

## **Comparative Analysis on the Practice and Implementation of Anti-terrorism Laws**

### **A. Introduction**

Civil Society Organizations (CSOs) and human rights defenders are just as concerned about terrorism as governments or any other sector of society. States not only have a right to counter terrorist acts but in fact they have a duty under human rights law to do so, as part of their duty to protect individuals under their jurisdiction. Over the last decade, international human rights institutions have elaborated on crucial elements that anti-terrorism laws need to contain in order to be compliant with international human rights standards (below part B).

Despite such guidelines, many states, including the Philippines through its Act to Prevent, Prohibit and Penalize Terrorism (Republic Act No. 11479, ATA), have enacted legislation that contain repressive measures prone to abuse. The experience of the World Organisation Against Torture's (OMCT)<sup>1</sup> Torture and Terrorism Working Group<sup>2</sup> as well as members form its SOS Torture Network has particularly shown that legislation with a broad definition of terrorism, the lack of safeguards against torture in legislation, cruel punishments (like the death penalty), the possibility to try children under anti-terrorism legislation, that creates special courts and that limits the freedom of expression essentially eliminates important democratic check and balances and has led to abuse and the prosecution of human rights defenders and political opponents (below part C).

### **B. Elements of Human Rights Compliant Anti-Terrorism Legislation**

Measures combat terrorism have to be in accordance with Security Council Resolutions 1373 (2001)<sup>3</sup> and 1566 (2004)<sup>4</sup>, which require in particular that anti-terrorist measures are carried out with full respect for human rights law, including the UN Convention against Torture. Counter-terrorism measures must be taken in conformity with the principle of proportionality which means

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<sup>1</sup> The World Organisations against Torture (OMCT) works with 200 member organisations to end torture and ill-treatment, assist victims, and protect human rights defenders at risk wherever they are. Together, we make up the largest global group actively standing up to torture in over 90 countries. We work to protect the most vulnerable members of our societies, including women, children, indigenous peoples, migrants and other marginalised communities. To achieve this, we advocate with governments to change or implement their laws and policies, we help victims seek justice and strive to hold perpetrators to account.

<sup>2</sup> The Torture and Terrorism Working Group is an initiative led by the OMCT, gathering 17 prominent human rights organisations from around the world, all working in contexts of tense security situations, including terrorist violence and counter-terrorism laws and measures. The group seeks to build collective understanding and guide anti-torture advocacy in environments affected by terrorism and violent extremism. It operates under the patronage of the UN Special Rapporteur on Torture, the UN Special Rapporteur on Terrorism and Human Rights as well as that of the OMCT President, Ms Hina Jilani.

The following organisations are members of the Torture & Terrorism working group: The Quill Foundation, KontraS, International commission of Jurists Kenya (ICJ Kenya), SUARAM, Cairo Institute for human rights studies (CIHRS), The Gulf Center for human rights (GC4HR), Christian action for the abolition of torture Democratic Republic of Congo (ACAT DRC), the CLEEN Foundation, Human Rights Association (IHD), PROMO-Lex Association, ODIKHAR, Human Rights Commission of Pakistan (HRCPP), Office of Civil Freedoms, Tunisian League for Human Rights (LTDH), Center for Legal and Social Studies (CELS) and the Russian Committee Against Torture (CAT).

<sup>3</sup> Security Council, Resolution 1373 (2001), UN Doc. S/RES/1373 (2001), 18 September 2001, available online: [https://undocs.org/S/RES/1373\(2001\)](https://undocs.org/S/RES/1373(2001)).

<sup>4</sup> Security Council, Resolution 1566 (2004), UN Doc. S/RES/1566 (2004), 8 October 2004, available online: <https://www.un.org/ruleoflaw/files/n0454282.pdf>.

they have to be in accordance with the law, pursue a legitimate aim, be necessary in a democratic society and justified on relevant and objective grounds.<sup>5</sup> With regards to counter-terrorism legislation, the principle of legality (non-retroactivity, foreseeability, precision and clarity of the law). Anti-terrorism measures and activities by intelligence agencies must further be monitored by an independent authority.<sup>6</sup> A limited range of preventive measures may be justified in the event of a clear identified danger, must be of exceptional nature and placed under meaningful judicial oversight.<sup>7</sup>

It is further imperative that anti-terrorism legislation establishes safeguards against torture and other forms of ill-treatment. In particular, the absolute prohibition of torture must be upheld in all circumstances, and evidence obtained under inhuman or degrading treatment or torture should never be admissible in court proceedings, the burden to prove beyond reasonable doubt that evidence has not been obtained under torture or ill-treatment should be shifted to the authorities and not rest upon the defendant, there need to be clear guidelines for the interrogation of detainees, detainees need to be detained with due process and have the right to access a lawyer.<sup>8</sup>

When it comes to data gathering, storage and use, rigorous procedures apply. Moreover, those subjected to surveillance or other measures should be given an effective remedy to contest the validity of those measures by an independent body.<sup>9</sup>

Victims of violations of human rights standards, in particular the absolute prohibition of torture, should be given the possibility of redress before an independent body. Relevant authorities have further to take measures that prevent human rights violations from reoccurring. Finally, it is important that the relevant authorities work in co-operation with and not against human rights defenders and other civil society actors in order to combat terrorism.

### **C. Components of Anti-terrorism Laws in Conflict with International Human Rights Laws**

Contrary to international human rights law obligations, many states have enacted broad anti-terrorism legislation prone to abuse. It has been our global experience that repressive anti-terrorism laws and measures have been used against Human Rights Defenders (HRD) and in order to try ordinary crimes. The following provides a comparative information and experience on the implementation of anti-terrorism laws from members of OMCT's Torture and Terrorism Working Group as well as members from the SOS Torture Network. By doing so, the brief highlights

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<sup>5</sup> CAT, Concluding Observations on Niger, UN Doc. CAT/C/NER/CO/1, 20 December 2019, para. 32, available online: <https://undocs.org/en/CAT/C/NER/CO/1>.

<sup>6</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, "Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight", UN Doc. A/HRC/14/46, 17 May 2010, paras. 13 and 30, available online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/134/10/PDF/G1013410.pdf?OpenElement>.

<sup>7</sup> Press Release, Office of the High Commissioner for Human Rights, "Switzerland's new "terrorism" definition sets a dangerous precedent worldwide, UN human rights experts warn", 11 September 2020, available online: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26224&LangID=E>.

<sup>8</sup> See e.g. United Nations Counter-Terrorism Implementation Task Force, "Basic Human Rights Reference Guide, Detention in the Context of Countering Terrorism", October 2014, available online: <https://www.ohchr.org/EN/newyork/Documents/DetentionCounteringTerrorism.pdf>.

<sup>9</sup> For more detail see e.g. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, "Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight", UN Doc. A/HRC/14/46, 17 May 2010, para. 37, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/134/10/PDF/G1013410.pdf?OpenElement>.

components of anti-torture laws, including the ATA, that are in conflict with international human rights laws and have been subject to abuse.

## I. Broad Definition of Terrorism

It is commonly understood that States should ensure that counter-terrorism legislation is limited to criminalizing conduct which is properly and precisely defined on the basis of the provisions of international counter-terrorism instruments and is strictly guided by the principles of legality, necessity and proportionality. The model definition of terrorism advanced by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism provides clear guidance to States on appropriate conduct to be proscribed as best practice. The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, provides the following definitional elements: a) acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages, b) irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act, c) such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.”<sup>10</sup>

The ATA includes very broad definitions and offenses in Section 4 such as "engaging in acts intended to endanger a person's life," "acts intended to cause extensive damage or destruction to government or public facility" or "intended to cause extensive interference with [...] critical infrastructure", where the purpose is to “intimidate the general public” or to “provoke or influence by intimidation the government”. References to the intimidation of the public or the intimidation of the government are overly broad, and many crimes could be subsumed under such broad terms. Furthermore, Section 4 ATA essentially criminalizes intent.

Particularly problematic is also Section 9 ATA as it criminalizes incitement of terrorism. Any person who, without taking any direct part in the terrorist acts but who incites others by means of “speeches, proclamations, writings, emblems, banners” will be punished with up to 12 years imprisonment.

The Committee against Torture has repeatedly been critical about broad definitions of terrorism and has criticized states for the “vague and ambiguous nature of the definition of terrorism....[that] leads to arbitrary arrests and convictions”.<sup>11</sup>

In numerous countries, overly broad definitions of what constitutes a terrorist act has led to convictions of persons who allegedly committed ordinary crimes. In **Pakistan**, for instance, in the case of *Kashif Ali v. the Judge Anti-Terrorism Court No. II, Lahore*, the Supreme Court of Pakistan

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<sup>10</sup> Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Comments on the 2017 Law on Combating Crimes of Terrorism and its Financing of Saudi Arabia, 17 December 2020, UN Doc. OI SAU 12/2020, available online:

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25726>.

<sup>11</sup> See e.g. CAT, Concluding Observations on Niger, UN Doc. CAT/C/NER/CO/1, 20 December 2019, para. 32, available online: <https://undocs.org/en/CAT/C/NER/CO/1>; CAT, Concluding Observations on Yemen, UN Doc. CAT/C/YEM/CO/2/Rev.1, 25 May 2010, para. 11, available online: <https://undocs.org/en/CAT/C/YEM/CO/2/Rev.1>.

held that a single murder as a consequence of personal enmity fell within the ambit of terrorism as it was committed in a public place. The Court held that the motive or intention behind the act was not relevant but whether or not the act had “the tendency to create sense of fear or insecurity in the minds of the people or any section of the society”.<sup>12</sup> In 2019, the Supreme Court ordered that Parliament redefine terrorism in the Anti-Terrorism Act as it had led to abuse.<sup>13</sup>

Similarly, in the **Republic of Korea**, the vague definitions in the National Security Act have been used for censorship. Korea has been criticized for applying its anti-terrorism legislation to unnecessarily and disproportionately interfere with the right to freedom of expression.<sup>14</sup>

## II. Lack of Safeguards against Torture

Anti-terrorism laws that lack safeguards against torture such as long periods of detention without judicial review, the lack of lodging a *habeas corpus* petition, and the lack of accessing a lawyer, have repeatedly been criticized by international mechanisms, including the CAT.<sup>15</sup> The Convention against Torture requires that in Article 2 that each “State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” The CAT has recurrently found that the lack of such measures in anti-terrorism laws increases the risk of torture in order to extract a confession as well as the risk of incommunicado detention in unofficial places of detention.<sup>16</sup> Arrest without warrant, detention for up to 24 days without judicial authorization as foreseen in Section 29 of the ATA are therefore problematic. The CAT has in the past criticized similar provisions containing unwarranted detention for an extended period of 25 days.<sup>17</sup>

The lack of legal safeguards in anti-terrorism legislation in other countries has led to forced confessions, solitary confinement, lack of access to lawyers, detention without judicial warrant for extended periods of times as shown in the cases below.

In **Pakistan**, under the Constitution and criminal procedural laws, a confession made to the police is inadmissible, only a Magistrate can register a confession. Under the Anti-terrorism Act, confessions before the police are admissible. This creates a great risk of torture in order to force a confession. Consequently, “confessions” are high in cases tried under the Anti-terrorism Act. In 2016, the government has stated in a press release that more than 90% of all those convicted by a military court had confessed their crime.

In **Qatar**, Mansoor Al Mansoori, a Qatari citizen, was detained in 2013 after he tried to organize a demonstration to protest against the French military intervention in Mali. He was kept for one month without charge. In August 2017 he was again arrested by the State Security Services officers with neither a warrant nor a reason for his arrest being provided. He was detained for four months and kept in solitary confinement for one month and a half. He did not have access to a lawyer and was only allowed limited contact with his family. In addition, he was never presented before a

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<sup>12</sup> Supreme Court of Pakistan, PLD 2016 Supreme Court 951.

<sup>13</sup> See e.g. Dawn, “Terrorism too widely defined in Anti-Terrorism Act, says SC; recommends Parliament bring changes”, 30 October 2019, available online: <https://www.dawn.com/news/1513839>.

<sup>14</sup> HRC, Concluding Observations on the Republic of Korea, UN Doc. CCPR/C/KOR/CO/4, 3 December 2015, para. 48, available online: <https://undocs.org/CCPR/C/KOR/CO/4>.

<sup>15</sup> CAT, Concluding Observations Pakistan, UN Doc. CAT/C/PAK/CO/1, 1 June 2017, para. 12, available online: <https://undocs.org/en/CAT/C/PAK/CO/1>; Concluding Observations on Australia, UN Doc. CAT/C/AUS/CO/4-5, 23 December 2014, para. 14, available online: <https://undocs.org/CAT/C/AUS/CO/4-5>.

<sup>16</sup> CAT, Concluding Observation Mauretania, UN Doc. CAT/C/MRT/CO/2, 4 September 2018, para. 10, available online: <https://undocs.org/en/CAT/C/MRT/CO/2>.

<sup>17</sup> CAT, Concluding Observations on Burkina Faso, UN Doc. CAT/C/BFA/CO/2, 18 December 2019, para. 9, available online: <https://undocs.org/en/CAT/C/BFA/CO/2>.

judge nor was he informed of the reasons for his detention. He was released in December 2017 without any legal procedure.<sup>18</sup>

### **III. Risk of Abuse and Prosecution of Human Rights Defenders, Political Opponents and CSOs and Limitation of Freedom of Expression**

Various special procedures and UN treaty bodies have expressed concerns over anti-terrorism laws that do not advance human rights compliant counterterrorism efforts, but are used to restrict legitimate activities of political or religious groups, journalists, HRDs and others. In its country reviews, the CAT has repeatedly raised concern about arbitrary arrest and detention of HRDs under counter-terrorism legislation.<sup>19</sup> Similarly, the Human Rights Committee has criticized broad powers and vague terms in anti-terrorism laws that were used to “stifle speech of journalists and human rights defenders.”<sup>20</sup> Furthermore, the Human Rights Committee in its General Comment No. 34 asked states that offences such as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with the freedom of expression.<sup>21</sup>

Broad provisions that permit the detention of people for social media posts critical of the government, making it a criminal offense to ‘incite others’ to commit terrorism through ‘speeches, proclamations, writings, emblems, banners,’ (as provided for in Section 9 ATA) severely restrict the freedom of expression and the media. Such provisions have been used against HRDs and activists in a variety of countries, including the ones mentioned below.

In **Pakistan**, for example, Muhammad Ismail was abducted on 24 October 2019, by unidentified men outside the High Court of Peshawar and was temporarily detained at the Cybercrime Department of the Federal Investigating Agency (FIA). He was accused of “hate speech and fake information against Government Institutions of Pakistan” through his Facebook and Twitter accounts for criticizing human rights violations. He was then detained in Peshawar jail, where he remained until 25 November 2019, when he was granted conditional bail. Muhammad Ismail is still facing charges of “cybercrime” and his bank accounts are frozen. Moreover, Muhammad Ismail’s name still figures on Pakistan’s Exit Control List (ECL), which prevents him from leaving the country. On 1 February 2021, Muhammad Ismail was arrested in the Anti-Terrorism Court in Peshawar while he was attending his bail confirmation hearing for a First Information Report (FIR) lodged on 6 July 2019 under the Anti-Terrorism Act against him and his wife, Uzlifat Ismail. While Uzlifat Ismail’s bail was confirmed, Mr. Ismail was handcuffed and taken away. The judge of the Anti-Terrorism Court cancelled an anticipatory bail request that had been granted to Muhammad Ismail in response to the above-mentioned FIR. On 3 February 2021, Mr. Ismail was taken to a Counter Terrorism Department (CTD) police station in Peshawar to be held on a three-day physical remand. On 4 February 2021, Uzlifat Ismail went to the police station in Peshawar to hand over medicine and clothes for Muhammad Ismail. At her arrival there, she was told that Mr. Ismail was

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<sup>18</sup> Alkarama Foundation, Qatar, Report submitted to the Committee against Torture in the context of the third periodic review of Qatar, 26 March 2018, available online: [https://www.alkarama.org/sites/default/files/2018-04/QTR\\_CATIII\\_ShadowReport\\_26032018\\_EN.pdf](https://www.alkarama.org/sites/default/files/2018-04/QTR_CATIII_ShadowReport_26032018_EN.pdf).

<sup>19</sup> See e.g. CAT, Concluding Observations on the Russian Federation, UN Doc CAT/C/RUS/CO/6, 28 August 2018, para. 34, available online: <https://undocs.org/en/CAT/C/RUS/CO/6>; Concluding Observations on Niger, UN Doc. CAT/C/NER/CO/1, 20 December 2019, para. 32, available online: <https://undocs.org/en/CAT/C/NER/CO/1>.

<sup>20</sup> HRC, Concluding Observations on Bangladesh, UN Doc. CCPR/C/BGD/CO/1, 27 April 2017, para. 9, available online: <https://undocs.org/en/CCPR/C/BGD/CO/1>.

<sup>21</sup> Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34, 12 September 2011, available online: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

not in the police station and she was not given any information about his whereabouts. On 6 February 2021, Mr. Ismail was presented before the Anti-Terrorism Court in Peshawar. The CTD asked for an extension of the physical remand for another fourteen days, which the judge denied, and Mr. Ismail was transferred to Peshawar Central Jail. On 8 February 2021, Mr. Ismail's lawyer applied for bail before the Peshawar High Court. The application has not yet been heard.

The heavy-handed approach by the government of **Kazakhstan** lead to hundreds of arrests and convictions of civil society activists, bloggers and religious figures. In 2016, Max Bokayev and Talgat Ayan were arrested for peacefully protesting against amendments to the Land Code. They were both sentenced to five years in prison and received a three-year ban on engaging in "social activities". They were also both placed on the list of persons linked to terrorist and extremist activities. Mr. Ayanov was released in April 2018 and Mr. Bokayev was released in 2021 after he served his sentence. More generally, there is an increased number of prosecutions and convictions for extremism. Data from the Supreme Court indicates that 37 individuals were convicted of extremism offences in 2014, while in 2018, the number rose to 156. According to the Special Rapporteur on counter-terrorism administrative prosecutions are also increasing.<sup>22</sup>

In recent years, the **Egyptian authorities** have violated academic freedom and harassed, detained, tortured and even killed Egyptian and foreign researchers, Ahmed Samir Santawy, a master's student in Sociology and Social Anthropology whose academic work focuses on women's rights in Egypt was arrested in February 2021 by the Egyptian Security Forces and was held incommunicado for the following five days. Subsequently, the State Security Prosecutor formally charged Ahmed Samir Santawy with "joining a terrorist organization", "deliberately spreading false news and data", and "use of a private account on the Internet to spread false news or data". These charges were based on screenshots from a Facebook account which allegedly belongs to Ahmed Samir Santawy. The prosecution has remanded Mr. Santawy to pretrial detention at the Liman Tora prison, south of Cairo. Since then, he has had no access to his lawyers or relatives.<sup>23</sup> Similarly, Waleed Salem, a PhD student at the Washington University was arrested and detained in 2020 for his research on the Egyptian judiciary. He remains unable to travel out of Egypt as his passport was withdrawn.<sup>24</sup>

The government of **Chile** has applied the Anti-Terrorist Act against the Mapuche people for demonstrating. Following the return of democracy in Chile, the government stripped the Mapuche of their land for investment projects in forest operations, roads or hydroelectric installations. When the courts denied recognition of their land titles, the Mapuche began to organize public protests. The authorities started to selectively and discriminatorily apply the Anti-Terrorist Act to weaken their movement and protests.<sup>25</sup>

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<sup>22</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Visit to Kazakhstan, UN Doc. A/HRC/43/46/Add.1, 22 January 2020, para. 22, available online: <https://undocs.org/en/A/HRC/43/46/Add.1>.

<sup>23</sup> OMCT, "Egypt: Release Researcher Ahmed Samir Santawy", 14 April 2021, available online: <https://www.omct.org/en/resources/statements/egypt-release-researcher-ahmed-samir-santawy>.

<sup>24</sup> Freedom of Thought and Expression Law Firm, "AFTE calls on the Egyptian government to allow researcher Waleed Salem to travel after his passport was withdrawn", 28 July 2020, available online: <https://afteegypt.org/en/statements/2020/07/28/19768-afteegypt.html>.

<sup>25</sup> See e.g. FIDH, "The Inter-American Court of Human Rights condemns the State of Chile for having used its antiterrorist legislation against members of the Mapuche people", 30 July 2014, available online: <https://www.fidh.org/en/region/americas/chile/the-inter-american-court-of-human-rights-condemns-the-state-of-chile>.

#### IV. Cruel Punishment

“Planning, training, preparing, and facilitating the Commission of Terrorism” (Section 6 ATA), “conspiracy to commit terrorism” (Section 7 ATA), and “recruitment to and membership in a terrorist organisation” (Section 10 ATA) are punishable with life imprisonment without the benefit of parole. Life sentences without the possibility of review are considered cruel punishment in terms of Article 16 of the Convention against Torture. As examples show below, international organisations and UN treaty bodies have criticized anti-terrorism legislations containing cruel punishments. The CAT has asked states to abolish life sentences without parole.<sup>26</sup> This has also led to important changes in legislations for instance in **Chad**. It reinstated the death penalty for terrorism related crimes in 2015 and executed 10 Boko Haram suspects after a swift three-day trial. Chad has been heavily criticised by UN treaty bodies, other international institutions and domestic civil society organisations. In 2020, the National Assembly amended Chad’s legislation and abolished the death penalty.<sup>27</sup>

Also **Iraq** has been criticized for cruel punishments under its anti-terrorism legislation. Between June 2014 and December 2017, the so-called Islamic State of Iraq and the Levant (ISIL) used widespread violence and systematic violations of international human rights and humanitarian law against the Iraqi population. Since, Iraq has been on the forefront of the fight against ISIL and has made considerable efforts to ensure accountability for the atrocities committed against Iraqis by ISIL fighters. While there have been some positive observations with regards to the judicial proceedings of tens of thousands terrorism-related cases, Iraq has also been criticized for not observing some fair trial standards (e.g. equality of arms, ineffective legal representation etc.). In addition, for a wide range of acts, the death penalty is mandatory.<sup>28</sup>

#### V. Special Anti-Terrorism Council/Court

International human rights bodies have been critical about special courts and other fora, in particular military courts that try terrorism-related offences. Such special anti-terrorism fora are problematic as they lack independence since its members are appointed by the executive or under the military hierarchy.<sup>29</sup> Military and special courts must fully adhere with the requirements of impartiality, independence, and fair trial rights must be guaranteed for anyone accused.<sup>30</sup> Moreover, military courts cannot try civilians. Against this background, a Special Anti-Terrorism Council chaired by the President’s executive secretary and composed of presidential appointees including the secretary of national defense and with a secretariat run by the Intelligence Coordinating Agency (Section 45 ATC) is problematic and does not fulfill the requirements of independence and impartiality.

It has been observed, that special courts have repeatedly refused to act on claims made by defendants that they were subjected to torture or ill-treatment in detention during interrogation for

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<sup>26</sup> CAT, Concluding Observations on South Africa, UN Doc. CAT/C/ZAF/CO/2, 7 June 2019, para. 19, available online: <https://undocs.org/en/CAT/C/ZAF/CO/2>.

<sup>27</sup> OHCHR, “Civil Society organizations pave the road to end capital punishment in Chad”, 9 October 2020, available online: <https://www.ohchr.org/EN/NewsEvents/Pages/chad-death-penalty.aspx>.

<sup>28</sup> United Nations Assistance Mission for Iraq, “Human Rights in the Administration of Justice in Iraq”, January 2020, available online: [https://reliefweb.int/sites/reliefweb.int/files/resources/Iraq\\_-\\_ISIL\\_trials\\_under\\_the\\_anti-terrorism\\_laws\\_and\\_the\\_implications\\_for\\_justice\\_28012020.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Iraq_-_ISIL_trials_under_the_anti-terrorism_laws_and_the_implications_for_justice_28012020.pdf).

<sup>29</sup> CAT, Concluding Observations on Pakistan, UN Doc. CAT/C/PAK/CO/1, 1 June 2017, para. 12, available online: <https://undocs.org/en/CAT/C/PAK/CO/1>; Concluding Observations on Saudi Arabia, UN Doc. CAT/C/SAU/CO/2, 8 June 2016, para. 17, available online: <https://undocs.org/CAT/C/SAU/CO/2>.

<sup>30</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/68/285, 7 August 2013, para. 93, available online: <https://undocs.org/en/A/68/285>.

the purpose of compelling a confession.<sup>31</sup> For instance, **Saudi Arabia** created the Specialized Criminal Court (SCC) in 2008 in order to prosecute individuals accused of terrorism.<sup>32</sup> There are large numbers of reports regarding unfair trials before this court, allegations of the use of torture and, coerced confessions.<sup>33</sup> For example, Salman al-Awda, a reformist religious cleric, was arrested in 2017 and faces the death penalty in his trial before the SCC. His fair trial rights were violated as he was in prolonged pre-trial detention, spent months in solitary confinement and incommunicado detention, and was ill-treated.<sup>34</sup>

Over the last years, **India** has amended several laws in order to put several crimes under the jurisdiction of the National Investigative Agency, India's agency to counter terrorism. The National Investigative Agency can set up its own courts at the state or federal level with the discretion to hold closed hearings and use secret witnesses.<sup>35</sup>

## **VI. Children Tried under Anti-terrorism Laws**

Anti-terrorism laws that allow children to be tried are particularly worrisome (Section 51 ATA). In **Pakistan**, for instance, Shafqat Hussain, 14 years old at the time, was – despite lack of any evidence- tried and sentenced to death under the Anti-terrorism Act for allegedly kidnapping and murdering another child. The sole evidence relied upon during the trial was a confession extracted from Shafqat after days of brutal torture. The justification for trying Hussain under the Anti-Terrorism Act was that the alleged murder instilled fear across Pakistan according to the law's broad definition. 2015 Shafqat was executed in Karachi Central Jail.

In **Malaysia**, children have been detained under national security laws, in particular the Prevention of Crime Act (POCA) aimed to tackle organized crime and threats to national security.

The CAT has raised concerns about “ongoing detention of minors who face charges of terrorism and whose legal status or age cannot be determined.”<sup>36</sup> Also the Human Rights Committee has criticized states for charging children under anti-terrorism legislation.<sup>37</sup>

## **D. Conclusion**

Contrary to common belief, broad executive powers to counter terrorism are not a necessary price to pay to protect national security and ensure public safety. Abusive laws aimed against terrorists threaten everybody. The Lack of checks and balances will inevitably lead the executive to use its powers arbitrarily and to the dreadful abuse of honest, innocent citizens – either by mistake or intentionally for political reasons. Capable and effective security forces are necessary to maintain stability and civil peace, but they should never be given a blank check. The experience of the

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<sup>31</sup> Concluding Observations on Saudi Arabia, UN Doc. CAT/C/SAU/CO/2, 8 June 2016, para. 17, available online: <https://undocs.org/CAT/C/SAU/CO/2>.

<sup>32</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Visit to Saudi Arabia, UN Doc. A/HRC/40/52/Add.2, 13 December 2018. para. 13, available online: <https://www.undocs.org/A/HRC/40/52/Add.2>.

<sup>33</sup> Ibid.

<sup>34</sup> Amnesty International, “Saudi Arabia: Prominent reformist cleric faces death sentence for his peaceful activism”, 26. July 2019, available online: <https://www.amnesty.org/en/latest/news/2019/07/saudi-arabia-prominent-reformist-cleric-faces-death-sentence-for-his-peaceful-activism/>.

<sup>35</sup> Human Rights Watch, “Back to the Future, India's 2008 Counterterrorism Laws”, 27 July 2010, available online: <https://www.hrw.org/report/2010/07/27/back-future/indias-2008-counterterrorism-laws>.

<sup>36</sup> CAT, Concluding Observations on Niger, UN Doc. CAT/C/NER/CO/1, 20 December 2019, para. 29, available online: <https://undocs.org/en/CAT/C/NER/CO/1>.

<sup>37</sup> HRC, Concluding Observations on Turkey, UN Doc. CCPR/C/TUR/CO/1, 13 November 2012, para. 16, available online: <https://undocs.org/CCPR/C/TUR/CO/1>.





OMCT's SOS Torture Network and its global Torture and Terrorism Working Group has shown that anti-terrorism laws that are not compliant with international human right standards lead to unjust regimes. The Supreme Court of the Philippines has the opportunity to prevent this from happening by providing guidance on how to amend the ATA to make it compliant with international standards.