



## Transitional Justice and Counter-terrorism in Iraq

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### **Abstract**

*Through the case study of Iraq, this research explores how the Sunni community view counterterrorism policies, the rule of law, and transitional justice after the 2003 US-led invasion of Iraq. Particularly, this paper investigates the ways in which the Iraqi Anti-Terror Law No. 13 of 2005 impacted transitional justice and national reconciliation in the country. The arguments, conclusions, and recommendations made by this article are informed by the doctrinal examination of the relevant law complemented with the analysis of empirical data collected through interviews with senior Sunni figures and online surveys with Sunnis from different provinces of Iraq. This research concludes that Sunnis' perceived misapplication of anti-terror laws dented their trust in the new judicial system, the rule of law, and ultimately the processes of transitional justice in Iraq.*

### **Keywords**

Terrorism, Anti-terror laws, Iraq, Transitional justice Sunnis Rule of Law, Counterterrorism, Conflict resolution, Reconciliation.

### **I. BACKGROUND: POLITICAL CHANGE, TERRORISM, AND TRANSITIONAL JUSTICE**

Transitional justice in Iraq is one of the most complex cases since the end of the World War II because of the magnitude and brutality of the crimes committed by Saddam's regime against the Iraqi people. More than 300,000 Iraqis went missing and thousands of political opponents were executed by the Ba'athist regime.<sup>1</sup> Transitional justice offers processes and mechanisms to help a society come to terms with a legacy of large-scale past abuses, ensure accountability, serve justice, achieve reconciliation and contribute to the reaffirmation of the rule of law.<sup>2</sup> Transitional justice often operates in areas where the rule of law is broken down or very weak. In these circumstances, the main challenge is not the existence or absence of law but rather the contested legitimacy of the law and its application.

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<sup>1</sup> Eric Stover, Hanny Megally, and Hania Mufti, 'Bremer's "Gordian Knot": Transitional Justice and the US Occupation of Iraq' (2005) 27(3) *Human Rights Quarterly* 830, 833.

<sup>2</sup> Catherine Turner, *Violence, Law and the impossibility of transitional justice* (Routledge, 2016) 13.

Therefore, one of the roles of law in transitional justice is to “mediate the normative shift in values that characterises these extraordinary periods.”<sup>3</sup> Law in transition responds to the nature of the injustice of the previous regime, which is deemed to be illegitimate and discredited.<sup>4</sup>

Shortly after the collapse of the Ba’ath authoritarian regime in 2003, the Coalition Provisional Administration (CPA) led by L. Paul Bremer III who ruled Iraq from May 2003 to June 2004, issued a number of executive orders including the disbanding of the former Iraqi Army and security services, a far-reaching mechanism of political lustration also known as the ‘de-Ba’athification’, confiscation of senior Ba’athists and former government officials’ assets, and reparations for victims of the former Ba’ath regime.<sup>5</sup> These executive orders formed the nucleus of transitional justice mechanisms in Iraq. In parallel, armed Sunni resistance and terrorist groups such as al-Qaida led an insurgency against the US-led coalition forces in Iraq.<sup>6</sup> In 2005, a transitional Iraqi government was formed to draft the permanent Constitution of Iraq and prepare the country for its first ever free and democratic elections.<sup>7</sup> By then, the Iraqi resistance and terrorist groups such as al-Qaida had exponentially increased their attacks against the Coalition and Iraqi security forces.<sup>8</sup> In response, the Iraqi Parliament adopted the Anti-Terror Law No. 13 on 4 October 2005 allowing the death penalty for perpetrators of terrorist acts and their accomplices.<sup>9</sup>

The increasing attacks of the Sunni armed resistance and terrorist groups such as al-Qaida forced the new Iraqi government and the US-led Coalition to securitise the Sunni community. For the newly formed government, security concerns trumped everything else. The sweeping Anti-Terror Law No. 13 of 2005 was meant to target members of the Sunni community who were either engaged in the armed resistance against the Iraqi Security Forces (ISF) and US-led Coalition forces or Sunnis who joined terrorist groups such as al-Qaida. It is important to note that Sunnis boycotted the transitional government of 2005 and were underrepresented in the parliament when the Iraqi Constitution and anti-terror law were adopted by the Parliament.<sup>10</sup>

It can be said that the Sunni armed resistance and [Sunni] terrorism threats have defined the character of the Iraqi state after 2003. In this context, the Anti-Terror Law No. 13 of 2005 and de-Ba’athification have been instrumental in the securitisation of the Sunni community in Iraq. The Shi’a-led interim governing bodies of 2004/5 and the transitional Iraqi government of 2005 framed the Sunni armed resistance against the US-led Coalition forces as [Sunni] Ba’athists’ attempt to climb back to power. The sectarianization of the 2003 political change in Iraq meant both the Shia and Sunni communities view transitional justice through sectarian lens. Sunnis, “feared that a new Iraqi government, and especially one that contained an overwhelming majority Shia or Kurds, would target Sunnis as a scapegoat for the crimes

<sup>3</sup> Ruti Teitel, *Transitional Justice* (Oxford University Press, 2000) 11.

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

<sup>5</sup> Paul L. Bremer III, *My Year in Iraq: The Struggle to Build a Future of Hope* (Simon & Schuster, 2006) 40-43.

<sup>6</sup> Carl Conetta, ‘Vicious Circle: The Dynamics of Occupation and Resistance in Iraq, Project on Defense Alternatives Research Monograph #10’ (2005) *Commonwealth Institute*, available: <https://www.files.ethz.ch/isn/15391/0505rm10.pdf> (accessed on 21 May 2019) 22-26.

<sup>7</sup> Bremer (n5) 54-58.

<sup>8</sup> United States Institute of Peace, ‘Who Are the Insurgents? Sunni Arab Rebels in Iraq’ (2008) Special Report, available: <https://www.usip.org/sites/default/files/sr134.pdf> (accessed 10 May 2019) 2.

<sup>9</sup> AlJazeera, ‘Iraq parliament adopts anti-terror law,’ available: <https://www.aljazeera.com/archive/2005/10/2008410112529619603.html> (accessed on 17 May 2019).

<sup>10</sup> Renad Mansour, ‘The Sunni Predicament in Iraq’ (2016) *Carnegie Middle East Centre*, available: [https://carnegieendowment.org/files/CMEC\\_59\\_Mansour\\_Sunni\\_Final.pdf](https://carnegieendowment.org/files/CMEC_59_Mansour_Sunni_Final.pdf) (accessed on 17 May 2019) 11, 22.

of the past.”<sup>11</sup> By the end of 2005, the security situation in Iraq was deteriorating because of Sunnis’ armed resistance, terrorist attacks, and Sunni-Shia sectarian violence.<sup>12</sup> The CPA, Iraqi government buildings, major court houses were located inside the heavily fortified Green Zone in Baghdad which was under regular attacks by the Iraqi resistance and terrorist groups. The volatile security environment in Iraq casted heavy shadows over the processes of transitional justice in Iraq. It was difficult for Iraqi courts to guarantee witnesses’ safety or provide adequate protection for judges and investigators.<sup>13</sup> It is argued here that transitional justice in Iraq after 2003 was doomed to fail because of the collapse of the Iraqi state, Sunni armed resistance, rise of terrorist groups such as al-Qaida, and sectarianization of political change in the country.

## II. SUNNIS’ PERCEPTION OF ANTI-TERROR LAWS

Sunni politicians accuse the post-2003 Shia-led Iraqi governments of selective implementation of the de-Baathification law, abuse of anti-terror laws, and securitisation of the Sunni community.<sup>14</sup> In 2012, the Sunni community organised mass sit-ins across the country protesting the Iraqi government’s political and economic perceived discrimination and arbitrary detentions of Sunni women and men under the anti-terror law.<sup>15</sup> These protests continued for two years until June 2014 when the Islamic State in Iraq and the Levant (ISIL) occupied large swathes of land in Sunni majority provinces such as Nineveh, Saladin, and Anbar.<sup>16</sup>

Several Sunni government officials and politicians understand that the anti-terror law is meant to protect the Iraqi people against terrorist organisations such as al-Qaida and ISIL.<sup>17</sup> However, Sunni officials and Sunnis citizens surveyed for this research voiced concern that the inherent vagueness in anti-terror laws are abused by the ruling parties to target the Sunni community.<sup>18</sup> Furthermore, many Sunni politicians criticised the apparent overlap and undetermined jurisdictional lines between the judicial and security systems in handling terrorism cases. For example, Iraq’s former Vice President (2006-2012) Tariq al-Hashemi claims,

“the Iraqi government, under former Prime Minister Nouri al-Maliki, used the Anti-Terror and de-Baathification laws to target both Sunni prominent politicians and government officials as well as using the problem of extremist groups such as al-Qaida and the Islamic State in Iraq (ISI) to force the Sunni population to submission [to its Shia rule]. In some cases, the Iraqi government aided by Shia militias, used excessive force to achieve demographic change in Baghdad, its suburbs, and some areas of Diyala province.”<sup>19</sup>

Data collected from interviews with Sunni politicians reveal that political and sectarian tensions dominate their views towards counterterrorism policies adopted by the CPA and Iraqi governments since 2003. The current situation, in al-Hashemi’s view, is unsustainable. He

<sup>11</sup> Eric Stover, Hanny Megally, and Hania Mufti, ‘Bremer’s “Gordian Knot”: Transitional Justice and the US Occupation of Iraq’ (2005) 27(3) *Human Rights Quarterly* 830, 834.

<sup>12</sup> Press Release, ‘Iraq Stands on Brink of Civil War. ‘Violence Seems out of Control’, Special Representative Tells Security Council’ (2006), *United Nations*, available: <https://www.un.org/press/en/2006/sc8895.doc.htm> (accessed 20 May 2019).

<sup>13</sup> Stover and others (n11) 834.

<sup>14</sup> Author interviews with Sunni officials: former Minister of Finance, three members of the Iraqi Parliament, former Speaker of Parliament, and former Vice President of Iraq; see Appendix (B).

<sup>15</sup> Al-Jazeera (28 December 2012), ‘Iraq mass protests mount pressure on Maliki,’ available: <https://www.aljazeera.com/news/europe/2012/12/2012122875346526845.html> (accessed 11 March 2019).

<sup>16</sup> David Ignatius, ‘How ISIS Spread in the Middle East And how to stop it,’ *The Atlantic* (29 October 2015), available: <https://www.theatlantic.com/international/archive/2015/10/how-isis-started-syria-iraq/412042/> (accessed 11 March 2019).

<sup>17</sup> See Appendix B.

<sup>18</sup> *Ibid.*

<sup>19</sup> Interview with Iraq’s former Vice President Tariq al-Hashemi on 9 January 2016 (Istanbul-Turkey); see Appendix B.

believes that unless the Iraqi government commits to the meaningful enforcement and understanding of the rule of law, inter-communal and extremist violence will continue to resurge in Iraq.<sup>20</sup>

The former governor of Nineveh (2009-2015), Atheel al-Nujaifi, agrees with al-Hashemi that the problem is not the anti-terror law as written but rather the inconsistency in applying and enforcing the law. Al-Nujaifi argues that there are structural challenges facing the rule of law in the province,

“The main problem with anti-terror legislations in Iraq is that the security forces are handling almost everything from A to Z. The judicial system comes last and often plays a customary role rather than a substantive role in ensuring that the apprehension, interrogation, and trials are observing the due process. For example, during my time as a governor of Nineveh the security services in the province can arrest individuals and keep them in detention for months, transfer them to detention facilities in Baghdad where they could be detained for years without seeing a judge – citing national security threats.”<sup>21</sup>

Rafi al-Issawi, the former Minister of Finance and a prominent Sunni politician from Fallujah, however, thinks that, the deliberately vague and broad definition of terrorism under the current Anti-Terror No. 13 of 2005 only serves the [Shia] ruling parties in Iraq. Al-Issawi accuses the former Prime Ministers al-Ja’afari and al-Maliki of abusing anti-terror laws to achieve political goals beyond security and justice.<sup>22</sup> Furthermore, Issawi draws a link between the misapplication of counterterrorism laws and radicalisation,

“Since 2003, thousands of innocent Sunni men and women were detained under the anti-terror law and hundreds were executed under Article (4) of the anti-terror law. There is compelling evidence supported by local and international human rights organisations that confessions were extracted through torture and coercion. The misapplication of counterterrorism laws and the use of excessive force in Sunni majority cities disenfranchised hundreds of young people. Extremist groups such as al-Qaida and ISIL attract such [Sunni] young people who feel victimised by the government and its forces.”<sup>23</sup>

According to the analysis of the data collected, Sunnis perceive the Iraqi Anti-Terror Law No. (13) of 2005 as an illegitimate law.<sup>24</sup> In normal circumstances, the Iraqi government would be expected to engage the Sunni community in a constructive dialogue to address their concerns and dispel misconceptions. However, Iraq has been going through a complex period of transitional justice, during which, trust among political groups and communities is at its lowest point. Therefore, it is argued here that the Sunni community’s negative perceptions of the anti-terror law represent a serious challenge for the Iraqi government’s efforts to achieve successful political and judicial transition.<sup>25</sup>

It is not only the Sunni political class that perceives the Iraqi anti-terror law as a weaponised political and sectarian tool. Data collected through the online survey shows that the random sample of Sunni respondents view the anti-terror legislation as illegitimate, politicised, and designed to target the Sunni community.<sup>26</sup> Further investigation of the data,

<sup>20</sup> Al-Hashemi (n19).

<sup>21</sup> Interview with Governor of Nineveh, Atheel al-Nujaifi, on 21 February 2016 (Istanbul-Turkey); see Appendix B.

<sup>22</sup> The author interviewed Rafi al-Issawi on 23 March 2016 (Dubai-UAE).

<sup>23</sup> Al-Issawi (n22).

<sup>24</sup> See Appendix B.

<sup>25</sup> Online survey conducted by the author [*Survey Monkey*]; see Appendix B.

<sup>26</sup> See Appendix B.

however, reveals that participants' views towards the Iraqi anti-terror law are impacted by the misapplication of the law, the inconsistent and irresponsible use of the label "terrorist" by the government and security officials, and the overall perception that Iraq is stuck midway in the transitional period riddled with structural issues. For example, one of the respondents described the anti-terror law as,

"Practically, the anti-terror law can only be applied to the Sunnis because they [Sunnis] do not have anyone to protect them. The Shia have the Prime Minister, the army, and militias. The Kurds have their Peshmerga [militias] and run their own affairs in the semi-autonomous Kurdistan region. Sunnis are considered terrorists by the Shia-led government, which is a puppet of Iran, because they [Sunnis] are perceived as pro-Saddam. Therefore, the Shia and to some extent the Kurds want to punish the Sunni community for supporting Saddam's regime. They [Shia and Kurdish politicians] use the anti-terror laws to kill, torture, and force Sunnis out of their lands."<sup>27</sup>

Generally, respondents from different cities of Iraq and the Sunni politicians as well as participants from Nineveh province are more concerned with the application of the anti-terror law than its wording. Nonetheless, around 25% of the participants voiced concerns that the "loose" definition of terrorism makes it easier for the government to abuse the law in Iraq's political environment which is charged with sectarian and ethno-nationalist tensions.<sup>28</sup>

Participants from Nineveh province voiced their concerns that the anti-terror law is in the hands of the security forces and "sectarian" militias rather than the judicial system. To illustrate: "whoever they [militiamen and security forces] deem terrorist they can arrest him/her. They have extensive powers to kill, arrest, torture, or blackmail", a participant from Mosul described the situation in the city.<sup>29</sup> Similarly: "they consider everyone who stayed in the city after the invasion of ISIL as a terrorist. Despite the fact that we were victims of ISIL", the participant continues. Other participants from Nineveh narrated similar stories citing excessive force during arrests, torture during arrest and at detention centres, and financial blackmail.<sup>30</sup>

The Iraqi government seems to be aware of the perceived notoriety of the anti-terror law, the heavy-handed approach of apprehension, detentions, and interrogations.<sup>31</sup> To illustrate: the Iraqi legislature, in order to confront the rising danger of armed tribal conflicts, has recently included tribal retribution acts<sup>32</sup> under the anti-terror laws.<sup>33</sup> The expansion of the anti-terror law to include tribal violence practically means individuals who are found guilty of such acts may face the death penalty.<sup>34</sup> This case demonstrates that the Iraqi government can use the Anti-Terror Law No. 13 of 2005 to designate a wide variety of acts the government deems threat to national security.

Empirical evidence collected through (1) interviews with Nineveh residents; (2) participants in the online survey from other provinces; and (3) semi-structured interviews with Sunni government officials and community leaders; confirms that many Sunnis perceive the Iraqi anti-terror law as illegitimate. These perceptions, the data reveals, are constructed

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<sup>27</sup> See Appendix B.

<sup>28</sup> See Appendix B.

<sup>29</sup> See Appendix B.

<sup>30</sup> See Appendix B.

<sup>31</sup> Mara Redlich Revkin, *The Limits of Punishment. Transitional Justice and Violent Extremism: Iraq case study* (2018) United Nations University, Institute for Integrated Transitions, available: <https://cpr.unu.edu/the-limits-of-punishment-transitional-justice-and-violent-extremism.html> (accessed 2 March 2019) 4-5.

<sup>32</sup> Also known as tribal *Dagga* in Arabic.

<sup>33</sup> Tariq Harb, "'Wanted by Tribes' Brings Death Penalty under Anti-terror Law," Nabaa News Agency (3 February 2018) available in Arabic: <https://n.annabaa.org/news26948> (accessed 11 March 2019).

<sup>34</sup> Under the Iraqi Anti-Terror Law No. 13 of 2005, individuals convicted in terror crimes face the death penalty; see also Appendix A.

around the apparent [mis]application of the anti-terror law especially in Sunni majority areas. In contrast, few respondents are concerned about the anti-terror law as written. Equally, data show that Sunni mistrust in the judicial and security systems is deeply rooted.<sup>35</sup> For example, one of the respondents from Nineveh stated, “Almost anyone can be freed from prison even if he is accused of being a terrorist if he has enough money [...] it is also true that you can put anyone you hate in prison if you have enough money.”<sup>36</sup>

It is argued here that the negative perceptions of the Iraqi anti-terror law, as an illegitimate instrument which bends to the will of powerful political actors and corruption, has an immediate impact on transitional justice in Iraq. According to data collected for this research, Sunnis view the anti-terror law as an illegitimate political tool to suppress their resistance to their perceived grievances. As one respondent puts it, “[w]hen we demonstrate against injustices, they [the Iraqi government] wants us [Sunnis] to shut our mouths up or else we would be labelled terrorists.”<sup>37</sup> It is concluded here that Sunnis’ perceptions of the anti-terror laws since 2003 represent a major obstacle to the successful delivery of transitional justice in Iraq. Equally, the empirical evidence underscores that observing the rule of law in post-conflict areas is essential to deliver successful transitions from authoritarian regimes to liberal democratic systems. At the same time, participants in the study criticised the judiciary and security services for lack of transparency in terror-related cases. The problem is exacerbated by the lack of communication between the judiciary and the public.

### III. ANTI-TERROR LAW NO. 13 OF 2005

The Iraqi authorities operate under the framework of the Anti-Terror Law No. 13 of 2005 to identify, apprehend, and prosecute individuals accused of committing terrorist acts.<sup>38</sup> The law defines terrorism as,

“Every criminal act committed by an individual or an organized group that targeted an individual or a group of individuals or groups or official or unofficial institutions and caused damage to public or private properties, with the aim to disturb the peace, stability, and national unity or to bring about horror and fear among people and to create chaos to achieve terrorist goals.”<sup>39</sup>

This article argues that this definition is too broad and vague. For example, Article 6 of the Anti-Terror Law No. 13 of 2005 states, “Crimes stated in this law are considered regular crimes involving moral turpitude”.<sup>40</sup> At the same time, the application and enforcement of these laws lack due process and in some cases are applied inconsistently.<sup>41</sup> Equally, the judicial system in Iraq is accused of corruption, nepotism, and ethno-sectarian prejudices.<sup>42</sup> Nonetheless, Iraq

<sup>35</sup> Human Rights Watch, *Iraq: Key Courts Improve ISIS Trial Procedures. But Changes Needed in Laws, Response to Torture, Other Courts* (2019) available: <https://www.hrw.org/news/2019/03/13/iraq-key-courts-improve-isis-trial-procedures> (accessed on 13 March 2019).

<sup>36</sup> See Appendix B.

<sup>37</sup> See Appendix B.

<sup>38</sup> See Art. 1, Annex A.

<sup>39</sup> Iraqi Anti-Terror Law No. 13 of 2005, Art. 1; see Annex A.

<sup>40</sup> *Ibid.*

<sup>41</sup> BBC, ‘*Iraqi Sunnis Stage Protests against Discrimination*’ (2013) available: <https://www.bbc.co.uk/news/world-middle-east-20914273> (accessed 12 March 2019).

<sup>42</sup> Cosmina Ioana Craciunescu, ‘Iraq’s Public Administrative Issues: Corruption’ (2017) 5(2) *Review of Public Administration and Management*, available: <https://www.longdom.org/open-access/iraqs-public-administrative-issues--corruption-2315-7844-1000207.pdf> (accessed 8 March 2019) 2-3.

is hardly the only country adopting a broad and vague definition of terrorism. There are many states which adopt a vague or politically-motivated definitions of terrorism.<sup>43</sup>

Academics, professionals, and politicians have been debating what constitutes a terrorist act for several decades now.<sup>44</sup> The cliché *one man's terrorist is another man's freedom fighter* epitomises the essence of this debate. Equally, political violence, often labelled terrorist, has evolved both quantitatively and qualitatively. Extremist groups such as al-Qaida and the Islamic State in Iraq and Levant (ISIL) prompted many governments to securitise their Muslim communities to prevent and protect their national security. The securitisation of Muslim communities in democratic societies in response to home-grown Islamist armed jihadism and the phenomenon of foreign fighters are testing the limits of liberal democracies in the European continent and the United States.<sup>45</sup> At the same time, terrorism as tactic has been used by separatist and ethno-nationalist groups in Turkey, Palestine/Israel, Columbia, the United Kingdom, Spain, and other countries. The revolution of digital technology and globalisation have exponentially amplified the impact of terrorism on the local and international levels.<sup>46</sup>

The bombing of the United States Embassy on 18 April 1983, by the Islamic Jihad Organisation that killed 63 people; the Khobar Towers bombing on 25 June 1996; the 11 September 2001 Twin Tower terrorist attacks by al-Qaida in New York; the beheading of the American journalist Daniel Pearl by a Pakistani terrorist organization on 1 February 2002; the Bali bombings of 12 October 2002; and the attack on the London Underground on 7 July 2005, are all clearly acts of terrorism.<sup>47</sup> These attacks share certain characteristics: in each case death was caused, occurred outside the context of war and they all have a political, religious, or ideological purpose. In addition, the individuals who carried out the attacks were non-state actors. Which of these features render these acts terrorist? Which should play a role in the legal definition of terrorism?<sup>48</sup>

In post-conflict zones undergoing a transitional justice process, the lines between justice and revenge are more often than not blurred. In this case, political discretion becomes part of the problem rather than a tool to deliver successful transitional justice. The least legislators can do at this stage, and in order to limit the risks of the currently broad and vague definition of terrorism, coupled with flawed judicial system, is to suspend the death penalty.<sup>49</sup> This research recommends that Iraq's legislature reviews and accordingly amends the current Anti-Terror Law No. 13 of 2005. This law must be based on an adequate definition of terrorism which is balanced by and offers safeguards for due process and resultantly respects human rights. The United Nations, for example, have developed a definition of terrorism and a set of comprehensive guidelines on how to protect human rights in post-conflict zones.<sup>50</sup>

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<sup>43</sup> Michael Bhatia, 'Fighting words: naming terrorists, bandits, rebels, and other violent actors' in Michael Bhatia (eds) *Terrorism and the Politics of Naming* (Routledge, 2008) 11-12.

<sup>44</sup> Alex Schmid and Albert Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (Transaction Publishers, 1998) xvii.

<sup>45</sup> Stuart Croft, *Securitizing Islam: Identity and the Search for Security* (Cambridge University Press, 2012).

<sup>46</sup> Cynthia C. Combs, *Terrorism in the Twenty-First Century* (8<sup>th</sup> edn, Routledge, 2018) 134-135.

<sup>47</sup> Jacqueline Hodgson and Victor Tadros, 'The Impossibility of Defining Terrorism' (2013) 16(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 494, 495.

<sup>48</sup> Hodgson and Tadros (n47) 495.

<sup>49</sup> UNAMI/OHCHR, Report on the Death Penalty in Iraq' (2014) available:

[https://www.ohchr.org/Documents/Countries/IQ/UNAMI\\_HRO\\_DP\\_1Oct2014.pdf](https://www.ohchr.org/Documents/Countries/IQ/UNAMI_HRO_DP_1Oct2014.pdf) (accessed 11 March 2019) 11-12.

<sup>50</sup> United Nations, 'Report of the Secretary General - In Larger Freedom: Toward Development Security and Human Rights for All', (2005) Session 52, available: <https://undocs.org/A/59/2005> (accessed 21 May 2019).

#### IV. THE RULE OF LAW AND TRANSITIONAL JUSTICE

In post-conflict zones, transitional justice is essential to the successful delivery of political transitions; to the establishment of lasting stability; and to the prevention of extra-legal retributions. However, there is an inherent tension between the rule of law and transitional justice. Transitional justice in post-conflict zones moves away from the existing and clearly defined regimes of legality to one which is more contingent and shaped by the circumstances in which it operates.<sup>51</sup> In Iraq, the Coalition Provisional Authority (CPA), established by the US-led invading forces, suspended the capital punishment in 2003.<sup>52</sup> However, the death penalty was re-introduced by the Iraqi Interim Government in 2004 with the stated objectives of deterrence and retribution, particularly in light of the security situation the country was then facing from armed insurgent groups and terrorists.<sup>53</sup> Throughout the years, the Government of Iraq has justified the use of the death penalty on the basis of deterrence, prevailing security issues, and the necessity of justice and retribution.<sup>54</sup> The Iraqi government claims that the death penalty has a deterrent effect, is sanctioned by Islam, and is widely supported by the public.<sup>55</sup> Convictions under the Iraqi Anti-Terror Law No. 13 of 2005 carry death penalty sentence.<sup>56</sup> The Kurdistan Regional Government (KRG) has its own Anti-Terror Law No. 3 of 2006,<sup>57</sup> the specifics of which fall outside the scope of this research.

Iraq's security approach to the perceived threats of insurgency and terrorism is hardly unique. Other countries such as Turkey, Columbia, Spain, and the United States used heavy-handed legal and security policies to confront perceived threats to their national security. On 17 April 2000, the US Secretary of State, Madeleine Albright gave a speech to the University of World Economy and Diplomacy at Tashkent in Uzbekistan:

“[T]he United States will not support any and all measures taken in the name of fighting drugs and all measures taken in the fighting of drugs and terrorism or restoring stability. One of the most dangerous temptations for a government facing violent threats is to respond in heavy-handed ways that violate the rights of innocent citizens. Terrorism is a criminal act and should be treated accordingly – and that means applying the law fairly and consistently. We have found, through experience round the world, that the best way to defeat terrorist threats is to increase law enforcement capabilities while at the same time promoting democracy and human rights.”<sup>58</sup>

In her speech, Albright insists that upholding the rule of law is the best means to achieve justice and lasting peace. Several months later, the United States reaction to the 9/11 terrorist attacks in New York was wage a “war against terrorism”, Guantanamo Bay detention camp, global extraditions, among other actions undermining the rule of law the United States prides

<sup>51</sup> Teitel (n3) 11.

<sup>52</sup> Tom Parker, 'Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal' (2005) 38(3) *Cornell International Law Journal*, available: <http://scholarship.law.cornell.edu/cilj/vol38/iss3/11> (accessed 18 March 2019) 907-908.

<sup>53</sup> Michael Newton, 'The death penalty and the Iraqi transition' in Madoka Futamura and Nadia Bernaz (eds) *The Politics of the Death Penalty in Countries in Transition* (Routledge, 2014) 178.

<sup>54</sup> UNAMI/OHCHR (n49).

<sup>55</sup> Tim Arango and Nick Cumming-Bruce, 'Top U.N. Rights Official Denounces Executions in Iraq as 'Obscene'' The New York Times (19 April 2013) available: [https://www.nytimes.com/2013/04/20/world/middleeast/iraq-executions.html?\\_r=1&](https://www.nytimes.com/2013/04/20/world/middleeast/iraq-executions.html?_r=1&) (accessed 11 March 2019).

<sup>56</sup> Art. 4 Iraqi Anti-Terror Law No. 13 of 2005; see Appendix A.

<sup>57</sup> Rudaw (19 July 2016) 'Kurdistan Consultative Council Announces its Opinion towards Anti-Terror Law' available in Arabic: <http://www.rudaw.net/arabic/kurdistan/190720161> (accessed 11 March 2019).

<sup>58</sup> Tom Bingham, *The Rule of Law* (Penguin, 2010) 133.

itself on observing.<sup>59</sup> There are other instances in history where the United States adopted extreme security measures to a perceived threat. For example, the detention of 110,000 Japanese Americans after Pearl Harbour, the effective kidnapping of 2,264 Japanese from Central America, and the prosecution of suspected Communists instigated by Senator McCarthy.<sup>60</sup>

Military reaction to a perceived terrorist threat in the national security context is often associated with the securitisation of a group or community such as an ethnic, religious, sectarian, ideological group inside and/or outside the threatened state.<sup>61</sup> The US Government justification for securitising the Japanese, Communist, and Muslim communities in the Pearl Harbour, McCarthy's, and 9/11 events is based on perceived [existential] national security concerns. Equally, the Iraqi government after 2003 justifies securitising the Arab Sunni community by citing national security concerns. While there are no official or legal text[s] justifying the securitisation of the Arab Sunni community, Iraqi government officials repeatedly state that jihadi extremism has major incubating spaces in Sunni provinces. According to legislators and government officials, this explains why the vast majority of men and women indicted under the Anti-Terror Law are Sunnis.<sup>62</sup>

Surveys, polls, and media representations reveal that the Iraqi Sunni community perceives a gap between the Anti-Terror Law as written and as applied.<sup>63</sup> In transitional periods, it is characteristic that there is a large gap between the law as written and as perceived. The idea of law as socially constructed rests on the assumption that the legitimacy of the law depends on popular understandings of legality. Where there is civic or armed resistance to the posited law of the state, this is read as sufficient to undermine the quality of law as legal. The gap between law and popular perceptions in conflict situations gives rise to some key antinomies of transitional justice, those between the 'is' and the 'ought' of law.<sup>64</sup> These distinctions are also integral to the *raison d'être* of transitional justice, in that it is precisely these gaps that transitional justice aims to close, using legal form itself to transition from one form of legality to another.<sup>65</sup>

The promotion of the rule of law through international human rights norms underlines the entire discourse of transitional justice.<sup>66</sup> In its ordinary social function, law provides order and stability, but in extraordinary periods of political change, law maintains order even as it enables transformation. During periods of political change, the rule of law also acts as a restraint on politics.<sup>67</sup> To illustrate, Sunni legislators, human rights organisations, and activists have recently called on the Iraqi government to suspend and review the current anti-terror law in order to stop arbitrary arrests, torture, and executions based on confessions extracted under duress.<sup>68</sup> It is obvious that successful transitional justice processes help post-conflict communities come to terms with their past and make effective political transitions. It is therefore argued here that successful transitional justice can only be achieved by observing the rule of law, or in other words, conducting an orderly transitional justice.

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<sup>59</sup> James M. Lutz and Brenda J. Lutz, *Global Terrorism* (Routledge, 2004) 2-3.

<sup>60</sup> Bingham (n58) 133.

<sup>61</sup> Thierry Balzacq, *Securitization theory: how security problems emerge and dissolve* (Routledge, 2011) 61.

<sup>62</sup> Ali Qais, 'Controversial Indictments under Anti-Terror Law' (2016) available in Arabic: <https://www.irfaasawtak.com/a/329246/أحكام-الإرهاب-في-القضاء-العراقي-مثير> (accessed 11 March 2019).

<sup>63</sup> 2016/17 data collected by the author; see Appendix B.

<sup>64</sup> Teitel (n3) 19.

<sup>65</sup> Turner (n2) 17-18.

<sup>66</sup> Larissa Van Den Herik and Nico Schrijver, *Counter-Terrorism Strategies in a Fragmented International Legal Order; Meeting the Challenges* (Cambridge University Press, 2013) 668-669.

<sup>67</sup> Teitel (n3) 21.

<sup>68</sup> Alaa Hassan, 'Calls for Suspension of Anti-Terror Law,' *Al-Hurra* (4 October 2012) available in Arabic: <https://www.alhurra.com/a/iraq-terrorism/213004.html> (accessed 11 March 2019).

## V. CONCLUSIONS

This study examined the impact of opaque counterterrorism laws on transitional justice in Iraq. The study found that successful transitional justice processes lay the foundations for lasting peace and stability as well as prevent the resurgence of violent political and inter-communal conflicts. The case study of Iraq is an evolving example of challenging processes of transitional justice in societies going through generational political change. This research found that the Sunni community in Iraq view anti-terror laws as illegitimate. Participants in this study perceive the application of the anti-terror law as arbitrary and/or politically motivated. This research concludes that these perceptions impact both the processes of political transition and transitional justice.

Literature show that observing the rule of law is essential to the delivery of successful political transition and transitional justice. Nonetheless, societies going through major political upheaval are rarely equipped to perfectly observe the rule of law and deliver justice. Scholars such as Teitel<sup>69</sup> argue that the law is contingent during transitional periods because the rule of law is hard to apply in countries going through revolutions and radical political change. This study concurs with Teitel's argument concerning the inherent challenge of delivering successful transitional justice during the times of radical political change; however, it is argued here that contingent legal and political actions can help mitigate the risks of abandoning the rule of law during transitional justice periods.

The empirical evidence informs the theoretical hypothesis of this study that observing the rule of law can both help deliver successful transitional justice and act as restraint on politics. In Iraq's case study, the rule of law can help restore Sunnis' confidence in the judicial system and prevent political actors from abusing the vague and broad definition of what constitute "terrorism." Therefore, this research recommends that the Iraqi government reviews the Anti-Terror Law No. 13 of 2005 to address its broad definition of "terrorism", particularly article 6 of the law. The United Nations definition of terrorism and Global Counter-Terrorism Strategy could prove useful here.<sup>70</sup> Equally, it is recommended that the Iraqi authorities offer legal training to professional prosecutors, police officers, security forces handling the apprehension and interrogation of suspects of terrorism offences. By reviewing the anti-terror law and offering training to those tasked with handling terror-related offences, the Iraqi government can mitigate the risks of the widening gap between the legitimacy of the anti-terror law and how the Sunni community view this law.

Finally, transparency is a fundamental principle of justice and a cornerstone of the rule of law. It allows for public engagement and oversight over both the judiciary and the justice authorities.<sup>71</sup> This study recommends increasing mechanisms of transparency through the participation of the public to establish credible justice and ensure accountability.

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<sup>69</sup> Teitel (n3) 11.

<sup>70</sup> United Nations Office of Counter-Terrorism, 'UN Global Counter-Terrorism Strategy; (2006) available: <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy> (accessed 25 May 2019).

<sup>71</sup> Ray Nickson, 'Unmet Expectations and the Legitimacy of Transitional Justice Institutions: The International Criminal Tribunal for the Former Yugoslavia and the Extraordinary Chambers in the Courts of Cambodia,' in Chrisje Brants and Susanne Karstedt (eds), *Transitional Justice and the Public Sphere: Engagement, Legitimacy and Contestation* (Hart Publishing, 2017).

## **APPENDIX (A)**

In the name of the people

Council of Ministers

Based on the approval of the National Assembly in accordance with article thirty-three, paragraphs (A and B) of the TAL, and based on the provisions of article thirty-seven of the mentioned law;

The Council of Ministers in its session on 07 November 2005 decided to issue the following law:

### **Number (13) for the Year 2005<sup>72</sup>**

#### **Anti-Terrorism Law**

##### **Article 1**

##### **Definition of Terrorism**

Every criminal act committed by an individual or an organized group that targeted an individual or a group of individuals or groups or official or unofficial institutions and caused damage to public or private properties, with the aim to disturb the peace, stability, and national unity or to bring about horror and fear among people and to create chaos to achieve terrorist goals.

##### **Article 2**

##### **The following acts are considered acts of terrorism**

1. Violence or threats which aim to bring about fear among people or expose their lives, freedoms and security to danger and their money and properties to damage regardless of its motives and purposes which takes place in the execution of a terrorist act, individually or collectively organized.
2. Work with violence or threat to deliberately sabotage or wreck, ruin or damage buildings or public property, government interests, institutions, state departments, the private sector or public utilities and public places prepared for public use or public meetings for the public or public funds, and an attempt to occupy it

or to seize it or expose it to danger or prevent its use for the purpose for which it was prepared with the aim of disrupting the security and stability.

3. Anyone who organized, chaired or participated in an armed terrorist gang that practices and plans for terrorism and also contributes and participates in this act.

4. Use violence or threat to stir up sectarian strife or civil war or sectarian infighting by arming citizens or by encouraging them to arm themselves and by incitement or funding.

5. Assault with firearms army and police offices, volunteer centres, security offices, and assault national military troops or their reinforcement, communication lines or their camps or bases, with a terrorist motive.

6. Assault with firearms, with a terrorist motive, embassies and diplomatic entities throughout Iraq as well as all Iraqi institutions, foreign and Arab companies and institutions and governmental and non-governmental and international organizations operating in Iraq in accordance with a valid agreement.

7. Use, with terrorist motives, explosive and incendiary devices designed to kill people, and possess the ability to do so, or to spread fear among the people, either through blowing up or releasing or spreading, or planting or bubby trapping equipment or human bodies, regardless of their forms or through the effect of poisonous chemicals or biological agents or similar radioactive materials or toxins.

8. Kidnap or impede the freedoms of individuals or detain them either for financial blackmailing for political, sectarian, national, religious or racially beneficial purposes that threaten security and national unity and promote terrorism.

##### **Article 3**

##### **The following acts are specifically considered amongst the crimes against State security**

1. Any act with terrorist motives, that threatens the national unity and the safety

<sup>72</sup> Iraq: *Anti-Terror Law (Law No. 13 of 2005)* [Iraq], 7 November 2005, available: <https://www.refworld.org/docid/5bd093414.html> (accessed 9 March 2019).

of society and affects the State security and its stability or weakens the capacity of the security services in defending and protecting the security of citizens, their properties, State borders and its institutions either through armed confrontation with State forces or any other act that deviates from the freedom of expression which the law guarantees.

2. Any act that includes the attempt to use force or violence to overthrow the regime or the form of government as set forth in the Constitution.

3. Anyone who led, for a criminal purpose, a branch of the armed forces, military checkpoint, a harbour, airport or any military site or city without being authorized by the government.

4. Anyone who attempts to incite an armed rebellion against the authority established in accordance with the constitution or participates in a conspiracy or a gang formed for the same purpose.

5. Any act by a person who had authority over individuals in the military and asked or charged them with the task of impeding orders of the government.

#### **Article 4 Penalties**

1. Anyone who committed, as a main perpetrator or a participant, any of the terrorist acts stated in the second & third articles of this law, shall be sentenced to death. A person who incites, plans, finances, or assists terrorists to commit the crimes stated in this law shall face the same penalty as the main perpetrator.

2. Any one, who intentionally covers up any terrorist act or harbours a terrorist with the purpose of concealment, shall be sentenced to life imprisonment.

#### **Article 5: Waiver of Punishment, Legal Excuses and Extenuating Legal Circumstances**

1. Any one, who provides to the competent authorities before a crime is discovered or

during its planning, information that contributes to the arrest of the criminals or prevents the execution of the operation, shall be pardoned.

2. Information, offered voluntarily by a person to the competent authorities after a crime is committed or after it is discovered by the authorities and before the person is arrested which leads to the arrest of the other participants, shall be considered an extenuating excuse for reducing the penalty stated in the second article of this law and the punishment shall be imprisonment.

#### **Article 6 Final Provisions**

1. Crimes stated in this law are considered regular crimes involving moral turpitude.

2. All funds, seized items, and accessories used in the criminal act or in preparation for its execution shall be confiscated.

3. Provisions of the current Penal Law shall apply to all situations not stipulated in this law.

4. This law shall enter into force on the date of its publication in the official Gazette.

Ghazi Ojail Yawir (Vice President)  
Adil Abdul Mahdi (Vice President)

Jalal Talabani (President)

#### **Justifying Reasons**

The size and volume of damages resulting from the terrorists' operations has reached a level that threatens to national unity, order, security and stability. To move forward towards a federal, pluralistic, democratic system based on the rule of law and the guarantee of rights and liberties and to set off in motion the wheel of comprehensive development, it has thus become necessary to issue a legislation that puts an end to and limits terrorist operations and reduces the interaction between those who execute them and those who support them. For these reasons this law is enacted.

## **APPENDIX (B)**

### **DATA COLLECTION**

To gain deeper insight into how the Sunni community perceives the Anti-Terror Law No. 13 of 2005, I conducted an online survey in 2015 to collect data from a sample of (53) Iraqi Sunnis to better understand how they perceive the anti-terror law and its application in Iraq. In addition, I interviewed (9) senior Iraqi Sunni government officials and political figures in 2016. In February and March 2019, I phone-interviewed (12) Sunnis living in Nineveh province to collect data on their perceptions and the application of anti-terror laws in their province after the territorial defeat of ISIL. To mitigate the risk of lack of diversity in snowball sampling, the seeds chosen for the sample are deliberately diversified.

The online survey was distributed through social media websites such as Facebook and Twitter as well giving participants the option to send their replies directly to my email address between 1 October and 10 November 2015. The survey was conducted in Arabic language and the data collected was translated into English by the author. The questionnaire has two sections: firstly, the questionnaire asks five demographic questions: 1-Name; 2-Age; 3-Nationality; 4-Ethnicity; 5-Sect. Secondly, the questionnaire presents three questions and an open-ended question for participants to add extra comments, if any, they deem relevant to the topic of the questionnaire: 1- How would you define terrorism? 2- What is your opinion towards the anti-terror law in Iraq? 3- In your opinion, what can be classified as terrorism in Iraq? 4- Please add your comments on the topic – if you have any.

In February 2016, I conducted nine semi-structured interviews with senior Iraqi Sunni government officials, Member of Parliament, and politicians to survey their opinions towards the Anti-Terror Law No. 13 of 2005. The selection criteria snowballing as well as direct phone and email communications with potential participants to see if they are willing to participate in the study.

Data collected from interviews with residents of Nineveh province during December 2018 informed the discussion of this study about how Sunnis view the Iraqi anti-terror law after the territorial defeat of ISIL. The author conducted eight interviews over phone with a sample selected by using snowballing method. The author recorded interviews' data by taking notes because participants refused tape-recording due to security concerns.

For this study, I adopted the Foucauldian approach of discourse analysis to interpret the data collected through the interviews, online survey, and phone interviews. For Foucault, discourse consists of several statements which he calls 'discursive formation'. These statements, which refer to the same object, are related to each other and consequently fit together in a pattern.<sup>73</sup>

The total sample size of approximately 70 participants is too small to make generalisations about the Iraqi Sunni community's views towards the anti-terror law. Nonetheless, the Sunni political figures who were interviewed for this research are representatives of the Sunni community during the period under study. Above all, the empirical evidence provides insight into the impact of the sweeping Anti-Terror Law No. 13 of 2005 on the Sunni community in Iraq.

### **Online Survey**

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<sup>73</sup> Hall, S., & Gieben, B, '*Formations of modernity*' (Polity Press in association with the Open University, 1992) 291.

Number of Participants	Location	Date	Language
53	Different provinces of Iraq	4 Nov. 2016 to 4 Dec. 2016	Arabic

#### Face-To-Face interviews with Sunni political and community leaders

Number of Participants	Location	Date	Language
9	Istanbul (Turkey), Amman (Jordan), and Dubai (UAE)	21 Feb. 2016 – 12 Oct. 2016	Arabic

#### Phone Interviews-Residents from Nineveh

Number of Participants	Location	Date	Language
12	Nineveh (Iraq)	17 Oct. 2018 – 12 Dec. 2018	Arabic