example, as has already been shown, under the amended Terrorism Act of 2000, suspects can be kept in custody under detention for up to 28 days without facing criminal charge, in accordance with the amendments to that law by The Act of Criminal Justice of 2003 and the Act of Terrorism of 2006, while the Iraqi legislator may not detain persons without charge for more than 24 hours from the time of arrest.^[29]

However, although Iraqi law comprises some of most essential procedural rights for protection of persons who may be facing criminal proceedings, the national and international institutions and organizations of human rights that defend the rights of people and observe the actuality of human rights standards during the period of detention in daily practice, in their reports note the disconnection between mentioned safeguards in law and practice. Thus, the principle of the rule of law has been violated in real practice.^[30]

It can be said in this regard that the promotion of any State in reaching the rule of law cannot be measured only by the enactment of the texts of legislation but also, and most importantly, by the enforcement and application of those texts on the ground. This leads to the serious result that as long



as there is a inconsistency between articulated texts of procedural rights and daily application of these texts on ground during working practice due to mistreatment of legal safeguards of detainees by law enforcement officials this means moving away from the rule of law.

The reliable reports on human rights make it clear that in spite of the fundamental rights against arbitrary arrest which have been provided by Iraqi law, the right of individuals to liberty has been breached by law enforcement officials in daily practice.^[31] The United Nations Assistance Mission during visiting to places of detention during its mission in Iraq frequently reported that excessively resorting to detention has been noticed by its team members who indicated plenty of cases in which persons seemed to be kept in detention without order detention from judicial authority.^[32] It is problematic in practice that detainees in police custody spend excessive pre-trial detention before being brought front the judicial authority in Iraq. While under provisions of Iraqi law as lied down in paper detention must be the last resort.^[33]

Iraqi law requires a person who is suspected of crimes or under criminal investigation during stages of arrest or detention at beginning of proceedings must be informed about the ability to consult an attorney.^[34] But in reality human rights organizations have observed that there is still a lack of necessary legal assistance that is in accordance with Iraqi law considered as the crucial right of a person facing criminal proceedings. It was noted that the right of a person facing criminal proceedings to be accompanied by a lawyer as a result of not being able to contact a lawyer is a serious problem in many cases during the investigation stage.^[35] However, as has already been seen, the procedural rights of investigation process either stipulated in the Code of Criminal Procedure or in the Constitution are very often neglected in the daily practice or at least remain not fully realizable.

In a similar vein, under Iraqi Code of Criminal procedure during the process of arrest every arrested citizen in all cases without exception even in terrorist crimes has the right to be promptly informed about his procedural human rights such as to have access to a lawyer, right to keep silent, right to communicate with family and others. These rights are entitled at outset of proceedings. Based on Article 19, the right of have a lawyer as example, is accessible according to the Iraqi Permanent Constitution of 2005 from outset of proceedings and at all stages of the criminal proceedings.^[36] However, according to the reputable reports of human rights these safeguards in fact have been disrespected in practice.^[37]

The Iraqi Code of Criminal Procedure includes provisions that prevent arbitrary treatment against a suspect from law enforcement officers.^[38] for the purpose of enhancing the respect of the most important procedural right that is right to be free against ill-treatment the constitution stipulates that "Any confession made under force, threat, or torture shall not be relied on". ^[39] However, a systemic problem with criminal cases in Iraq is that courts in daily practice are reliance on confessions improperly obtained in practice during detention in investigation stages.^[40]

In conclusion, the application of procedural rights while combating terrorist crimes in the Iraqi criminal justice system has not been well. The legal system has failed in the context of the rights of a person who faces criminal procedures in cases of terrorist crimes to settle between these due rights and security because the practice of justice system in criminal cases prefers state security at the expense of the defendant's rights. What follow is that in criminal cases there is a contradiction between protection of human rights in legal texts or rule of law as laid down in papers and daily practice.

5. CONCLUSION

In analyzing the application of due process to counterterrorism, the current article is undertaken to verify the adequacy of Iraqi legislature in dealing with terrorist crimes to examine the extent to which there is compatibility between the procedural rights and national security in legal confrontation against terrorism. The study focused on provisions of the Iraqi Criminal Procedure Code that apply to criminal investigations. The Code regulates all criminal procedures regarding collected relevant

evidence, processes of investigations and trial in committed crimes including national security and terrorism offences and other normal crime.

The research that explored the settlement between procedural guarantees related to terrorist crimes in Iraqi law and citizen security leads the author to clear conclusion that because of our country is seeking national security against one of the most dangerous forms of terrorist crime, it is difficult for the authorities in daily practice to realizing or achieving these wide ranges of procedural safeguards stipulated for a person in the course of criminal proceedings involving terrorist crimes.

It has been substantiated that in the Iraqi justice system during criminal proceedings the application of procedural rights for individuals suspected of involvement in terrorism has not gone well. Over the last years, there has been no easy solutions to protect procedural rights against violation during daily practice in all stages of the criminal justice process.

This paper has been designed to assist Iraqi legislator & investigations authorities in achieving effective protection for rule of law regarding procedural rights in criminal cases involving terrorist suspects.

Eventually, It may be well to proposes that the proper legal policy in confrontation against terrorism is the legislature that should enact new provisions or special Act, which expressly provides wide ranging police power during conducting investigations against terrorism offenses in one hand and secure respecting fundamental rights for a suspected terrorist on the other in order to respond to the security demands and at the same time ensure full compliance with human rights obligations and rule of law.

REFERENCES

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- [1] 1 In recent years, the United Nations agencies has been continually involved in assisting Iraq and all states that are ruined from terrorism encouraging international community to combating terrorist financing through freezing the assets of terrorists, detecting and hindering the sources of funding. The UN also continues in denying terrorists access to the global business system, protecting valid institutions from being harmed by terrorists group, and stopping use alternative financial networks from terrorist and preventing the movement of assets through them. As reported by the United Nation:
- [2] "We have had a long-standing partnership with Iraq since 2014 on responding to emerging terrorism financing threats and increasing the number of AML/CFT prosecutions and convictions in the country. With the aim of enhancing internal coordination and increasing the number of AML/CFT prosecutions and convictions, we have been supporting the newly established independent Iraqi Financial Intelligence Unit through capacity building initiatives, strengthening its cooperation with its regional and international counterparts and supporting its efforts to join EGMONT Group". Reliable reports indicated that "since September 11, 2001, 209 of the 212 countries and jurisdictions in the world have expressed their support for the financial war on terror; 173 countries have issued orders to freeze the assets of terrorists; terror networks have lost access to nearly \$200 million, which have been frozen or seized in more than 1,400 terrorist-related accounts around the world; of that total, over \$73 million has been seized or frozen due to the efforts of the United States. Over 100 countries have introduced new terrorist-related legislation, and 84 countries have established Financial Intelligence Units. In the September 6, 2003, political decision of European Union Foreign Ministers to designate the leadership and institutions of HAMAS as a terrorist organization and to freeze their financial assets. Since September 28, 2001, all 191 UN Member States have submitted first-round reports to the United Nations Security Council Counterterrorism Committee on actions they have taken to suppress international terrorism, including blocking terrorist finances, as required under United Nations Security Council Resolution 1373".
- [3] Official website of United Nations, Office on drugs and Crimes, combating terrorist financing, <<https://www.unodc.org/unodc/en/terrorism/expertise/combating-terrorist-financing.html>>&
- [4] <<https://georgewbush-whitehouse.archives.gov/infocus/iraq/>> at 14/1/2023.
- [5] 2Joan Fitzpatrick, (2003)"Speaking Law to Power: The War against Terrorism and Human Rights"(April/2003) Volume 14/Issue 2, European Journal of International Law/ Eur J Int Law 14 (2): 241.
- [6] 3It is worth highlighting that, in the course of a strong struggling against terrorist acts it is of the most significant to pass new anti-terrorist legislations for providing the authorities with extensive special powers specific to instances of terrorism so that they are able to curb those dangerous acts. That is to



- say, the situation under Iraq legal system is contrary to such view and this is due to there are no special rules against terrorists in the area of criminal proceedings.
- [7] 4In the opinion of some scholars, it is truly that the principle of procedural equality has been compromised in the field of terrorism over the past few years, due to the crucial role played by the police, investigative authority and the prosecution in these proceedings. It has been seen daily practice that breaching human rights norm as well as restrictions on the rights of persons who are facing these criminal procedures in addition to the possibility of remaining in solitary confinement, which gives the government the upper hand in the fight against this type of crimes. Juan-Luis Gómez Colomer, (2013) "the Right to A Defence in the Criminal Procedure of the Young Spanish Democracy" Volume2, *Lex ET Scientia International Journal LESIJ NO. XX, VOL. 2/2013*, p. 127.
- [8] 5Some scholars noted that "Counter-terrorism measures have incurred excessive human rights costs, spurring radicalisation. State agents who abduct torture or illegally assassinate terrorists are scarcely ever held accountable; impunity reigns. Some states use 'drones' to kill terrorists seemingly outside the accepted parameters of international law on the use of force, armed conflict, and human rights. In a legal and moral universe of this kind promoted by states, contentious terrorists are unlikely not to reciprocate the spiral of violence, or be socialised into behaving better". Ben Saul, 2015 "Old and New Terrorist Threats: What Form Will They Take and How Will States Respond?" Sydney Law School, *Legal Studies Research Paper No. 15/82, September*, p. 3 at: <<<http://ssrn.com/abstract=2663846>>> accessed 5 June 2019.
- [9] 6For instance the Organization African Union (OAU) mentions that: "Nothing in this Convention shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law" *The African Union Convention on the Prevention and Combating of Terrorism, Articles 22 date of adoption 1/7/1999 & date of entry into force 6/12/2002*; see also UN Security Council Resolution 1373.
- [10] 7Amnesty International, in October 2001, reported the concerns that "in the name of fighting international terrorism, governments have rushed to introduce draconian new measures that threaten the human rights of their own citizens, immigrants and refugees ... Governments have a duty to ensure the safety of their citizens, but measures taken must not undermine fundamental human rights ... Common features of the new anti-terror laws include broad or vague definitions of new offences, wide powers of detention without trial, prolonged incommunicado detention (which is known to facilitate torture), intrusions into privacy, and measures which effectively deny or restrict access to asylum or speeds up deportation". See Cephass Lumina, (2007) "Counter-terrorism legislation and the protection of human rights: A survey of selected international practice" *African Human Rights Law Journal, Afr. Hum. Rts. L.J. 35 2007*, p. 37.
- [11] 8As example, the government of Zambia in its responding to the UN Counter-Terrorism committee on 19 June 2002, stated that "it has a number of provisions under its Penal Code (Cap 87 of the Laws of Zambia) that can be used to fight against terrorism in accordance with Security Council Resolution 1373". See Cephass Lumina, *op. cit.*, p. 43.
- [12] 9See United Nations General Assembly resolution 48/122 (1993); Security Council resolution 1377 (2001); *The Secretary-General of the United Nations, document 2005 / A / 59, para. 94.*
- [13] 10Stock, Jürgen Stock & Annette L. Herz, 2010 "International Terrorism - German Police Perspective: The Current Threat Environment and Counterstrategies from the German Police Perspective" Marianne Wade and AlmirMaljevi Marianne (eds), *A War on Terror (Springer Science+BusinessMidea)*, p. 48.
- [14] 11It has been stated that "The preliminary investigative documents shall be submitted to the competent judge in a period not to exceed twenty-four hours from the time of the arrest of the accused, which may be extended only once and for the same period". *The Iraqi Permanent Constitution 2005, Articles (15) (13 para. 9), Art. 19(13).*
- [15] 12Art. 9(3) of the ICCPR and Art. 5(3) of the ECHR: "expressly guarantee the right of any person who is arrested or detained to be brought 'promptly' before a judge or other officer authorized by law to exercise judicial power".
- [16] 13McLawrence v Jamaica UN Human Rights Committee Communication No (702/1996) 18 July 1997 para 5.6; *T.W. v Malta App no 25644/94 (ECtHR, 29 April 1999)*, (2000) 29 EHRR 185 para. 43; see also Human Rights Committee, General Comment No. 8, (Sixteenth session, 1982) "Right to Liberty and Security of Persons: (Article 9)" adopted on 30/06/1982, para. 2.
- [17] 14s. 41, s. 42 of the Police and Criminal Evidence Act 1984 (PACE).
- [18] 15Schedule 8 of the Terrorism Act 2000, as amended by s 23 of the Terrorism Act 2006.
- [19] 16The law states that "at the time an Iraqi law enforcement officer arrests any person, the officer shall inform that person of his or her right [...] to consult an attorney" Coalition Provisional Authority's (CPA)



- Memorandum 3, signed 18 June 2003, published in the Official Gazette, issue 3978 of 17 August 2003; The Iraqi Code of Criminal Procedure also states that "Before questioning the accused the investigative judge must inform the accused that: [...] he or she has the right to be represented by an attorney, and if he or she is not able to afford representation, the court will provide an attorney at no expense to the accused" Article 123 of the Iraqi Code of Criminal Procedure (ICCP (in the official English translation that is available online at the homepage of the Global Justice Project: Iraq (GJPI) <<<http://gjpi.org/central-activities/judicial-independence/>>> accessed 28 January 2014; see also BassimJameelAlmusawi, (2022) "Legal response to protection of right to communicate & appropriate adults during process of arrest or detention" Volume 19, No 2, Brazilian Journal of International law /BJIL, 19/2022, p. 314.
- [20] 17Art. 125 and Art. 126 of Iraqi Code of Criminal Procedure.
- [21] 18In this context, Iraqi Criminal Procedure Code in Art. 126, paragraph (b), states that: "The accused shall not swear oath unless he is in the place of testimony against other defendant".
- [22] 19Iraqi Code of Criminal Procedure, Art. 218, as amended by Memorandum of the Coalition Authority No. (3) s V, June 2003, Iraqi Gazette No. 3978 August 2003.
- [23] 20It has been stated that: "Before questioning the accused the investigative judge must inform the accused that: (...) he or she has the right to remain silent and no adverse inference may be drawn from the accused's decision to exercise that right". Iraqi Code of Criminal Procedure, Art. 123 (B).
- [24] 21Weh v Austria (2005) 40 E.H.R.R. 37 at [47]; Andrew Ashworth, (2007) "Human rights: Article 6(1) - privilege against self-incrimination" Criminal Law Review, 899.
- [25] 22For example in English law and Northern Ireland, as Cheney et al claim that "the suspect is not forced to speak, but the court, whenever it appears proper, can draw adverse inferences from the suspect's failure to answer questions put to him in some circumstances". For detail, see Deborah Cheney et al., (1999) Criminal Justice and the Human Rights Act 1998: Jordan Publishing Bristol, p61; Susan Easton, (1988) The Case for the Right to Silence: Ashgate Publishing Company, 2nd ed., 13.
- [26] 23John Murray v United Kingdom(1996) 22 E.H.R.R. 29
- [27] 24Art. 127 of the Code of Criminal Procedure states that "unlawful means may not be used to influence the accused in order to obtain recognition as abuse, threat of abuse, inducement, promise, intimidation, psychological influence, use of drugs, alcohol or drugs". During daily practice, criminal courts confirmed through many cases that a admissibility of confession would be unfair in event the confession is taken place by the accused front the investigator with a denial of due process particularly in case the confession is not recorded nor confirmed by juicily authority after transferring the accused front the magistrate court. However, a admissibility of confession is fair in case the confession is submitted to the investigator who has insufficient time to bring the accused before the examining magistrate to record the confessions. In details see D. Fakhri Al-Hadithi, (2015) Explanation of the Code of Criminal Procedure, Al-Sanhoury Library, Beirut, p. 444.
- [28] 25Ali Delf, (2016) the Legal Value of Confiscated Confession, Sinhoury Library, Beirut, p. 89. the Iraqi Code of Criminal Procedure, Article 93 states that "it is not permissible to use force against the accused upon his arrest".
- [29] 26In one of its verdict Federal Court of Cassation in Iraq mentioned that: No valid judicial ruling can be based on questionable or unreliable confessions made by the accused under duress and alleged torture, which are supported by appropriate medical reports and by medical experts whose statements confirmed these violations against him. Decision of Iraqi Federal Court of Cassation / Public Authority No. 96 / Public Authority 2007 on 31/10/2007.
- [30] 27Dan Stigall, 2007 "Comparative Law and State-Building: The "Organic Minimalist" Approach to Legal Reconstruction" 29 Loy. L.A. Int'l & Comp. L. Rev. 1 2007, p. 32.
- [31] 28As Williamson states that "the Coalition Provisional Authority (CPA) reforms gave greater protections to detained Iraqis than those to which English and French citizens are entitled" John C. Williamson, Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System, (2004) 33 GA. J. INT'L & COMP. L. at 239.
- [32] 29Art. (123) of the Iraqi Code of Criminal Procedure and articles; Arts. (15) (13 paragraph 9) of the Iraqi Constitution of 2005.
- [33] 30The annual reports of the Department of Prisons and Detainees of the Ministry of Human Rights starting from the establishment of the ministry under the order of the Coalition Provisional Authority (dissolved) No. 60 of 2004 until its abolition in 2015. The report of the High Commission for Human Rights in Iraq, report on the reality of torture in prisons and detention centers, (Baghdad, 2015) Also consider the statistics recorded by the Human Rights Division of the Supreme Judicial Council / Head of the Public Prosecution / Federal Judiciary <<<http://www.iraqja.iq/view.2255>>> accessed 11August 2016.

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- [34] 31The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Reports (Baghdad, 2005-2013)*; see also *The Annual Reports of the Iraqi High Commission of Human rights & Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Reports (Baghdad, 2007-2019)*.
- [35] 32The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Report (Baghdad, 2010)* 23; the Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Report (Baghdad, 2012-2019)* 12, 13; see also Amnesty International, *New Order Same Abuses: Unlawful Detentions and Torture in Iraq*, *op. cit.*, pp. 18-29.
- [36] 33The Annual Reports of the High Commission of Human Rights 2018 & Iraqi Ministry of Human Rights, *the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2010)* 77.
- [37] 34Art. 19(11) of the Iraqi Permanent Constitution. The official translation in English is available online at the homepage of the Iraqi government at <<<http://www.cabinet.iq/default.aspx>>> accessed 20 November 2013.
- [38] 35The Annual Report of the High Commission of Human Rights 2018 & the Iraqi Ministry of Human Rights, *The Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2012)* 68, 73. Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Report (Baghdad, June 2013)* 14.
- [39] 36Also, the Iraqi Permanent Constitution states that “the court shall appoint a lawyer at the expense of the state for an accused of a felony or misdemeanour who does not have a defence lawyer” The Iraqi Permanent Constitution 2005 Art. 19(4).
- [40] 37Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI) , *op. cit.*, para. 14.
- [41] 38ICCP Art.127 prohibits “the use of any illegal method to influence the accused to extract a confession such as mistreatment, threats, injury, enticement, promises, psychological influence or use of drugs or intoxicants are considered illegal.”; also, IPC Article 333 criminalises “any public official who tortures or orders torture, or threatens torture, of a person accused of a criminal act, including witnesses, with the aim of compelling a confession”.
- [42] 39The Iraqi Permanent Constitution 2005, Art. 37(C).
- [43] 40The reports of Iraqi High Commission of Human Rights 2014-2019 & the Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Report (Baghdad, June 2013)* 12; *The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report: 2011 (Baghdad, May 2012)*16, 18.